



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

198/H

CR

ICTR-00-55C-A

02nd July 2013

{198/H - 190/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Registrar: Mr. Bongani Majola
Decision of: 2 July 2013

ILDÉPHONSE NIZEYIMANA

v.

THE PROSECUTOR

Case No. ICTR-00-55C-A

**DECISION ON ILDÉPHONSE NIZEYIMANA'S MOTION TO DISQUALIFY JUDGE
WILLIAM H. SEKULE AND JUDGE ARLETTE RAMAROSON**

Counsel for Ildéphonse Nizeyimana
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Abdoulaye Seye
Thembile M. Segoete

ICTR Appeals Chamber

02 JUL 2013 *CR*

Date: *Jurid R.*

Action: *Chambers, Defense,*

Copied To: *OTPAKAD 85PLA*

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM:

ROSETTE MUZIGO-MORRISON

SIGNATURE:

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DATE:

02/07/13

1. I, THEODOR MERON, 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 Motion to Disqualify Judge William H. Sekule and Judge Arlette Ramaroson”, filed by Mr. Ildéphonse Nizeyimana (“Nizeyimana”) on 4 June 2013 (“Motion”).

A. Background

2. On 19 June 2012, Trial Chamber III of the Tribunal (“Trial Chamber” or “Nizeyimana Trial Chamber”) convicted Nizeyimana of genocide, extermination and murder as crimes against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.¹ The written Trial Judgement was filed in English on 22 June 2012.² The Trial Chamber sentenced Nizeyimana to life imprisonment.³

3. On 29 June 2012, the Prosecution filed a notice of appeal against the Trial Judgement.⁴ Nizeyimana filed a notice of appeal on 23 July 2012 and an amended notice of appeal on 14 May 2013.⁵ On 26 June 2012, I assigned Judges, including Judge Arlette Ramaroson, to the Bench in this case.⁶ On 19 March 2013, I also assigned Judge William H. Sekule to the Bench seised of the appeal proceedings in this case.⁷

4. In the Motion, Nizeyimana seeks the disqualification of Judges Sekule and Ramaroson from this case, on the basis of an alleged appearance of bias resulting from their prior involvement as members of the Bench in the *Nyiramasuhuko et al.* case.⁸ Nizeyimana requests that, if Judges Sekule and Ramaroson do not recuse themselves, they be disqualified by an order of the Bureau.⁹

¹ T. 19 June 2012 pp. 10, 11.

² *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Judgement and Sentence, pronounced on 19 June 2012, filed on 22 June 2012 (“Trial Judgement”).

³ Trial Judgement, para. 1599.

⁴ Prosecutor’s Notice of Appeal, 29 June 2012. On 12 September 2012, the Prosecution filed its Appellant’s brief. See Prosecutor’s Appellant’s Brief, 12 September 2012.

⁵ Ildéphonse Nizeyimana’s Notice of Appeal, 23 July 2012 (“Notice of Appeal”); Ildéphonse Nizeyimana’s Amended Notice of Appeal, 14 May 2013 (“Amended Notice of Appeal”) (filed as an annex to Motion by Ildéphonse Nizeyimana to Amend his Notice of Appeal Pursuant to Rule 108, 14 May 2013). See also Decision on Motion by Ildéphonse Nizeyimana to Amend his Notice of Appeal, 18 June 2013, para. 10 (accepting the Amended Notice of Appeal as the operative notice of appeal). I ordered Nizeyimana to file his Appellant’s brief, if any, no later than 40 days from the date on which he is served with the French translation of the Trial Judgement. See Decision on Ildéphonse Nizeyimana’s Motion for Extension of Time for the Filing of the Appellant’s Brief, 19 July 2012.

⁶ Order Assigning Judges to a Case Before the Appeals Chamber, 26 June 2012.

⁷ Order Replacing a Judge in a Case Before the Appeals Chamber, 19 March 2013.

⁸ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T. See Motion, paras. 8, 13, 33.

⁹ Motion, paras. 8, 33.

On 14 June 2013, the Prosecution filed a response to the Motion, arguing that it should be denied.¹⁰
 On 17 June 2013, Nizeyimana filed a reply to the Response.¹¹

5. I note that the Motion was filed confidentially. However, I find that no exceptional reasons justify its confidential status.¹²

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.¹³

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.”¹⁴

¹⁰ Prosecution’s Response to Ildephonse Nizeyimana’s “Confidential Motion to Disqualify Judge William H. Sekule and Judge Arlette Ramarason”, 14 June 2013 (“Response”), paras. 3, 17.

