UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No.: MICT-13-33
Date: 6 October 2017
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mparany Mamy Richard Rajohnson
Judge Seymour Panton

Registrar: **Mr. Olufemi Elias**

Decision of: **6 October 2017**

PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

DECISION ON AN APPEAL OF A DECISION RENDERED BY A SINGLE JUDGE

The Office of the Prosecutor

Mr. Serge Brammertz
Mr. Richard Karegyesa
Ms. Thembile Segoete
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Counsel for Jean de Dieu Kamuhanda

Mr. Peter Robinson

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of the "Appeal of Decision on Interview of Prosecution Witness GEK" filed by Jean de Dieu Kamuhanda on 29 June 2017 ("Appeal").[1] The Prosecution responded on 10 July 2017 ("Response"),[2] and Kamuhanda filed his reply on 12 July 2017 ("Reply").[3]

I. BACKGROUND

2. On 10 July 2000, Trial Chamber II of the International Criminal Tribunal for Rwanda ("Trial Chamber" and "ICTR", respectively) issued an order establishing protective measures restricting contact for any protected victim or potential Prosecution witnesses or any relative of such person testifying in case of *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A.[4] Notably, the Protective Measures Decision, which remains in effect, requires judicial authorization prior to a member of the Kamuhanda defence team contacting individuals subject to it.[5] Prosecution Witness GEK testified in Kamuhanda's trial subject to the Protective Measures Decision.[6]

3. On 22 January 2004, the Trial Chamber, relying in part on the testimony of Witness GEK, convicted Kamuhanda, a former Minister of Higher Education and Scientific Research in Rwanda's interim government, of genocide and extermination as a crime against humanity and, by majority, sentenced Kamuhanda to two concurrent sentences of life imprisonment.[7] On 19 September 2005, the Appeals Chamber of the ICTR, by majority, upheld Kamuhanda's convictions and affirmed his sentences.[8] On 25 August 2011, the Appeals Chamber of the ICTR dismissed Kamuhanda's request for review of his convictions.[9]

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[1] *See* Order Assigning Judges to a Case Before the Appeals Chamber, 11 July 2017.
[2] Prosecution Response to Kamuhanda's Appeal of Decision on Interview of Prosecution Witness GEK, 10 July 2017.
[3] Reply Brief: Appeal of Decision on Interview of Prosecution Witness GEK, 12 July 2017.
[4] *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 10 July 2000 ("Protective Measures Decision"). The original version of the Protective Measures Decision was filed in French on the same date.
[5] Protective Measures Decision, paras. 2(i), 9, p. 6; Decision on Motion for Contact with Persons Benefitting from Protective Measures, 10 March 2016, para. 10. *See also Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010, paras. 70-74.
[6] Protective Measures Decision, p. 6; *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Witness GEK, T. 3 September 2001 pp. 179, 180 (French; closed session).
[7] *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement and Sentence, 23 January 2004, paras. 6, 251-258, 272, 312-315, 437-439, 443, 651, 652, 700, 702, 750, 770, 771.
[8] *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005, para. 365.
[9] *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R, Decision on Request for Review, 25 August 2011, para. 66.

4. On 12 May 2017, Kamuhanda filed a motion seeking to interview Witness GEK and requested that a Single Judge order the Witness Support and Protection Unit of the Mechanism ("WISP") to contact the witness to ascertain consent to an interview with Kamuhanda's counsel.[10] Kamuhanda further requested the Single Judge to order the WISP to strike the following language from the consent form:

> I fully understand the meaning and implications of my personal decision and therefore commit myself, through this document, not to hold WISP and the Mechanism in general accountable for any moral and material prejudice which I might suffer from my decision as to whether to participate in such an interview.[11]

