



Mechanism for International Criminal Tribunals

Case No.: MICT-13-33

Date: 14 November 2016

Original: English

IN THE APPEALS CHAMBER

Before: Judge Prisca Matimba Nyambe, Presiding
Judge Gberdao Gustave Kam
Judge Seymour Panton

Registrar: Mr. John Hocking

Decision of: 14 November 2016

PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

**DECISION ON APPEAL OF DECISION DECLINING TO
RESCIND PROTECTIVE MEASURES FOR A DECEASED
WITNESS**

Office of the Prosecutor:

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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of the “Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness” filed by Jean de Dieu Kamuhanda on 14 August 2016 (“Appeal”).¹ The Prosecution responded on 25 August 2016,² and Kamuhanda filed a reply on 27 August 2016.³

I. BACKGROUND

2. On 22 January 2004, Trial Chamber II of the International Criminal Tribunal for Rwanda (“Trial Chamber” and “ICTR”, respectively) found Kamuhanda, a former Minister of Higher Education and Scientific Research in the interim government,⁴ responsible for instigating, ordering, and aiding and abetting the killings and extermination of members of the Tutsi ethnic group on 12 April 1994 in Gikomero Parish Compound, and convicted him of genocide and extermination as a crime against humanity.⁵ The Trial Chamber, by majority, sentenced Kamuhanda to two concurrent sentences of imprisonment for the remainder of his life.⁶ On 19 September 2005, the ICTR Appeals Chamber, by majority, upheld Kamuhanda’s convictions for ordering genocide and extermination as a crime against humanity and affirmed his sentences.⁷ On 25 August 2011, the ICTR Appeals Chamber dismissed Kamuhanda’s request to review his case.⁸ Although Kamuhanda has recently filed numerous requests before the Mechanism related primarily to witness protection matters,⁹ there are currently no review proceedings pending in relation to Kamuhanda’s convictions.

3. On 5 March 2016, Kamuhanda sought the rescission of the protective measures granted to Defence Witness ALM and the reclassification of the witness’ pseudonym sheet and closed session transcript as public.¹⁰ Specifically, Kamuhanda requested, pursuant to Rule 86(H) of the Rules of Procedure and Evidence of the Mechanism (“Rules”), that the Single Judge direct the Witness Support and Protection Unit of the Mechanism to obtain a written statement from Witness ALM’s

¹ See Order Assigning Judges to a Case Before the Appeals Chamber, 19 August 2016.

² Prosecution Response to Kamuhanda’s Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness, 25 August 2016 (“Response”).

³ Reply Brief: Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness, 27 August 2016 (“Reply”).

⁴ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement and Sentence, signed on 22 January 2004, filed on 23 January 2004 (“Trial Judgement”), para. 6.

⁵ Trial Judgement, paras. 647, 651, 652, 700-702, 750.

⁶ Trial Judgement, paras. 770, 771.

⁷ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005, para. 365.

⁸ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Decision on Request for Review, 25 August 2011, para. 66.

⁹ See, e.g., *Décision relative à une demande d’autorisation d’interroger un témoin*, 5 August 2016; Decision on an Application Pursuant to Rule 86, 19 April 2016; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33-R86HL3, Decision on an Application Pursuant to Rule 86, 23 March 2016; Decision on Motion to Interview a Witness, 10 March 2016.

family who, after having been advised of the consequences, could confirm that the witness is deceased and waive the witness' protective measures under Rule 86(J) of the Rules.¹¹ Kamuhanda requested that, upon receipt of the waiver, the Single Judge rescind Witness ALM's protective measures pursuant to Rule 86(I) of the Rules.¹² On 29 March 2016, the Single Judge denied Kamuhanda's request, finding that, where a witness is deceased, the witness's consent to the variation of protective measures could not be substituted by consent from his or her family members.¹³ The Single Judge further found that, in the absence of the witness's consent, Kamuhanda had failed to demonstrate a compelling showing of exigent circumstances that would justify the rescission of the protective measures or that the requested rescission was necessary to prevent a miscarriage of justice, as required by Rule 86(I) of the Rules.¹⁴ On 1 July 2016, Kamuhanda requested certification to appeal,¹⁵ and on 8 August 2016, the Single Judge granted Kamuhanda certification to appeal "the issue raised" in the Impugned Decision on the basis that it "would significantly affect his right to a fair and public review" and that its immediate resolution by the Appeals Chamber may materially advance the preparation of an application for review of Kamuhanda's convictions and of any subsequent review proceedings.¹⁶

II. SUBMISSIONS

4. Kamuhanda submits that the Single Judge erred in law by finding that family members of a deceased witness cannot validly consent to the rescission of, or waive the protective measures granted to such witness.¹⁷ He contends that allowing family members of a deceased witness to waive the protective measures or consent to their rescission is consistent with Rules 86(H)-(J) of the Rules, as they are the persons benefiting from the protective measures once the witness has died.¹⁸

5. The Prosecution responds that the plain meaning of Rule 86(I) of the Rules supports the Single Judge's interpretation that, where a witness is deceased, consent to the variation of the protective measures cannot be substituted by consent from members of the witness's family.¹⁹ The

¹⁰ Motion to Rescind Protective Measures for Defence Witness ALM, 5 March 2016 ("Motion for Variation of Protective Measures"), paras. 8, 9.

