



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

18018/H
RMA

IN THE APPEALS CHAMBER

ICTR-98-42-A
21-November 2014
{18018/H-18014/H}

Before: Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Carmel Agius
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. Bongani Majola

Decision of: 21 November 2014

ICTR Appeals Chamber
Date: 21 NOV 2014
Action:
Copied To: Judges,

THE PROSECUTOR

v.

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

Parties, JKAS, LDs
HSS
Rosette H. Mwanza

Case No. ICTR-98-42-A

DECISION ON NSABIMANA'S MOTION FOR SEVERANCE

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

Frédéric Titinga Pacéré and
Gershom Otachi Bw'Omanwa

Counsel for Joseph Kanyabashi

Michel Marchand and Alexandra Marcil

Counsel for Élie Ndayambaje

Pierre Boulé and Claver Sindayigaya

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James Arguin

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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 Trial Judgement pronounced in this case by Trial Chamber II of the Tribunal (“Trial Chamber”) on 24 June 2011 and issued in writing in English on 14 July 2011;¹

NOTING that Sylvain Nsabimana (“Nsabimana”) was found guilty of aiding and abetting genocide, extermination and persecution as crimes against humanity as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for failing to discharge his duty as a prefect to protect the Tutsi civilians who had sought refuge at the Butare Prefecture Office from being killed;²

NOTING that Nsabimana was sentenced to 25 years’ imprisonment;³

NOTING the notice of appeal filed by Nsabimana against his convictions and sentence on 10 October 2011;⁴

NOTING that, on 23 September 2014, the parties in this case were given informal notice by the Presiding Judge that, “due to the size of the case and the number of pending motions for additional evidence”, the Appeals Chamber anticipated holding the hearing of the appeals in the case around March 2015 rather than in December 2014 as initially projected;⁵

BEING SEISED of a motion filed by Nsabimana on 15 October 2014, in which he requests the severance of his case from the cases of Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje (“co-Appellants”) pursuant to Rules 82(B) and 107 of the Rules of Procedure and Evidence of the Tribunal (“Rules”);⁶

¹ *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”).

² Trial Judgement, paras. 5888-5906, 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186.

³ Trial Judgement, para. 6271.

⁴ Notice of Appeal, 25 January 2012 (original French version filed on 10 October 2011). *See also* Appellant’s Brief, 26 September 2013 (original French version filed on 8 April 2013).

⁵ E-mail from Other Registry Services Unit, Appeals Chamber Support Section, dated 23 September 2014.

⁶ Sylvain Nsabimana’s Motion for Severance, 23 October 2014 (original French version filed on 15 October 2014) (“Motion”), paras. 1, 12, 28, 43, p. 10. Nsabimana was ordered to re-file his initial motion for severance filed on 13 October 2014 because it did not comply with the formal requirements provided for in the relevant practice directions applicable on appeal. *See* Order to Re-File, 14 October 2014, p. 1.

NOTING that, in support of his Motion, Nsabimana submits, *inter alia*, that: (i) he has been in detention since 18 July 1997 and the trial proceedings “dragged on” for almost 14 years because of the joinder of trials ordered in October 1999;⁷ (ii) there is, for the time being, no date advanced for the final appeal judgement and the appellate process will be considerably delayed by the examination of the numerous motions for additional evidence filed by four of his co-Appellants;⁸ (iii) making him “endure this stage of the proceedings under Rule 115, when it does not at all concern him, amounts to disregarding the interests of justice”;⁹ (iv) prolonging the proceedings will result in the violation of his right to be tried without undue delay and cause him serious prejudice;¹⁰ and (v) in these circumstances, the “interests of justice should be protected pursuant to Rule 82(B) of the Rules by ordering severance of [his] appeal from that of the five other Appellants”;¹¹

NOTING the response filed by the Prosecution on 28 October 2014, in which the Prosecution contends that the Motion should be dismissed as the close links between the cases of Nsabimana and those of his co-Appellants require that they be decided together in the interests of fairness and judicial economy¹² and as Nsabimana fails to demonstrate that: (i) the severance would expedite the proceedings and, thus, avoid the alleged infringement upon his right to expeditious proceedings;¹³ and (ii) the potential three-month delay resulting from the continued joinder of his case would cause him serious prejudice;¹⁴

NOTING the reply filed by Nsabimana on 31 October 2014, in which he submits, *inter alia*, that: (i) while he and some of his co-Appellants were convicted for events at the Butare Prefecture Office, they were convicted under distinct forms of responsibility; and (ii) the date of March 2015

⁷ Motion, paras. 3-5, 10.

