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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-54-AR73(C)
20TH February 2012
{135/H – 128/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 20 February 2012

Augustin NGIRABATWARE

v.

THE PROSECUTOR

Case No. ICTR-99-54-AR73(C)

ICTR Appeals Chamber

Date: 20th February 2012

Action: SHARIFAH ADONG

Copied To: Concerned Judges
S.L.P., L.O.S., A.I.C.S., Districts

C.M.S., L.S.S. Sharifah

**DECISION ON NGIRABATWARE'S APPEAL OF THE DECISION
REDUCING THE NUMBER OF DEFENCE WITNESSES**

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| International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda | |
| CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE VÉRIFIÉE PAR NOUS | |
| NAME / NOM: SHARIFAH ADONG | |
| SIGNATURE: Sharifah | DATE: 20/02/2012 |

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 an appeal¹ filed by Mr. Augustin Ngirabatware on 21 September 2011 against a decision issued by Trial Chamber II of the Tribunal ("Trial Chamber") on 26 August 2011.² The Prosecution responded on 3 October 2011,³ and Mr. Ngirabatware filed his reply on 6 October 2011.⁴

A. Background

2. The Prosecution closed its case against Mr. Ngirabatware on 31 August 2010 after calling 20 witnesses.⁵ At the pre-defence conference on 25 October 2010, the Trial Chamber urged Mr. Ngirabatware to examine his proposed list of 96 witnesses and to include only those necessary for "an adequate and clear Defence."⁶ Mr. Ngirabatware testified first for the defence on 16 November 2010, and his evidence continued over the course of 23 trial days and two trial sessions until 14 February 2011.⁷ After his testimony concluded, the Trial Chamber ordered Mr. Ngirabatware to file an updated witness list and reserved the right to make a final determination of the number of witnesses to be called.⁸

3. On 4 March 2011, Mr. Ngirabatware filed his revised list proposing 58 witnesses.⁹ During the next trial session held over 19 trial days from 13 June to 13 July 2011, Mr. Ngirabatware presented 12 of those witnesses.¹⁰ At the close of the session, on 13 July 2011, the Trial Chamber ordered Mr. Ngirabatware to significantly reduce his witness list.¹¹ The Trial Chamber reached this conclusion after reviewing the defence will-say statements together with other relevant

¹ Dr. Ngirabatware's Appeal of the Trial Chamber's Decision of 26 August 2011, 21 September 2011 ("Appeal").

² *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List, 26 August 2011 ("Impugned Decision").

³ Prosecutor's Response Brief on Defence Appeal on the Trial Chamber's Decision Reducing the Number of Defence Witnesses, 3 October 2011 ("Response").

⁴ Dr. Ngirabatware's Reply to Prosecutor's Response Brief on Defence Appeal of the Trial Chamber's Decision Reducing the Number of Defence Witnesses, 6 October 2011 ("Reply").

⁵ Impugned Decision, para. 1.

⁶ Impugned Decision, para. 3, referring to T. 25 October 2010 p. 7. See also Impugned Decision, para. 2.

⁷ Impugned Decision, para. 4.

⁸ Impugned Decision, para. 5, referring to T. 14 February 2011 pp. 115, 116.

⁹ Impugned Decision, para. 7.

¹⁰ Impugned Decision, para. 10.

¹¹ Impugned Decision, para. 12.

submissions, and after observing that much of the remaining evidence would be repetitive of evidence already heard.¹²

4. Although the Trial Chamber ordered Mr. Ngirabatware to file his final list by 1 August 2011, he did not do so.¹³ Instead, he filed a motion to reconsider the oral order of 13 July 2011 to reduce the witness list or, in the alternative, for certification to appeal it.¹⁴

5. In the *Impugned Decision* of 26 August 2011, the Trial Chamber denied the requests for reconsideration and certification of the oral order.¹⁵ The Trial Chamber further recalled that Mr. Ngirabatware had failed to comply with the order to file a reduced witness list and therefore addressed the matter *proprio motu*.¹⁶ After considering the presentation of the Prosecution case, the time allotted for the remainder of the defence case, and the will-say statements and other submissions from the defence, the Trial Chamber ordered Mr. Ngirabatware to file a reduced witness list containing no more than 19 additional witnesses.¹⁷