¹¹ Motion for Variation of Protective Measures, para. 8.

¹² Motion for Variation of Protective Measures, para. 8.

¹³ Decision on Motion to Rescind Protective Measures for Defence Witness ALM, 29 March 2016 ("Impugned Decision"), p. 3.

¹⁴ Impugned Decision, p. 3.

¹⁵ Request for Certification to Appeal Decision on Motion to Rescind Protective Measures for Defence Witness ALM, 1 July 2016.

¹⁶ Decision on a Motion for Certification to Appeal, 8 August 2016 ("Decision of 8 August 2016"), pp. 2, 3. The Single Judge further considered that it would serve the interests of justice if the Appeals Chamber would rule on the issue of rescission of protective measures for deceased witnesses. *See* Decision of 8 August 2016, n. 11.

¹⁷ Appeal, paras. 1, 14, 15, 22, 32. *See also* Reply, para. 10.

¹⁸ *See* Appeal, paras. 19-34; Reply, paras. 4-10.

¹⁹ Response, paras. 5, 7.

Prosecution further asserts that Kamuhanda's proposed interpretation of the Rules may place a deceased witness's extended family at risk.²⁰

III. DISCUSSION

6. As a preliminary matter, the Appeals Chamber notes that the Impugned Decision was rendered after the close of the trial and appeal proceedings in Kamuhanda's case²¹ and that, therefore, Rule 80(B) of the Rules, which requires certification to appeal a decision rendered at trial, by its plain language is not applicable in the present case.²² The Appeals Chamber further observes that Rule 86 of the Rules, which regulates measures for the protection of victims and witnesses, does not expressly provide for an appeal as of right or address the issue of whether a decision rendered by a Single Judge after the close of trial and appeal proceedings is subject to appeal. In interpreting an equivalent provision in the ICTR Rules, the ICTR Appeals Chamber has held that an applicant is entitled to appeal a decision on witness protective measures which was rendered after the close of the trial and appeal proceedings.²³ Bearing this practice in mind and in light of the importance of the protection of victims and witnesses to the proper functioning of the Mechanism,²⁴ the Appeals Chamber considers that it has jurisdiction over this appeal.

7. As with any discretionary decision, in order to succeed on appeal, Kamuhanda has to demonstrate that the Single Judge committed a discernible error in that the Impugned Decision was based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or that it was so unfair or unreasonable as to constitute an abuse of discretion.²⁵ In this respect, the Appeals Chamber will consider whether the Single Judge has given weight to extraneous or

²⁰ Response, paras. 11, 12.

²¹ See *supra* paras. 2, 3.

²² Rule 80(B) of the Rules reads: "Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber an immediate resolution by the Appeals Chamber may materially advance the proceedings." See also *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008 ("*Niyitegeka* Decision of 20 June 2008"), para. 13 (interpreting the parallel for certification in the ICTR Rules of Procedure and Evidence ("ICTR Rules"), Rule 73(B) of the ICTR Rules).

²³ See *Niyitegeka* Decision of 20 June 2008, para. 14. See also *Georges A.N. Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Order to the Registrar Concerning Georges Rutaganda's Access to Documents, 22 January 2009, p. 2.

²⁴ See Decision on a Motion for a Public Redacted Version of the 27 January 2010 Decision on Application of The Prosecutor of the Tribunal for Variation of Protective Measures, 11 May 2016, p. 2; *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. MICT-15-88-R86H.1/MICT-15-88-R86H.2, Decision on Prosecution Requests for a Public Redacted Version of a Decision on Applications Pursuant to Rule 86(H), 9 February 2016, p. 1 and references cited therein.