5. In an order issued on 8 June 2017, the Single Judge considered that this contested language conformed with the general responsibility of the WISP to inform witnesses about their rights and duties as well as the Mechanism's responsibility to ensure the protection of victims and witnesses.[12] The Single Judge further found that Kamuhanda had not shown that the language would likely have "a negative impact on the witness" and that the form provided by the WISP to the witness should not be modified when ascertaining whether Witness GEK would consent to an interview with Kamuhanda's counsel.[13] On 27 June 2017, after being informed by the WISP that the witness did not consent to the requested interview,[14] the Single Judge denied the Motion of 12 May 2017.[15]

II. SUBMISSIONS

6. Kamuhanda argues that the Single Judge made an incorrect interpretation of governing law in the Order of 8 June 2017 by refusing to order the WISP to remove from its consent form the statement that Witness GEK might suffer "moral and material prejudice" if the witness consented to the interview.[16] Kamuhanda submits that this admonition unnecessarily discouraged the witness from agreeing to the interview, and, consequently, he appeals the Single Judge's Decision of 27 June 2017, which denied the interview request due to the absence of consent.[17]

7. In support of his appeal, Kamuhanda argues that the contested language violates the Defence's right to interview witnesses, who are not the property of any party, without unjustified

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[10] Motion to Interview Prosecution Witness GEK, 12 May 2017 ("Motion of 12 May 2017"), paras. 1, 14.
[11] Motion of 12 May 2017, paras. 15-18.
[12] Order for Submissions, 11 July 2017 (French original filed on 8 June 2017) ("Order of 8 June 2017"), pp. 3, 4.
[13] Order of 8 June 2017, p. 4.
[14] Registrar's Submission Pursuant to Order of 8 June 2017, 21 June 2017 (confidential) ("Registrar's Submission"), p. 2, Annex, Registry Pagination ("RP.") 2/1554bis, 1/1554bis.
[15] Decision on Motion for Authorisation to Interview a Witness, 11 July 2017 (French original dated 27 June 2017 and filed on 28 June 2017) ("Decision of 27 June 2017"), p. 2.
[16] Appeal, paras. 6, 7, 13, 23.
[17] Appeal, paras. 1, 8, 9, 13, 14, 23, 24.

interference.[18] Specifically, he asserts that the contested language violates the principles that any restrictions placed on interviewing protected witnesses must be the least restrictive necessary and proportional to the goal advanced by the protective measures.[19] In his view, the contested language fails these tests and is unnecessary because: (i) it is not used, to his knowledge, by any other court or tribunal, including by the WISP in the Mechanism's Hague Branch, when conveying interview requests;[20] (ii) the Defence is already bound to protect the confidentiality of information likely to identify the witness;[21] and (iii) the United Nations and its organs already have immunity from liability.[22] To remedy the errors caused by the Single Judge's refusal to strike the contested language, Kamuhanda requests that the Appeals Chamber remand the matter to the Single Judge to take further steps to determine whether the witness is willing to meet with the Defence after being "properly advised".[23]

8. The Prosecution responds that the Appeal should be dismissed as out of time since Kamuhanda did not appeal the Order of 8 June 2017, which is the judicial determination that denied his request to strike the contested language from the consent form.[24] Alternatively, it submits that Kamuhanda fails to demonstrate that the Single Judge committed discernible error in denying his request to interview Witness GEK as he simply repeats arguments that were properly rejected in the first instance.[25]

9. Kamuhanda replies that the issue was not ripe until the issuance of the Decision of 27 June 2017 due to the possibility that Witness GEK might consent to the interview.[26] He further argues that the Prosecution fails to provide any justification for the contested language.[27]

III. PRELIMINARY MATTER

10. The Appeals Chamber first considers whether the Appeal was filed out of time in light of the fact that the Order of 8 June 2017 – not the Decision of 27 June 2017 – contains the judicial determination that the Appeal alleges is erroneous. Although the Appeal substantially alleges that the Single Judge erred in the Order of 8 June 2017 by refusing to grant Kamuhanda's request that

