



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-42-A
05-April-2013
(5824/H-5815/H)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Carmel Agius
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. Bongani Majola

Decision of: 5 April 2013

ICTR Appeals Chamber

Date: 05 APR 2013

Action: RMM

Copied To: Judges, Parties

JPU, LSS, LDs

THE PROSECUTOR

v.

Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI
Élie NDAYAMBAJE

Case No. ICTR-98-42-A

**DECISION ON JOSEPH KANYABASHI'S MOTION TO AMEND HIS
NOTICE OF APPEAL**

Counsel for Pauline Nyiramasuhuko

Nicole Bergevin and Guy Poupart

Counsel for Arsène Shalom Ntahobali

Normand Marquis and Mylène Dimitri

Counsel for Sylvain Nsabimana

Josette Kadji and Pierre Tientcheu Weledji

Counsel for Alphonse Nteziryayo

Titinga Frédéric Pacere and
Gershom Otachi Bw'Omanwa

Counsel for Joseph Kanyabashi

Michel Marchand and Alexandra Marcil

Counsel for Élie Ndayambaje

Pierre Boulé and Claver Sindayigaya

Office of the Prosecutor

Hassan Bubacar Jallow

James J. Arguin

Deborah Wilkinson

Steffen Wirth

Tajesh Adhichetty

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORMÉ À L'ORIGINAL PAR NOUS

NAME / NOM: ROSETTE MUZIGO-MORRISON

SIGNATURE: [Signature]

DATE: 5/4/13

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 a motion filed by Mr. Joseph Kanyabashi on 20 March 2013, in which he requests leave to amend his notice of appeal.¹

A. Procedural Background

2. On 24 June 2011, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Mr. Kanyabashi of genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.² The Trial Chamber sentenced him to 35 years of imprisonment.³

3. On 25 July 2011, the Pre-Appeal Judge granted, in part, Mr. Kanyabashi’s request for an extension of time for the filing of his appeal submissions.⁴ He ordered that Mr. Kanyabashi’s notice of appeal be filed no later than 17 October 2011, and his appeal brief no later than 60 days from the date on which he was served with the French translation of the Trial Judgement.⁵

4. Mr. Kanyabashi filed his Notice of Appeal on 18 October 2011.⁶

5. On 2 July 2012, Mr. Kanyabashi was served with an informal working copy of the French translation of the Trial Judgement (“French Working Copy”).⁷ On 5 February 2013, Mr. Kanyabashi was served with the official French translation of the Trial Judgement.⁸

6. On 6 March 2013, Mr. Kanyabashi responded to the Prosecution’s appeal against his acquittal in relation to the speech he gave at the swearing-in ceremony of 19 April 1994.⁹

¹ *Requête urgente de Joseph Kanyabashi en amendement de son acte d’appel*, 20 March 2013 (“Motion”).

² *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011 (“Trial Judgement”), para. 6186. *See also ibid.*, para. 6244.

³ Trial Judgement, para. 6271.

⁴ Decision on Motions for Extension of Time for the Filing of Appeal Submissions, 25 July 2011 (“25 July 2011 Decision”), para. 16.

⁵ 25 July 2011 Decision, para. 16.

⁶ Notice of Appeal by Joseph Kanyabashi, 19 April 2012 (original French version filed on 18 October 2011) (“Notice of Appeal”). A first version of the Notice of Appeal was filed on 17 October 2011 but the Notice of Appeal was re-filed on 18 October 2011 due to errors in the transmission.

⁷ See E-mail from Other Registry Services Unit, Appeals Chamber Support Section, dated 2 July 2012.

⁸ The French translation of the Trial Judgement was filed on 1 February 2013 and was served to the parties on 5 February 2013. *See* Motion, para. 6.