¹¹ Reply to Prosecution’s Response to the Confidential Motion to Disqualify Judge William H. Sekule and Judge Arlette Ramarason, 17 June 2013 (“Reply”).

¹² Nizeyimana submits that the Motion is filed confidentially because Witness RWV09 is a protected witness in both the present case and the *Nyiramasuhuko et al.* case. However, no confidential information in relation to this witness is disclosed in the Motion, or the present decision, since the fact that this witness is a Hutu soldier from the *École des Sous Officiers* (“ESO”) is information contained in both trial judgements and public transcripts. See Trial Judgement, para. 259; *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 (“*Nyiramasuhuko et al.* Trial Judgement”), paras. 2388, 2778; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 9 March 2005 pp. 9.,48-50. See also Motion, para. 32; Response, fn. 1.

¹³ See, e.g., *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Motion for Disqualification of Judge Fausto Pocar, 2 October 2012 (“*Nyiramasuhuko et al.* Decision”), para. 6, referring to *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52B-R, Decision on Request for Disqualification of Judge Pocar, 6 June 2012 (“*Nahimana Decision*”), para. 7, fn. 9, and references contained therein.

¹⁴ See *Nyiramasuhuko et al.* Decision, para. 7, referring to *Nahimana Decision*, para. 8, fn. 10, and references contained therein.

9. The Appeals Chamber has also emphasized that there is a presumption of impartiality that attaches to any Judge of the Tribunal.¹⁵ Accordingly, the party who seeks the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial.¹⁶ In this respect, the Appeals Chamber has consistently held that there is a high threshold to reach to rebut the presumption of impartiality.¹⁷ The party must demonstrate “a reasonable apprehension of bias by reason of prejudgement” that is “firmly established”.¹⁸ 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”.¹⁹

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. Nizeyimana submits that Judges Sekule’s and Ramaroson’s prior involvement as members of the Trial Chamber in the *Nyiramasuhuko et al.* case (“*Nyiramasuhuko et al.* Trial Chamber”) gives rise to a reasonable apprehension of bias on their part as: (i) they made a finding concerning the credibility of Defence Witness RWV09, who testified in the *Nyiramasuhuko et al.* case as Witness WTRT;²⁰ (ii) such finding is tantamount to a general finding on the credibility of the evidence of all Hutu soldiers from ESO;²¹ and (iii) both Judges have made findings related to issues in the present appeal.²² Nizeyimana submits that a “cumulative effect” would result from the fact that two Judges of the Bench seised of his appeal have been involved as fact finders in a case covering significant overlapping issues.²³

12. Nizeyimana argues that the *Nyiramasuhuko et al.* Trial Chamber’s negative assessment of Witness WTRT’s credibility was only based on the consideration that the witness was a Hutu

¹⁵ See *Nyiramasuhuko et al.* Decision, para. 8, referring to *Nahimana* Decision, para. 9, fn. 11, and references contained therein.

¹⁶ See *Nyiramasuhuko et al.* Decision, para. 8, referring to *Nahimana* Decision, para. 9, fn. 12, and references contained therein.

¹⁷ See *Nyiramasuhuko et al.* Decision, para. 8, referring to *Nahimana* Decision, para. 9, fn. 13, and references contained therein.

¹⁸ See *Nyiramasuhuko et al.* Decision, para. 8, referring to *Nahimana* Decision, para. 9, fn. 14, and references contained therein.

¹⁹ See *Nyiramasuhuko et al.* Decision, para. 8, referring to *Nahimana* Decision, para. 9, fn. 15, and references contained therein.

²⁰ Motion, paras. 13, 14, 23.

²¹ Motion, paras. 14, 17, 18.

²² Motion, paras. 14, 24-27.

²³ Motion, paras. 14, 25, 27.

soldier from ESO.²⁴ According to Nizeyimana, this assessment suggests a general finding that Hutu soldiers from ESO are not credible or have diminished credibility.²⁵ As Nizeyimana submits that the credibility of ESO soldiers, along with their role in the killings in Butare, is central to his appeal, he points to such assessment as evidence of appearance of bias.²⁶ With regard to Nizeyimana's argument concerning an overlap in issues and an alleged inextricable link between his case and the *Nyiramasuhuko et al.* case, he points to the fact that he was a well-known captain at ESO, in Butare prefecture, where the events considered by the *Nyiramasuhuko et al.* Trial Chamber occurred.²⁷ Accordingly, and without suggesting that either Judge is actually biased against him, Nizeyimana contends that, by reason of Judges Sekule's and Ramaroson's findings in the *Nyiramasuhuko et al.* case, a reasonable observer would apprehend bias.²⁸