6. On 15 September 2011, the Trial Chamber granted Mr. Ngirabatware certification to appeal the *Impugned Decision*.¹⁸ The Trial Chamber reasoned that, considering the impending completion of the trial phase of the case on 31 October 2011, "the reduction of Defence witnesses at this particular stage of the proceedings involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial."¹⁹ On 26 October 2011, the Trial Chamber announced that, due to scheduling issues, beginning on 30 January 2012 it would continue the trial for up to six weeks to hear the final three witnesses of the defence case and possible rebuttal evidence from the Prosecution.²⁰

B. Submissions

7. Mr. Ngirabatware submits that the Trial Chamber erred in ordering him to reduce his witness list in its *Impugned Decision*.²¹ Specifically, Mr. Ngirabatware contends that the Trial

¹² *Impugned Decision*, para. 12.

¹³ *Impugned Decision*, paras. 12, 13.

¹⁴ *Impugned Decision*, p. 2.

¹⁵ *Impugned Decision*, paras. 48, 52, p. 12.

¹⁶ *Impugned Decision*, paras. 53-55.

¹⁷ *Impugned Decision*, paras. 57, 58, 60.

¹⁸ *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011, 15 September 2011 ("Certification Decision"), p. 10.

¹⁹ *Certification Decision*, para. 48.

²⁰ T. 26 October 2011 pp. 86, 87.

²¹ In the conclusion of the Appeal, Mr. Ngirabatware invites the Appeals Chamber "if the Appeals Chamber deems it fit" to *proprio motu* examine the Trial Chamber's order of 13 July 2011 to reduce his witness list, "considering that it is the same challenge despite the limit of certification." See Appeal, para. 106. Absent certification, the Appeals Chamber has no jurisdiction to broaden the scope of this appeal to consider the propriety of the Trial Chamber's order of

Chamber lacked the legal authority to do so after the defence case had commenced.²² According to Mr. Ngirabatware, pursuant to Rule 73ter(D) of the Tribunal's Rules of Procedure and Evidence a trial chamber may only reduce the number of defence witnesses at the pre-defence conference, and not well into the case.²³ Mr. Ngirabatware further observes that the authority to order a reduction in the number of defence witnesses to be called has traditionally been exercised only before, or shortly after, the defence begins presenting its evidence.²⁴

8. In any case, Mr. Ngirabatware further argues that the Trial Chamber erred in its assessment of his defence case prior to ordering the reduction. In particular, he submits that the Trial Chamber failed to provide sufficient reasons in support of its claim that the evidence of the remaining witnesses would be repetitive.²⁵ In a similar vein, Mr. Ngirabatware contends that the assessment made by the Trial Chamber to justify the reduction was flawed. Specifically, Mr. Ngirabatware argues that the Trial Chamber failed to appreciate the number of allegations against him and the need to provide corroboration.²⁶ Mr. Ngirabatware suggests that, as a result of the reduction in witnesses a number of allegations will go unchallenged.²⁷

9. Moreover, Mr. Ngirabatware submits that, in assessing the pace of his case, the Trial Chamber failed to appreciate that he regularly complied with the estimated times for his examination in chief and that some of the delay resulted from the Prosecution's lengthy cross-examination or postponements in the commencement of trial sessions.²⁸ Mr. Ngirabatware further contends that, in accounting for the number of witnesses heard, the Trial Chamber should not have considered his own appearance since an accused has a fundamental right to testify.²⁹

10. Finally, Mr. Ngirabatware submits that the Trial Chamber failed to consider the prejudice to his case resulting from the reduction.³⁰ He argues that, following the first reduction of his witness list on 4 March 2011, he had a reasonable expectation that no further reductions would be made.³¹ According to Mr. Ngirabatware, had he been informed earlier that he would have to reduce the

13 July 2011. See *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Motion for Extension of Time to File Appeal Submissions Against Trial Chamber's Decisions of 10 September 2009, 17 September 2009, para. 10. Therefore, the Appeals Chamber limits its consideration to the scope of the certification.