⁸ Motion, paras. 9, 11, 19-24, 29, 30, 35-38, 41. Nsabimana argues that, had his trial not been joined, the oral arguments “would have been heard already and perhaps the Appeal Judgement would have been delivered”. *See ibid.*, para. 22. He also submits that, in the event that the Appeals Chamber grants the motions for additional evidence, the proceedings will be further delayed. *See ibid.*, paras. 38-41.

⁹ Motion, para. 27. *See also ibid.*, paras. 26, 39, 41. Nsabimana submits that his case is similar to the *Ndindiliyimana et al.* case where the Appeals Chamber ordered the severance of Augustin Bizimungu’s appeal on the ground that the additional submissions requested did not relate to the appeals of Augustin Bizimungu’s co-appellants. *See ibid.*, paras. 17, 40-42, referring to *Augustin Ndindiliyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Order for Further Submissions and Severance, 7 February 2014 (“*Ndindiliyimana et al. Decision*”), p. 2.

¹⁰ Motion, paras. 11, 18, 19.

¹¹ Motion, para. 43.

¹² Prosecution Response to Nsabimana’s Motion for Severance, 28 October 2014 (“Response”), paras. 1, 3-5, 8, 13. The Prosecution contends that the *Ndindiliyimana et al. Decision* is distinguishable from the present case. *See ibid.*, para. 7.

¹³ Response, paras. 3, 9-11.

¹⁴ Response, paras. 3, 12, referring to *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution’s Response Brief, 24 July 2009 (“*Bagosora et al. Decision*”), para. 29.

for the appeals hearing was provided on an indicative basis only and the scheduling of the hearing could be further postponed;¹⁵

RECALLING that, pursuant to Rule 48 of the Rules, “[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried”;

RECALLING that, pursuant to Rule 82(B) of the Rules, a trial chamber “may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice”;

RECALLING that, by virtue of Rule 107 of the Rules, Rules 48 and 82 of the Rules also apply at the appellate stage;¹⁶

EMPHASISING that the projected date for the appeals hearing in this case was revised not only due to the number of pending motions for additional evidence but also because of the size of the case;

CONSIDERING that Nsabimana’s argument that the appellate process will be “considerably” delayed by the examination of the pending motions for additional evidence is speculative, as the time required for the Appeals Chamber to consider the motions is not known;

CONSIDERING, without expressing any views on the merits of any of these motions, that some of the pending motions for additional evidence relate to the evidentiary basis on which the Trial Chamber partly relied to convict him and might, if successful, have repercussions on Nsabimana’s convictions;¹⁷

CONSIDERING also that the joint appeal proceedings entail potential advantages for Nsabimana, including that he may benefit from: (i) the Appeals Chamber’s consideration of all issues raised by

¹⁵ Reply to Prosecution Response to Sylvain Nsabimana’s Motion for Severance, 7 November 2014 (original French version filed on 31 October 2014), paras. 5-7, 11, 12, 16. *See also* Corrigendum to Reply to Prosecution Response to Sylvain Nsabimana’s Motion for Severance, 7 November 2014 (original French version filed on 3 November 2014), para. 3.

¹⁶ *See also, e.g., Bagosora et al. Decision*, para. 24; *Ndindiliyimana et al. Decision*, p. 2.