13. The Prosecution responds that Nizeyimana's "sweeping assertions" fail to rebut the presumption of impartiality which attaches to any Judge of the Tribunal.²⁹ With respect to the finding concerning the credibility of Witness WTRT, it submits that "[i]t cannot be seriously read, as Nizeyimana contends, to apply in the mind of the Judges to any Hutu ESO soldier testifying in defence about any event in this or any other case before the Tribunal".³⁰ The Prosecution further argues that this finding concerns specific events at the Butare Prefecture Office which are not at issue in Nizeyimana's appeal,³¹ and that Nizeyimana's arguments in this regard are based on an incorrect reading of the relevant passage in the *Nyiramasuhuko et al.* Trial Judgement.³² It submits that Nizeyimana's contention that the credibility of ESO soldiers is central to his appeal does not accurately reflect his case.³³ In this regard, the Prosecution argues that the *Nizeyimana* Trial Chamber did not make any credibility finding solely based on any witness's affiliation to ESO and, in particular, that the credibility findings which Nizeyimana challenges on appeal do not rest on the relevant witnesses' affiliation to ESO.³⁴

²⁴ Motion, paras. 14, 16.

²⁵ Motion, paras. 14, 17, 18.

²⁶ Motion, paras. 14, 20-22. In particular, Nizeyimana submits that more than 25% of his Defence witnesses were Hutu soldiers from ESO. He also points to the grounds of appeal in his Notice of Appeal where, he claims, the credibility of ESO soldiers is at issue. Nizeyimana's references to his grounds of appeal equally apply to the Amended Notice of Appeal.

²⁷ Motion, paras. 26, 27.

²⁸ Motion, para. 13.

²⁹ Response, para. 3. *See also* Response, para. 4.

³⁰ Response, para. 8.

³¹ Response, paras. 4, 5.

³² Response, paras. 5-7.

³³ Response, para. 13.

³⁴ Response, para. 14.

14. Nizeyimana replies that the use of the word “however”, by the *Nyiramasuhuko et al.* Trial Chamber, to introduce its credibility assessment of Witness WTRT, supports his argument that such finding rested on the fact that Witness WTRT was a Hutu soldier from ESO.³⁵

D. Discussion

15. On 24 and 25 June 2013, pursuant to Rule 15(B) of the Rules, I conferred with Judges Sekule and Ramaroson, respectively, regarding the Motion. Both Judges consider that there is no merit to the request that they withdraw or be disqualified from the appeal proceedings in this case.

16. With regard to the *Nyiramasuhuko et al.* Trial Chamber’s finding on Witness WTRT’s credibility, Nizeyimana refers to a passage in paragraph 2778 of the *Nyiramasuhuko et al.* Trial Judgement,³⁶ which, in its relevant part, reads: “Witness WTRT testified that there were only about 100 refugees at the [Butare Prefecture Office] at the end of April or beginning of May. However, Witness WTRT was a Hutu soldier from the ESO and the Chamber does not find his testimony on this point to be credible”.³⁷ Nizeyimana contends that, by such finding, the Trial Judges suggested that Hutu soldiers from ESO, generally, have little or diminished credibility.³⁸ Having reviewed Nizeyimana’s submissions and the relevant text, I conclude that the *Nyiramasuhuko et al.* Trial Chamber’s assessment would not be reasonably perceived as a general finding on the credibility of all Hutu soldiers from ESO.

17. I note that, as suggested by the Prosecution,³⁹ the *Nyiramasuhuko et al.* Trial Chamber did not expressly base its conclusion concerning the credibility of Witness WTRT on the fact that he was a Hutu soldier from ESO. The *Nyiramasuhuko et al.* Trial Chamber’s reference in this regard is not followed by any causal conjunctive adverb, or equivalent expression, indicating that the subsequent finding rests on this consideration. Moreover, the Trial Chamber made it clear that its credibility assessment specifically concerned the witness’s testimony *on the point* considered, namely the issue of the number of refugees present at the Butare Prefecture Office at the given time.⁴⁰ Therefore, considering the *Nyiramasuhuko et al.* Trial Chamber’s unequivocal language in this respect, a reasonable observer would understand that the credibility finding exclusively

³⁵ Reply, paras. 4, 6-9.

³⁶ Motion, para. 15.

³⁷ *Nyiramasuhuko et al.* Trial Judgement, para. 2778 (references omitted).

³⁸ Motion, paras. 14, 16-18.

³⁹ Response, paras. 6, 7. The Prosecution argues that, contrary to Nizeyimana’s assertion, the *Nyiramasuhuko et al.* Trial Chamber did not find that Witness “WTRT was incredible *because* he was an ESO soldier”. See Response, para. 6, referring to Motion, para. 18.