²² Appeal, paras. 25-38, 94-105. See also Reply, para. 20.

²³ Appeal, paras. 26-30.

²⁴ Appeal, paras. 27, 31-38.

²⁵ Appeal, paras. 12-24. See also Reply, paras. 8, 13, 14.

²⁶ Appeal, paras. 72-90.

²⁷ Reply, para. 17.

²⁸ Appeal, paras. 60-71.

²⁹ Appeal, paras. 54-59; Reply, paras. 26-28.

³⁰ Appeal, paras. 49-53.

³¹ Appeal, para. 48. See also Reply, paras. 18, 19.

number of defence witnesses, he would have reconsidered his entire defence strategy.³² Mr. Ngirabatware further argues that the Trial Chamber failed to appreciate that the defence lacked access to certain documents which would have enabled it to assess the potential credibility of its witnesses in determining which of them to call.³³ He also argues that the Trial Chamber did not hear the defence prior to ordering the reduction.³⁴

11. The Prosecution responds that the Trial Chamber had the authority to order the reduction of defence witnesses and acted within its discretion in so ordering.³⁵ The Prosecution submits that Mr. Ngirabatware has failed to identify any error in the Impugned Decision.³⁶

C. Discussion

12. The essential question in this interlocutory appeal is whether the Trial Chamber properly exercised its discretion in reducing the number of defence witnesses at a late stage in proceedings, *i.e.* after the Defence had presented 16 witnesses over the course of 54 trial days. Decisions relating to the general conduct of trial, including decisions to reduce a party's witness list, are matters within the discretion of the Trial Chamber.³⁷ The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.³⁸ Such deference is based on the recognition of the Trial Chamber's organic familiarity with the day-to-day conduct of the trial and the practical demands of the case.³⁹

13. The Appeals Chamber finds no merit in Mr. Ngirabatware's contention that the Trial Chamber lacked the authority to order the reduction of his witness list well after the commencement of the defence case. A trial chamber "possesses the inherent power to control the proceedings during the course of the trial."⁴⁰ This authority includes the power to reduce the size of a party's

³² Appeal, paras. 50, 51.

³³ Appeal, paras. 52, 53.

³⁴ Appeal, paras. 91-93.

³⁵ See generally Response, paras. 5-48.

³⁶ Response, para. 4.

³⁷ *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Kanyabashi Appeal Decision*"), para. 10. See also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007 ("*Prlić Appeal Decision*"), para. 8.

³⁸ See *Kanyabashi Appeal Decision*, para. 10; *Prlić Appeal Decision*, para. 8.

³⁹ See *Kanyabashi Appeal Decision*, para. 10; *Prlić Appeal Decision*, para. 8.

⁴⁰ *Prlić Appeal Decision*, para. 14 (internal citation omitted)(emphasis in the original).

case after a pre-trial or pre-defence conference, even in later stages of the case.⁴¹ The Appeals Chamber also notes, as the Trial Chamber correctly observed, that other trial chambers have previously ordered the reduction of defence witnesses outside of the pre-defence conference, and even after the defence case has commenced.⁴² That said, in doing so, a trial chamber is required to consider whether the amount of time or number of witnesses allocated is objectively adequate to permit the relevant party to fairly set forth its case.⁴³ In this respect, a trial chamber must take into consideration the complexity of the accused's case and be satisfied that the maximum number of witnesses allotted is sufficient to allow the accused a fair opportunity to present his defence.⁴⁴

14. In the present case, the Trial Chamber expressly noted that "the number of witnesses allotted to the Defence must be sufficient to allow him a fair opportunity to present his defence, and must respect the equality of arms between the Parties."⁴⁵ The Trial Chamber further stated that it "has closely considered the Pre-Defence Brief, the Amended Pre-Defence Brief, the will-say statements of proposed witnesses, other relevant submissions, and the case as a whole, including its complexity."⁴⁶ After considering this material along with the 16 witnesses who had already been heard, the Trial Chamber concluded that the presentation of 19 additional witnesses, for a total allocation of 35 defence witnesses, would be sufficient to guarantee Mr. Ngirabatware "a fair opportunity to present his defence."⁴⁷ The Appeals Chamber is therefore satisfied that the Trial Chamber took into account the complexity of the case, as well as whether the remaining witnesses would allow Mr. Ngirabatware to adequately present his defence.