7. On 20 March 2013, Mr. Kanyabashi filed the Motion, to which he attached as an annex his Proposed Amended Notice of Appeal.¹⁰

8. On 2 April 2013, the Prosecution filed a response objecting, in part, to the Motion.¹¹ On 5 April 2013, Mr. Kanyabashi filed his reply, to which he attached a “track-changed” version of the Proposed Amended Notice of Appeal.¹²

B. Applicable Law

9. In accordance with Rule 108 of the Rules of Procedure and Evidence of the Tribunal, the Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal set out in the notice of appeal. Such a motion should be submitted as soon as possible after the moving party has identified the new alleged error of the trial chamber or after discovering any other basis for seeking to vary the notice of appeal.¹³ The motion must explain precisely what amendments are being sought and show, with respect to each amendment, that the “good cause” requirement is satisfied.¹⁴ The “good cause” requirement encompasses both good reason for including the proposed new or amended grounds of appeal and good reason as to why the proposed amendments were not included or correctly articulated in the original notice of appeal.¹⁵

10. In its previous determinations as to which proposed variations to a notice of appeal may be authorised within the scope of the good cause requirement, the Appeals Chamber has considered the following factors to be of relevance: (i) the proposed variation is minor but clarifies the notice of appeal without affecting its content; (ii) the opposing party has not opposed the variation or would not be prejudiced by it; (iii) the variation would bring the notice of appeal into conformity with the appeal brief; (iv) the variation would not unduly delay the appeal proceedings; or (v) the variation could be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded.¹⁶

⁹ *Mémoire de Joseph Kanyabashi en réponse à celui du Procureur*, 6 March 2013. See Prosecutor’s Notice of Appeal, 1 September 2011; Prosecutor’s Appellant’s Brief, 15 November 2011.

¹⁰ See Motion, Annex “*Acte d’appel amendé de Joseph Kanyabashi*” (“Proposed Amended Notice of Appeal”).

¹¹ Prosecution Response to Kanyabashi’s Urgent Motion to Amend Notice of Appeal, 2 April 2013 (“Response”), paras. 1, 3, 4, 21.

¹² *Réplique de Joseph Kanyabashi à la Réponse du Procureur à la Requête urgente en amendement de son acte d’appel*, 5 April 2013 (“Reply”).

¹³ See, e.g., Decision on Pauline Nyiramasuhuko’s Motion to Amend her Amended Notice of Appeal, 18 February 2013 (“18 February 2013 Decision”), para. 7 and reference cited therein.

¹⁴ See, e.g., 18 February 2013 Decision, para. 7 and reference cited therein.

¹⁵ See, e.g., 18 February 2013 Decision, para. 7 and reference cited therein.

¹⁶ See, e.g., 18 February 2013 Decision, para. 8 and reference cited therein.

C. Discussion

11. Mr. Kanyabashi requests leave to amend his Notice of Appeal and to replace it with the Proposed Amended Notice of Appeal.¹⁷ Specifically, Mr. Kanyabashi seeks to: (i) reorganise the supporting paragraphs of two specific grounds of appeal;¹⁸ (ii) merge grounds of appeal;¹⁹ (iii) delete a number of grounds of appeal;²⁰ (iv) clarify a ground of appeal;²¹ (v) provide further references;²² (vi) make minor corrections;²³ and (vii) add a new ground of appeal.²⁴

12. The Appeals Chamber will first consider Mr. Kanyabashi's proposed reorganisation, deletion and merging of grounds of appeal as well as other purported minor variations (*see* points (i) through (vi) in the preceding paragraph), before turning to the proposed amendments to the substance of the Notice of Appeal. Contrary to Mr. Kanyabashi's assertion,²⁵ the Appeals Chamber nonetheless considers that some of the amendments presented as a mere reorganisation of the supporting paragraphs of ground I(F) of the Notice of Appeal ("Ground I(F)") would affect the substance of the Notice of Appeal. The Appeals Chamber will thus address these specific amendments together with the proposed addition of a new ground of appeal.