¹⁷ *See* Arsène Shalom Ntahobali’s Sixth Motion for Leave to Present Additional Evidence, 9 September 2014 (confidential; original French version filed on 2 May 2014); Arsène Shalom Ntahobali’s Third Motion for Admission of Additional Evidence, 22 August 2014 (confidential; original French version filed on 6 November 2013); Pauline Nyiramasuhuko’s Second Motion for Punitive Measures Against the Prosecution and for the Admission of Additional Evidence, 16 September 2014 (original French version filed on 5 November 2013); Arsène Shalom Ntahobali’s Fifth Motion to Present Additional Evidence, 20 August 2014 (public with confidential annexes and a confidential and *ex parte* annex; original French version filed on 7 March 2014); Pauline Nyiramasuhuko’s Motion for Admission of Additional Evidence, 3 October 2014 (public with a confidential annex; original French version filed on 20 May 2014); Trial Judgement, paras. 5888-5906.

all co-Appellants in their respective appeals;¹⁸ (ii) any successful challenge to the Trial Chamber's findings common to all of the co-Appellants on either a factual or legal basis, in particular concerning the fairness of the proceedings;¹⁹ and (iii) Pauline Nyiramasuhuko's and Arsène Shalom Ntahobali's challenges to the Trial Chamber's findings on the crimes at the Butare Prefecture Office on the basis of which Nsabimana was convicted;²⁰

CONSIDERING further that the severance of Nsabimana's case from that of his co-Appellants might lead to discrepancies in the Appeals Chamber's ultimate findings in both cases²¹ and would, at this stage, negatively impact on the schedule of the case of his co-Appellants, thus contradicting the interests of justice;

FINDING, therefore, that Nsabimana has failed to establish a conflict of interest causing him serious prejudice or to demonstrate that the severance of his case would protect the interests of justice and that, on the contrary, the continuation of the joint appeal proceedings at the present stage serves both the interests of Nsabimana and the interests of justice;

FOR THE FOREGOING REASONS,

DIMISSES the Motion.

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

Done this twenty-first day of November 2014
at The Hague,
The Netherlands.



[Seal of the Tribunal]

Fausto Pocar

Judge Fausto Pocar
Presiding Judge

¹⁸ Cf. *Bagosora et al.* Decision, para. 34. The Appeals Chamber recalls that "a joint trial is the best guarantee that identical evidence with regard to each accused is fully considered", which is also true on appeal. See *idem*, quoting *The Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006, para. 27.

¹⁹ See, in particular, Pauline Nyiramasuhuko's Appellant's Brief, 30 April 2014 (confidential; original French version filed on 8 April 2013; French public redacted version filed on 3 April 2014) ("Nyiramasuhuko Appeal Brief"), Grounds 1, 4, 5; Arsène Shalom Ntahobali's Appellant's Brief, 15 April 2014 (confidential; original French version filed on 8 April 2013; French public redacted version filed on 24 March 2014) ("Ntahobali Appeal Brief"), Grounds 1.1, 1.4, 1.6, 1.8; Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 (confidential; public redacted version filed on 14 June 2013), Ground 9; Joseph Kanyabashi's Appellant's Brief, 11 August 2014 (confidential; original French version filed on 8 April 2013; public redacted version filed on 8 May 2014), Ground 6; Élie Ndayambaje's Appellant's Brief, 26 July 2013 (confidential; original French version filed on 19 April 2013; French public redacted version filed on 4 June 2013), Grounds 13, 15, 16.

²⁰ See Nyiramasuhuko Appeal Brief, paras. 465-509 (Ground 16), 743-771 (Ground 23), 818-881 (Ground 25), 936-1280 (Ground 30), 1281-1296 (Ground 31); Ntahobali Appeal Brief, paras. 272-318 (Ground 2.5), 603-769 (Ground 3.6). The Appeals Chamber notes that if Nsabimana's case were severed, he would not be able to benefit directly from any such challenges by his co-Appellants.

²¹ The Appeals Chamber recalls that "[j]oint appeal proceedings not only enhance fairness as between the appellants by ensuring a uniform procedure against all but also minimize the possibility of inconsistencies in (a) treatment of such evidence, (b) common legal findings of the Trial Chamber, (c) sentencing, or (d) other matters that could arise from separate appeals." See *Bagosora et al.* Decision, para. 25 and references cited therein.