⁴⁰ I emphasise that the relevant passage reads: “[t]he Chamber does not find his testimony *on this point* to be credible”. *Nyiramasuhuko et al.* Trial Judgement, para. 2778 (emphasis added).

concerned Witness WTRT and, in particular, a specific aspect of his testimony on the issue, and in the context of the events, under consideration.

18. Considering that Nizeyimana has not pointed to any other finding, or passage, in the *Nyiramasuhuko et al.* Trial Judgement in support of his contention, I find that the assessment of Witness WTRT's credibility in the *Nyiramasuhuko et al.* Trial Judgement may not be reasonably perceived, in itself, as establishing any prejudgement on the issue of the credibility of Hutu ESO soldiers in general. Therefore, this would not lead a reasonable observer, properly informed, to reasonably apprehend bias on the part of Judge Sekule or Judge Ramaroson.

19. With regard to Nizeyimana's submissions that Judges Sekule and Ramaroson have previously made findings on the credibility of Witness RWV09, "whose testimony and credibility is an integral part of [his] appeal",⁴¹ I consider that 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 or other findings concerning the testimony of the same witness which 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 the 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.⁴³

20. Analogously, with respect to Nizeyimana's general assertion that his case and the *Nyiramasuhuko et al.* case are linked in light of the position he held at ESO and given the location of the crimes considered in the *Nyiramasuhuko et al.* case, I recall that the Appeals Chamber has previously recognized that Judges of this Tribunal are sometimes involved in cases which, by their very nature, cover overlapping issues.⁴⁴ In this regard, the Appeals Chamber has held that:

⁴¹ Motion, para. 14.

⁴² Cf. *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-A, Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz, 24 February 2011 ("*Kanyarukiga* Decision"), para. 17.

⁴³ *Kanyarukiga* Decision, para. 17.

⁴⁴ *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement"), para. 378; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 78. See also *Nyiramasuhuko et al.* Decision, para. 19, and references contained therein. With regard to Nizeyimana's submission that he "was oft named in the Butare testimony", I observe that, not only the *Nyiramasuhuko et al.* Trial Chamber did not make any finding concerning Nizeyimana, but that its Trial Judgement does not refer to him. See Motion, para. 26.

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.⁴⁵

Therefore, the fact that Judges Sekule and Ramaroson were members of the *Nyiramasuhuko et al.* Trial Chamber which heard the case and rendered the *Nyiramasuhuko et al.* Trial Judgement, does not, in and of itself, demonstrate an appearance of bias on their part and is therefore not a sufficient basis to require their disqualification from the appeal proceedings in the present case.

21. Finally, I find no merit in Nizeyimana's argument that the present circumstances differ from those considered in previous instances before the Tribunal since the alleged appearance of bias concerns two Judges and a "cumulative effect" would result from the fact that, as Trial Judges, they deliberated and made findings together on issues related to his case.⁴⁶ The presumption of impartiality, which has been recognized in our jurisprudence, attaches, individually, to every Judge of the Tribunal.⁴⁷ Therefore, as long as such presumption is not rebutted in relation to any Judge whose impartiality has been impugned, or in respect of whom an appearance of bias is alleged, the number of Judges concerned by such an allegation is irrelevant. Given that a reasonable apprehension of bias has not been demonstrated with respect to either Judge Sekule or Judge Ramaroson by virtue of their prior involvement as Trial Judges in the *Nyiramasuhuko et al.* case, the fact that they were both Judges in that case is irrelevant.

22. In conclusion, I consider that Nizeyimana has not rebutted the presumption of impartiality by showing actual bias or a reasonable apprehension of bias arising from Judges Sekule's and Ramaroson's involvement in the *Nyiramasuhuko et al.* trial. I therefore consider that the Motion is without merit.

E. Disposition

23. For the foregoing reasons, 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.

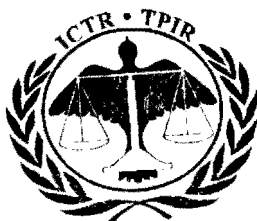
⁴⁵ *Karera* Appeal Judgement, para. 378, citing *Nahimana et al.* Appeal Judgement, para. 78 (internal citations omitted), referring to *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Decision of the Bureau, 5 May 1998, p. 2.

⁴⁶ Motion, paras. 25-28. See also Motion, paras. 24, 29.

⁴⁷ See *supra*, para. 9; *Nahimana et al.* Appeal Judgement, para. 48, and references contained therein.

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

Done this 2nd day of July 2013
At The Hague
The Netherlands.



[Seal of the Tribunal]

Judge Theodor Meron
Presiding Judge