1. Proposed Reorganisation and Other Minor Amendments

13. Mr. Kanyabashi requests leave to reorganise the supporting paragraphs of ground III(J), merge grounds of appeal, and delete nine grounds from his Notice of Appeal.²⁶ He also seeks leave to clarify a ground of appeal, add further references, and make small editorial corrections.²⁷

14. Mr. Kanyabashi submits that these proposed amendments will make his Notice of Appeal clearer and more concise, and will bring it into conformity with the forthcoming appeal brief.²⁸ He also submits that the proposed amendments will not delay the proceedings, or prejudice the Prosecution.²⁹ Mr. Kanyabashi adds that: (i) the length of the Trial Judgement and the need to respond to the Prosecution's appeal hindered the finalisation of his grounds of appeal and appeal brief;³⁰ (ii) the receipt of the official French translation of the Trial Judgement allowed a more

¹⁷ Motion, para. 8, p. 11. *See also* Reply, para. 13.

¹⁸ Motion, paras. 9, 17-19. *See also* Reply, paras. 7, 10.

¹⁹ Motion, paras. 9, 20.

²⁰ Motion, paras. 9, 26.

²¹ Motion, paras. 9, 16. *See also* Reply, para. 5.

²² Motion, paras. 9, 21-23. *See also* Reply, paras. 8, 10.

²³ Motion, paras. 9, 24, 25. *See also* Reply, paras. 4, 6, 9.

²⁴ Motion, paras. 9, 15. *See also* Reply, para. 11.

²⁵ Motion, para. 17.

²⁶ Motion, paras. 17, 20, 26. *See also* Reply, para. 10.

²⁷ Motion, paras. 16, 21-25.

²⁸ Motion, para. 12. *See also* Reply, para. 12.

²⁹ Motion, paras. 16, 18-20, 22, 23, 25, 26.

³⁰ Motion, para. 12.

detailed analysis of the Trial Judgement and led to further consultations with his Defence team;³¹ and (iii) he was required to restructure his grounds of appeal in order to reduce his appeal brief following the Decision on the Extension of Word Limits.³²

15. The Prosecution objects to some of the proposed clarifications and additions of further references, as well as to the proposed reorganisation of one of the grounds of appeal,³³ because Mr. Kanyabashi fails to show good cause for these amendments and the filing of the Motion was untimely.³⁴ The Prosecution does not object to the remaining proposed amendments.³⁵

16. The Appeals Chamber observes that Mr. Kanyabashi was served with the French Working Copy of the Trial Judgement more than eight months ago, and that he fails to explain why he was unable to consult with his Defence Team after reading and analysing of this version of the Trial Judgement and move for the amendment of his Notice of Appeal at an earlier stage. The Appeals Chamber is therefore not satisfied that the recent availability of the official French translation of the Trial Judgement constitutes good cause for the requested amendments.

17. Turning to the length of the Trial Judgement, the Appeals Chamber recalls that the Pre-Appeal Judge specifically took this factor into consideration when granting Mr. Kanyabashi an extension of time to file his Notice of Appeal.³⁶ In these circumstances, the Appeals Chamber does not consider that the length of the Trial Judgement constitutes good cause for the requested amendments.

18. With respect to Mr. Kanyabashi's submission that he had to shorten his appeal brief because of the limitation imposed by the Decision on the Extension of Word Limits,³⁷ the Appeals Chamber emphasises that the Practice Direction clearly stipulates that an appeal brief shall not exceed 30,000 words.³⁸ Although a pre-appeal judge or the Appeals Chamber may authorise a party to

³¹ Motion, para. 14.

³² Motion, para. 13, *referring to* Decision on Nyiramasuhuko's, Ntahobali's, Kanyabashi's, and Ndayambaje's Motions for Extensions of the Word Limit for their Appeal Briefs, 13 December 2012 ("Decision on the Extension of Word Limits").