[18] Appeal, paras. 15, 16, 19-21.
[19] Appeal, paras. 17, 18.
[20] Appeal, para. 14. *See also* Reply, para. 5.
[21] Appeal, para. 22.
[22] Appeal, para. 22.
[23] Appeal, para. 24.
[24] Response, paras. 8, 10, 12, 15.
[25] Response, paras. 9-12, 15. The Prosecution further asserts that Kamuhanda fails to demonstrate that the contested language discourages witnesses from consenting to interviews with defence counsel. *See* Response, paras. 12-14.
[26] Reply, paras. 3, 4.

the WISP strike the contested language from the consent form, the impact of the alleged error did not materialize until the Decision of 27 June 2017, when the Single Judge denied Kamuhanda's request to interview Witness GEK due to the absence of consent. Requiring Kamuhanda to appeal an interim order before being able to demonstrate any prejudice resulting from that order would necessarily inhibit his ability to appeal the discretionary determination at issue and would result in a needless expenditure of judicial resources.[28] Consequently, the Appeals Chamber finds that the Appeal was timely filed.

IV. STANDARD OF REVIEW

11. The Appeals Chamber recalls that decisions related to witness protection are discretionary decisions.[29] In order to successfully challenge such a decision, Kamuhanda must demonstrate that the Single Judge committed a discernible error resulting in prejudice to him.[30] The Appeals Chamber will only reverse a discretionary decision where it is found to be based on an incorrect interpretation of the governing law or on a patently incorrect conclusion of fact, or where the decision is so unfair or unreasonable as to constitute an abuse of discretion.[31]

V. DISCUSSION

12. The Appeals Chamber first considers Kamuhanda's argument that the contested language amounted to an unjustified interference with his right to interview witnesses and violated the principles that any constraints placed on interviewing protected witnesses must be the least restrictive necessary and proportional to the goal advanced by the protective measures. The Appeals Chamber observes that the Single Judge, referring to Articles 6.3 and 10.2 of the Policy for the Provision of Support and Protection Services to Victims and Witnesses and Article 20 of the Statute of the Mechanism, considered that the contested language conformed with the general responsibility of the WISP to inform witnesses about their rights and duties as well as the Mechanism's

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[27] Reply, para. 5. Kamuhanda rejects the Prosecution's position that the contested language has not discouraged witnesses from consenting to interviews with defence counsel. *See* Reply, paras. 8-10.

[28] In order to successfully challenge a discretionary decision, an applicant must demonstrate that the Single Judge committed a discernible error *resulting in prejudice to the applicant*. *See infra* para. 11.

[29] *Prosecutor v. Elièzer Niyitegeka*, Case No. MICT-12-16-R, Decision on Appeals of Decisions Rendered by a Single Judge, 9 August 2017 ("*Niyitegeka* Decision of 9 August 2017"), para. 14 and references contained therein.

[30] *Niyitegeka* Decision of 9 August 2017, para. 14 and references contained therein.

[31] *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 ("*Orić* Decision of 17 February 2016"), para. 9; *Niyitegeka* Decision of 9 August 2017, para. 14.

responsibility to ensure the protection of victims and witnesses.[32] Kamuhanda does not argue that it was irrelevant for the Single Judge to consider the positive obligations imposed on the WISP by the Policy or the Statute when evaluating the contested language and the Appeals Chamber finds no error in this respect.

13. Furthermore, the Appeals Chamber is not persuaded that the authorities Kamuhanda relies upon to suggest that any constraints placed on interviewing protected witnesses must be the least restrictive necessary and proportional to the goal advanced by the protective measures demonstrate that the Single Judge erred in his interpretation of the governing law. The Appeals Chamber observes that none of the authorities Kamuhanda refers to in his Appeal was presented to the Single Judge for consideration.[33] In essence, Kamuhanda seeks to litigate *de novo* the lawfulness of the contested language, which is inappropriate in view of the limited jurisdiction of the Appeals Chamber.[34]