15. The Appeals Chamber is not convinced that the Trial Chamber was required to explicitly identify the particular witnesses whose potential testimony it considered as repetitive. The Appeals Chamber recalls that, while a trial chamber has the obligation to provide a reasoned opinion, it is not required to articulate its reasoning in detail.⁴⁸ Beyond noting the complexity of the case and the need for corroboration, Mr. Ngirabatware has not identified a single witness, whom he was forced to remove from his list or explained why that potential witness would be essential to the proper presentation of his case. Similarly, Mr. Ngirabatware has not demonstrated with any degree of specificity how the additional 19 witnesses would be insufficient to complete the fair presentation of his defence.

⁴¹ See *Prlić* Appeal Decision, para. 14 (confirming that a trial chamber has the authority to significantly reduce the time allocated to the Prosecution's case well after the commencement of trial).

⁴² See Impugned Decision, para. 45, nn. 41, 42 (citing cases).

⁴³ *Prlić* Appeal Decision, para. 14; *Kanyabashi* Appeal Decision, para. 21.

⁴⁴ *Kanyabashi* Appeal Decision, para. 21.

⁴⁵ Impugned Decision, para. 56.

⁴⁶ Impugned Decision, para. 57.

⁴⁷ Impugned Decision, para. 58.

⁴⁸ *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010, para. 195.

16. In addition, Mr. Ngirabatware's submissions relating to his lack of responsibility for delays in the presentation of his case have no merit. It follows from the Impugned Decision that the main criterion for the Trial Chamber in deciding to limit the defence case was its specific consideration of the nature of the anticipated testimony of the *remaining* witnesses.⁴⁹ Indeed, only after assessing the nature of the case and determining an appropriate number of witnesses did the Trial Chamber go on to observe the relative time each party had used in the presentation of its evidence.⁵⁰ In view of this, the Appeals Chamber also considers it irrelevant whether the Trial Chamber counted Mr. Ngirabatware as a witness in discussing the defence evidence already presented.

17. Finally, the Appeals Chamber is not convinced that Mr. Ngirabatware has identified any prejudice as a result of the timing and the *proprio motu* nature of the Trial Chamber's order. It is apparent from the procedural history of this case that the Trial Chamber repeatedly expressed its concern about the number of Mr. Ngirabatware's anticipated witnesses from the commencement of the defence case, explicitly noting that it reserved the right to reduce the number of his witnesses.⁵¹ Mr. Ngirabatware, therefore, had no reason to expect that a further reduction in his witness list was not possible. Mr. Ngirabatware has also not provided any indication of how his case would have been restructured, had he known that he was limited to a total of 35 witnesses.

18. In addition, the Trial Chamber also explained that it had taken into account the defence submissions concerning the timing of the reduction, as contained in the pleadings underlying the Impugned Decision as well as the will-say statements and pre-defence briefs.⁵² As these submissions formed the basis for the Trial Chamber's decision to order a reduction in the number of the witnesses, there is no merit in the contention that Mr. Ngirabatware was not afforded an opportunity to be heard.⁵³ Furthermore, Mr. Ngirabatware had the opportunity to present arguments challenging the order in his requests for reconsideration and certification of the Impugned Decision.⁵⁴

19. In sum, the Appeals Chamber considers that the Trial Chamber had the authority to order the reduction of Mr. Ngirabatware's witness list, even at a late stage in his defence case. Mr. Ngirabatware has not demonstrated that, in doing so, the Trial Chamber abused its discretion.

⁴⁹ Impugned Decision, paras. 57, 58.

⁵⁰ Impugned Decision, paras. 57-59.

⁵¹ See *supra*, para. 2.

⁵² Impugned Decision, para. 57, n. 56.

⁵³ See *Kanyabashi Appeal Decision*, para. 16.

⁵⁴ Certification Decision, paras. 22-29.


D. Disposition

20. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

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

Done this 20th day of February 2012,
at The Hague,
The Netherlands.





Judge Patrick Robinson
Presiding

[Seal of the Tribunal]