³³ Response, paras. 4, 10, 13, 15-19. Specifically, the Prosecution objects to: (i) the proposed clarification of ground I(A)(ii) of the Notice of Appeal; (ii) the proposed reorganisation of the supporting paragraphs of ground III(J) of the Notice of Appeal; (iii) the proposed addition of references to new witnesses in grounds III(C)(v) and III(J) of the Notice of Appeal; (iv) the proposed addition of references to the Trial Judgement under grounds I(A) and III(H) of the Notice of Appeal; and (vi) the proposed replacement of "Motif F" with "Motif E" under ground I(D) of the Notice of Appeal.

³⁴ Response, paras. 5-7. In particular, the Prosecution contends that Mr. Kanyabashi fails to explain why he did not include these amendments in the Notice of Appeal or why he did not move for their inclusion earlier, why the reading of the official French translation was central to their identification, or why his team did not utilise the French Working Copy. *See ibid.*, paras. 5, 7. *See also ibid.*, para. 20.

³⁵ Response, para. 3.

³⁶ 25 July 2011 Decision, paras. 9, 16.

³⁷ Motion, para. 13. *See also ibid.*, para. 26.

³⁸ Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006 ("Practice Direction"), para. C(1)(a).

exceed this word limit,³⁹ such an extension of the word limit cannot be taken for granted when requested. Pending the Pre-Appeal Judge's disposition of Mr. Kanyabashi's request for extension of the word limit, it was therefore incumbent on Mr. Kanyabashi's Counsel not to work under the assumption that his request for an extension of the word limit to 80,000 words would be granted.⁴⁰ Accordingly, the Appeals Chamber does not find that the need to shorten his appeal brief as a result of the Decision on the Extension of Word Limits constitutes good cause for allowing the requested amendments.

19. Nevertheless, the Appeals Chamber observes that most of the amendments sought by Mr. Kanyabashi serve to correct mistakes, provide further references and clarifications, or improve the legibility and comprehensibility of his Notice of Appeal without substantially affecting its content.⁴¹ The Appeals Chamber further notes that the proposed deletion, restructuring, and merging of grounds of appeals improve the structure and facilitate the comprehensibility of Mr. Kanyabashi's Notice of Appeal and are as such likely to assist the Appeals Chamber in its examination of his appeal.

20. The Appeals Chamber further considers that allowing these amendments at the present stage of the proceedings would not unduly affect the briefing schedule, given that Mr. Kanyabashi has not yet filed his appeal brief. In view of the nature of these proposed amendments and the fact that they will not cause any delay or prejudice to the Prosecution, the Appeals Chamber considers that it is in the interests of justice to allow them, despite Mr. Kanyabashi's failure to show good cause for not including them in his Notice of Appeal or to request them earlier.

2. Proposed Amendments to the Substance

21. Mr. Kanyabashi seeks leave to amend his Notice of Appeal by adding a new ground of appeal in which he would argue that the Trial Chamber erred in double-counting the same elements in its assessment of both the gravity of the offences and aggravating circumstances ("Proposed Ground VIII(A)(iii)").⁴² He submits that this requested amendment results from the joint reading of

³⁹ Practice Direction, para. C(5).

⁴⁰ See Decision on the Extension of Word Limits, para. 13.

⁴¹ Contrary to the Prosecution's assertion, the Appeals Chamber finds that the proposed amendments to grounds I(A)(ii) and III(J) of the Notice of Appeal provide useful clarification and do not substantially affect the content of the Notice of Appeal. Likewise, the Appeals Chamber does not find that the proposed addition of references to the Trial Judgement under grounds I(A) and III(H) of the Notice of Appeal are completely irrelevant to these grounds. The Appeals Chamber further considers that the proposed replacement of "*Motif E*" with "*Motif F*" under ground I(D) of the Notice of Appeal does not lead to further confusion. Finally, with regard to the proposed addition of references to new witnesses under grounds III(C)(v) and III(J) of the Notice of Appeal, the Appeals Chamber considers that, while these proposed amendments refer to additional witnesses, they do not create new and distinct allegations of errors, and therefore do not substantially affect the content of the Notice of Appeal.