²⁵ See, e.g., *Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para. 9; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.5, Decision on Interlocutory Appeal against the 27 March 2015 Trial Chamber Decision on Modality for Prosecution Re-Opening, 22 May 2015 ("*Mladić* Decision of 22 May 2015"), para. 6; *Niyitegeka* Decision of 20 June 2008, para. 14.

irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching the Impugned Decision.²⁶

8. In the Impugned Decision, the Single Judge considered that, in accordance with Rule 86(F)(i) of the Rules, protective measures ordered before the ICTR continue to have effect unless and until they are rescinded, varied or augmented.²⁷ The Single Judge also considered that, in accordance with Rules 86(H) and 86(I) of the Rules, protective measures may be rescinded with the consent of the protected person or, in the absence of consent, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result.²⁸

9. Pursuant to Rule 86(F)(i) of the Rules, protective measures ordered before the ICTY, the ICTR, or the Mechanism (“first proceedings”), continue to have effect in any other proceedings before the Mechanism (“second proceedings”) unless and until they are rescinded, varied or augmented. The Appeals Chamber observes that Kamuhanda requested rescission of protective measures granted to a witness in his own case and, therefore, the Single Judge became seised of the “first proceedings”. In contrast, Rules 86(F)(i), 86(H) and 86(I) of the Rules which form the basis of the Impugned Decision, govern the continuation of protective measures in a “second proceedings” and the conditions for their rescission upon a request from a party to the “second proceedings”, a domestic jurisdiction, or a protected victim or witness.

10. Since Kamuhanda is a party to the “first proceedings” seeking rescission of protective measures in his own case, neither Rule 86(F)(i) nor Rule 86(H), and consequently Rule 86(I) of the Rules, apply in relation to Kamuhanda’s request. Notwithstanding, the Appeals Chamber considers that it was within the Single Judge’s discretion to take into account the conditions for rescission of protective measures set out in Rule 86(I) of the Rules, as the consent of the witness concerned, the existence of exigent circumstances or the potential for a miscarriage of justice may be relevant factors in balancing the interests of the convicted person and the need for the continued protection of victims and witnesses.²⁹ However, the conditions set out in Rule 86(I) of the Rules are not required as a matter of law in the circumstances of this case where a party is seeking the modification of protective measures granted to one of its witnesses in its own case.

²⁶ See *Mladić* Decision of 22 May 2015, para. 6.

²⁷ Impugned Decision, p. 2.

²⁸ Impugned Decision, pp. 2, 3.

²⁹ See Impugned Decision, p. 3. The Appeals Chamber notes that, although the Impugned Decision contains a reference to Rule 86(J) of the Rules (*see* Impugned Decision, p. 2), no finding was entered by the Single Judge pursuant to this Rule.

11. The Appeals Chamber further recalls that, pursuant to Rule 86(A) of the Rules, a Chamber may, at the request of either party, order appropriate measures for the privacy and protection of victims and witnesses.³⁰ Rule 86(A) of the Rules is applicable *mutatis mutandis* to matters of rescission or variation of protective measures sought by a party in its own case.³¹ In assessing whether protective measures should be rescinded or varied under Rule 86(A) of the Rules, a Chamber should take into consideration any information relevant to the requested modification. In such cases, the consent of the witness is not necessarily required if the Chamber is otherwise satisfied that the modification or rescission is justified in the circumstances of the case.

12. In granting protective measures in the present case, the Trial Chamber considered that “the fears of the potential witnesses and their families, if they testify on behalf of [Kamuhanda] without protective measures” were well founded.³² The Appeals Chamber notes that, following the death of a witness who had benefited from protective measures, security concerns may remain for the witness’s family. Therefore, the security concerns of members of a deceased witness’s family may constitute a relevant consideration in determining whether the protective measures granted to the witness should remain in place or be rescinded under Rule 86(A) of the Rules.

13. In light of the above findings, the Appeals Chamber considers it unnecessary to address the remainder of Kamuhanda’s arguments at this stage.

³⁰ See also Rule 2(C) of the Rules.

³¹ See *The Prosecutor v. François Karera*, Case No. ICTR-01-74, Decision Rescinding the Protective Measures of Witness BMI, 27 September 2011, paras. 5, 6; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Rescission of Protective Measures in relation to Witness Ljubinko Cvetić, 7 December 2006, paras. 1, 2. See also *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda’s Motion for Protective Measures for Defence Witnesses, 22 March 2001 (“Protective Measures Decision”), para. 24 (where the Trial Chamber noted that Kamuhanda could seek at any time variation or augmentation of the protective measures granted to the potential witnesses, including Witness ALM).

³² Protective Measures Decision, paras. 14, 16, p. 6.

IV. DISPOSITION

14. For the foregoing reasons, the Appeals Chamber:

REMANDS the matter to the Single Judge for further consideration consistent with this decision.

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

Done this 14th day of November 2016,
At Arusha,
Tanzania



Judge Prisca Matimba Nyambe
Presiding Judge

[Seal of the Mechanism]





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