



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

14586/H
RMM

ICTR-98-42-A

14th Nov 2013

IN THE APPEALS CHAMBER {14586/H-14582/H}

Before: Judge Fausto Pocar, Pre-Appeal Judge

Registrar: Mr. Bongani Majola

Decision of: 14 November 2013

ICTR Appeals Chamber
Date: 14 NOV 2013
Action: Judges, Parties
Copied To: JPU, ID, LSS

THE PROSECUTOR

v.

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

Case No. ICTR-98-42-A

**DECISION ON NDAYAMBAJE'S MOTION FOR EXTENSION OF THE
TIME LIMIT FOR THE FILING OF A MOTION TO PRESENT
ADDITIONAL EVIDENCE**

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 Pacéré 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 Arguin

Deborah Wilkinson

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 MOI
NAME / NOM: ROSETTE MUZIGO-MORISSON
SIGNATURE: [Signature] DATE: 14/11/13

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I, Fausto POCAR, 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) and Pre-Appeal Judge in this case;¹

NOTING the Trial Judgement pronounced in this case by Trial Chamber II of the Tribunal on 24 June 2011 and issued in writing in English on 14 July 2011;²

NOTING the notice of appeal filed by Élie Ndayambaje (“Ndayambaje”) on 8 April 2013;³ the appeal brief filed confidentially by Ndayambaje on 8 April 2013;⁴ the response brief filed confidentially by the Prosecution on 21 August 2013;⁵ and the brief in reply filed confidentially by Ndayambaje on 25 September 2013;⁶

NOTING that, pursuant to Rule 115(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), a motion to present additional evidence on appeal must be filed no later than 30 days from the date of filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons, are shown for a delay;

NOTING that, accordingly, Ndayambaje was to file any motion for leave to present additional evidence on appeal no later than 25 October 2013;

BEING SEISED of the “*Requête en extrême urgence d’Élie Ndayambaje en extension du délai pour le dépôt d’une requête en admission de moyens de preuve supplémentaires*” filed confidentially by Ndayambaje on 25 October 2013 (“Motion”), in which he requests a 75-day extension of the deadline for filing a motion or motions for leave to present additional evidence;⁷

¹ Order Assigning a Pre-Appeal Judge, 21 July 2011.

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”).

³ *Acte d’appel amendé d’Élie Ndayambaje*, 8 April 2013.

⁴ *Mémoire d’appel d’Élie Ndayambaje*, 8 April 2013 (confidential) as corrected by *Corrigendum du Mémoire d’appel d’Élie Ndayambaje*, 19 April 2013 (confidential; public redacted version filed on 4 June 2013).

⁵ Prosecution Consolidated Respondent’s Brief, 21 August 2013 (confidential; public redacted version filed on 4 October 2013).

⁶ *Mémoire d’appel en réplique d’Élie Ndayambaje*, 25 September 2013 (confidential; public redacted version filed on 1 November 2013).

⁷ Motion, paras. 13, 22, p. 7. I note that Ndayambaje further submits that it is in the interests of justice that his Motion was disposed of prior to 25 October 2013. See *ibid.*, para. 26. In this regard, I note that Ndayambaje filed his Motion on the date of the expiration of the filing deadline for motions for additional evidence on appeal without proper justification for his failure to file it earlier. In this regard, although Ndayambaje alleges that he did not receive the *Gacaca* documents from the Prosecution until 3 days prior to the filing deadline, I consider that Ndayambaje could have exercised more diligence in trying to obtain the *Gacaca* documents prior to this and note that he was informed on

NOTING that Ndayambaje submits that good cause exists for the requested extension of the time limit because: (i) his Defence team only received the *Gacaca* documents – totalling 177 pages and containing potential exculpatory evidence (“*Gacaca* Documents”) – that will form the basis of his potential motion(s) for leave to present additional evidence less than three days before the filing deadline of 25 October 2013;⁸ (ii) the pages of the *Gacaca* Documents are poorly photocopied and illogically ordered with, *inter alia*, missing words and no pagination;⁹ (iii) the *Gacaca* Documents are written in Kinyarwanda, a language that only one member of his team understands;¹⁰ (iv) only Ndayambaje himself is familiar with the Muganza area, places, and persons listed in the documents rendering a consultation with him necessary in order to determine their exculpatory effect;¹¹ (v) given the volume and importance of the *Gacaca* Documents, the requested extension of time will be necessary to complete the analysis and prepare the motion(s) for leave to present additional evidence on appeal;¹² (vi) his request will not delay the appeal proceedings;¹³ and (vii) without an extension, the Defence team will be unable to fulfil its duty to ensure him a full and complete defence;¹⁴