⁴² See Motion, para. 15; Proposed Amended Notice of Appeal, "*Motif*" VIII(A)(iii), p. 65.

the official French translation of the Trial Judgement and of the recent *Gatete* Appeal Judgement.⁴³ According to Mr. Kanyabashi, the argument developed under Proposed Ground VIII(A)(iii) is likely to have a direct impact on the success of his appeal, such as to lead to a miscarriage of justice if it is excluded.⁴⁴ He submits that this proposed amendment will not prejudice the Prosecution as it will have several weeks to respond, and that the proceedings will not be delayed.⁴⁵

22. Mr. Kanyabashi further seeks leave to reorganise the supporting paragraphs of Ground I(F) in the form of Proposed Ground I(F)⁴⁶ which concerns his superior responsibility in relation to events at Kabakobwa Hills.⁴⁷ Within the framework of this proposed reorganisation, Mr. Kanyabashi seeks to add the new submission that the prior behaviour of the policemen involved in the events at Kabakobwa demonstrates the absence of their predisposition to commit crimes.⁴⁸ Mr. Kanyabashi submits that these requested amendments are aimed at clearly separating arguments related to knowledge of the crimes from those related to the superior's failure to act, and identifying resulting errors of law and fact.⁴⁹ He argues that these amendments are requested for the purposes of clarification in order to render Ground I(F) more concise and coherent.⁵⁰ According to Mr. Kanyabashi, these amendments, would not fundamentally affect the content of Ground I(F) and are essential to the success of his appeal regarding the Kabakobwa events.⁵¹

23. The Prosecution objects to the addition of Proposed Ground VIII(A)(iii),⁵² submitting that the receipt of the official French translation of the Trial Judgement and the *Gatete* Appeal Judgement do not constitute good cause for allowing this amendment at this stage⁵³ and that Mr. Kanyabashi "ignores the reality" in asserting that the Prosecution will not be prejudiced.⁵⁴ The Prosecution further objects to the proposed amendments to Ground I(F)⁵⁵ on the ground that these proposed changes are not clearly identified in the Motion and add "new substantive errors".⁵⁶

24. Mr. Kanyabashi replies that Proposed Ground VIII(A)(iii) aims at emphasising the cumulative effect of the errors committed by the Trial Chamber and their impact on his sentence.⁵⁷

⁴³ Motion, para. 15, referring to *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, (*Gatete* Appeal Judgement") paras. 272-275.

⁴⁴ Motion, para. 15.

⁴⁵ Motion, para. 15.

⁴⁶ Motion, para. 17; Proposed Amended Notice of Appeal, "*Motif*" I(F), pp. 13-15 ("Proposed Ground I(F)").

⁴⁷ See Motion, para. 18.

⁴⁸ Motion, para. 18. See Proposed Amended Notice of Appeal, paragraph "I(F)(ii)(b)", p. 14.

⁴⁹ Motion, para. 18. See also Reply, para. 7.

⁵⁰ Motion, paras. 17, 18.

⁵¹ Motion, para. 18.

⁵² Response, para. 4.

⁵³ Response, para. 8.

⁵⁴ Response, para. 9.

⁵⁵ Response, para. 4.

⁵⁶ Response, para. 11. See also *ibid.*, para. 12.

⁵⁷ Reply, para. 11.

Mr. Kanyabashi further submits that the proposed reorganisation of Ground I(F) is of the highest importance, given the seriousness of the Trial Chamber's errors and their impact on the verdict.⁵⁸

25. The Appeals Chamber observes that Proposed Ground VIII(A)(iii) alleges a new error of law. It also notes that Mr. Kanyabashi was provided with the French Working Copy in July 2012, that Mr. Kanyabashi's Counsel are able to work in English,⁵⁹ and that the *Gatete* Appeal Judgement was rendered nearly six months ago. In these circumstances, the Appeals Chamber considers that the recent availability of the official French translation of the Trial Judgement and the development of the Tribunal's jurisprudence in the *Gatete* case do not constitute good cause for allowing Proposed Ground VIII(A)(iii).