NOTING that the Prosecution responded on 29 October 2013 that Ndayambaje’s Motion is premature because he has not yet identified the additional exculpatory evidence for admission on appeal pursuant to Rule 115 of the Rules;¹⁵

NOTING that Ndayambaje replied on 30 October 2013 that, as stated in his Motion, his Defence team has already identified certain elements in the *Gacaca* Documents that are likely to be exculpatory and that, in filing the Motion, his Defence team acted in compliance with the requirement that a moving party must demonstrate good cause for delay “as soon as possible after it became aware of the evidence sought to be admitted” in order to protect his rights in light of the expiration of the deadline for filing motions for leave to present additional evidence on appeal;¹⁶

17 October 2013 that the documents had been communicated to the Registry. In light of the impending deadline, Ndayambaje could have filed the Motion at an earlier date. In those circumstances, I considered that there was no reason to deprive the Prosecution of the opportunity to respond.

⁸ Motion, paras. 10, 11, 16, 18.

⁹ Motion, para. 18.

¹⁰ Motion, para. 19. Ndayambaje submits that he and his co-counsel will need to identify the *Gacaca* documents that require translation into French for the benefit of the rest of his Defence team and the Appeals Chamber. *See ibid.*, paras. 19, 21.

¹¹ Motion, para. 19. *See also ibid.*, para. 21.

¹² Motion, para. 22.

¹³ Motion, para. 23.

¹⁴ Motion, para. 24.

¹⁵ Prosecution Response to Ndayambaje Motion for Extension of Time to File Rule 115 Motions, 29 October 2013, paras. 1-3.

¹⁶ *Réplique d’Élie Ndayambaje à la “Prosecution Response to Ndayambaje Motion for Extension of Time to File Rule 115 Motions”*, 31 October 2013, paras. 2-5.

CONSIDERING that the good cause requirement in Rule 115(A) of the Rules “obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible *after it became aware of the existence of the evidence sought to be admitted*”;¹⁷

CONSIDERING, consequently, that parties cannot seek extension of the time limit to present additional evidence *in abstracto* or in anticipation of a future motion for leave to present currently unidentified additional evidence;¹⁸

CONSIDERING that a party may apply to present concrete additional evidence, and if it does so after the time limit has passed, must demonstrate good cause or cogent reasons for its delay, in a preliminary submission or, more commonly, as part of the motion for leave to present additional evidence on appeal itself with a request that the motion be recognised as validly filed;¹⁹

CONSIDERING that, while Ndayambaje has highlighted in his Motion the *Gacaca* Documents generally as additional evidence he may seek to admit pursuant to Rule 115 of the Rules, he has not specifically identified the additional evidence which he seeks to have admitted;

CONSIDERING that, as stated in the Motion, the Ndayambaje Defence team has not yet fully analysed the *Gacaca* Documents in order to determine whether they are, in fact, exculpatory, and which ones may be the subject of the proposed motion(s) for admission of additional evidence of appeal;²⁰

CONSIDERING FURTHER that Ndayambaje’s demonstration of good cause for delay would be better assessed concurrently with, or as part of, the proposed motion for leave to present additional evidence itself, should he file one;

FINDING, in light of the foregoing, that the Motion is premature, without prejudice to Ndayambaje’s right to file motions seeking admission of additional evidence on appeal, provided that good cause or cogent reasons, as applicable, for any delay are demonstrated;

¹⁷ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Defence Requests for Extension of Time to File Motions Pursuant to Rule 115, 1 June 2011 (“*Popović et al.* Decision”), para. 10 (emphasis in original), quoting *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution’s Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2.

¹⁸ *Popović et al.* Decision, para. 11.

¹⁹ *Popović et al.* Decision, para. 11, quoting *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 9.

²⁰ See Motion, paras. 19, 21.

HEREBY DISMISS Ndayambaje's Motion.

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

Done this fourteenth day of November 2013,
at The Hague,
The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to read "Fausto Pocar", written over a horizontal line.

Judge Fausto Pocar
Pre-Appeal Judge