26. Likewise, the Appeals Chamber considers that Mr. Kanyabashi fails to show a good reason as to why the proposed amendments to Ground I(F) were not included or correctly articulated in his Notice of Appeal, or why he did not seek leave to make them earlier.

27. Nonetheless, the Appeals Chamber recalls that the interests of justice require that an appellant not be held responsible for the failures of his Counsel.⁶⁰ Further, the Appeals Chamber recalls that, in certain limited circumstances, it has permitted amendments which were of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if the grounds were excluded, despite the absence of a showing of good cause.⁶¹

28. Without expressing any views on the merits of Mr. Kanyabashi's appeal, the Appeals Chamber considers that the issues raised under Proposed Ground VIII(A)(iii) could be of substantial importance to the success of his appeal. In these circumstances and given that the requested variation would not result in any undue delay or prejudice since Mr. Kanyabashi has not yet filed his appeal brief and the Prosecution will have the opportunity to respond, the Appeals Chamber grants leave to Mr. Kanyabashi to add Proposed Ground VIII(A)(iii).

29. The Appeals Chamber observes that Mr. Kanyabashi seeks to alter the substance of Ground I(F) so as to include new allegations of error,⁶² and modify the legal arguments to a certain

⁵⁸ Reply, para. 7.

⁵⁹ 25 July 2011 Decision, para. 11. The Appeals Chamber recalls that Counsel are principally responsible for the assessment of potential legal errors in the Trial Judgement. See 18 February 2013 Decision, para. 22 and references cited therein.

⁶⁰ 18 February 2013 Decision, para. 23 and reference cited therein.

⁶¹ 18 February 2013 Decision, para. 23 and references cited therein.

⁶² See Proposed Amended Notice of Appeal, proposed paragraph I(F)(i), proposed paragraph I(F)(ii)(b), portion of proposed paragraph I(F)(ii)(c), portion of proposed paragraph I(F)(ii)(d), proposed paragraph I(F)(ii)(f), portion of proposed paragraph I(F)(iii).

extent.⁶³ However, the Appeals Chamber is not persuaded by a careful review of Proposed Ground I(F) and Mr. Kanyabashi's generic submissions that these proposed amendments would be of substantial importance to the success of his appeal. The Appeals Chamber therefore denies Mr. Kanyabashi's request to modify Ground I(F) in the form of Proposed Ground I(F).

3. Conclusion

30. As a result, the Appeals Chamber:

- (i) denies the request for leave to reorganise Ground I(F) of the Notice of Appeal in the form of Proposed Ground I(F) of the Proposed Amended Notice of Appeal; and
- (ii) authorises all remaining requested amendments.

31. Further, in order to remedy the lack of clarity of Mr. Kanyabashi's Proposed Amended Notice of Appeal, the Appeals Chamber instructs Mr. Kanyabashi to provide a table of contents in the revised version of the Proposed Amended Notice of Appeal to be filed, and to designate his grounds of appeal with numbers.

D. Disposition

32. For the foregoing reasons, the Appeals Chamber:

GRANTS Mr. Kanyabashi's Motion **in part** to the extent specified in paragraph 30 of the present Decision;

INSTRUCTS Mr. Kanyabashi to provide a table of contents and designate his grounds of appeal with numbers;

INSTRUCTS Mr. Kanyabashi to file a revised version of his Proposed Amended Notice of Appeal containing the amendments authorised herein and complying with the instruction above no later than 8 April 2013; and

DISMISSES the Motion in all other respects.

⁶³ Compare the third sentence of paragraph I(F)(ii) of the Notice of Appeal with the third sentence of proposed paragraph I(F)(ii)(c) of the Proposed Amended Notice of Appeal.

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

Done this fifth day of April 2013,
at The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