14. The Appeals Chamber recalls the generally accepted principle that the interpretation and implementation of protective measures should be the least restrictive necessary to provide for the protection of victims or witnesses.[35] However, the Appeals Chamber is not convinced that the contested language strays from this principle or that the Single Judge erred in refusing to exclude it on this basis. Moreoever, none of the other authorities Kamuhanda relies upon sets forth generally applicable tests for assessing the lawfulness of means used to ascertain the consent of a protected witness to an interview.[36] Consequently, the Appeals Chamber is not persuaded that Kamuhanda

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[32] *See* Order of 8 June 2017, p. 4, nn. 10, 11, *referring, inter alia, to* Policy for the Provision of Support and Protection Services to Victims and Witnesses, 26 June 2012 ("Policy"), Articles 6.3 and 10.2 *and* Article 20 of the Statute of the Mechanism ("Statute").

[33] *Compare* Appeal, paras. 17-21 *with* Motion of 12 May 2017, paras. 14-18.

[34] *See* Article 23(2) of the Statute. The Appeals Chamber emphasizes that, in the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could have reasonably done so in the first instance. *See Orić* Decision of 17 February 2016, para. 14 and references contained therein. Kamuhanda in no way demonstrates the existence of special circumstances. To the contrary, Kamuhanda had considerable time to develop and refine his arguments as to the unlawfulness of the contested language before requesting that the Single Judge strike it from the consent form as he had repeatedly litigated this issue before other single judges of the Mechanism. *See, e.g.*, Motion for Oral Hearing for Prosecution Witness GET, 17 August 2016, paras. 4, 5, 10; Motion to Apply "*Ordonnance Avant Dire Droit Portant Depot D'Observations*" to Prosecution Witness GAE, 27 September 2016, paras. 2, 3, 5-7.

[35] *The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 19.

[36] *See, e.g., The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para. 14; *Situation in the Republic of Côte D'Ivoire in the case of the Prosecutor v. Charles Blé Goudé*, Second Decision on Issues Related to Disclosure of Evidence, ICC-02/11-02/11-67, 6 May 2014, para. 19; *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision Adopting a Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Other Parties, ICC-01/05-01/13-1093, 20 July 2015, para. 10; *State v. Murtagh*, 169 P.3d 602 (Alaska, 2007); *Webb v. Texas*, 409 U.S. 95 (1972). The Appeals Chamber further observes that Kamuhanda's reliance on these authorities ignores that, unlike in those cases, his trial and appeal proceedings have concluded and his convictions have been affirmed.

demonstrates that the Single Judge's decision denying the request to strike the contested language from the consent form is inconsistent with these authorities or amounts to a discernible error.

15. Likewise, Kamuhanda does not demonstrate that the Single Judge erred based on his contentions that the contested language is unnecessary because: (i) it is not used by any other court, including the WISP in the Mechanism's Hague Branch when conveying interview requests; (ii) the Defence is already bound to protect the confidentiality of information likely to identify the witness; and (iii) the United Nations and its organs already have immunity. The Appeals Chamber observes that arguments (i) and (iii) were not presented to the Single Judge and reiterates that appealing first instance decisions in this manner is not appropriate.[37] In any event, the Appeals Chamber observes that the contested language releases the Mechanism and the WISP from accountability for any moral or material prejudice the witness might suffer whether he or she consents to the interview *or does not* and, therefore, *prima facie*, it neither encourages nor discourages a witness from consenting to an interview.[38] In addition, Kamuhanda's contention that the impugned provision necessarily discouraged the witness from agreeing to an interview is not supported by Witness GEK's explanation for not consenting to the interview. Witness GEK declined the request for the interview not because of the contested language, having to express an understanding that the witness could not hold the Mechanism responsible for his or her decision, but rather because of fears for safety.[39] Consequently, Kamuhanda fails to demonstrate that the Single Judge committed a discernible error in refusing to strike the contested language from the consent form and in subsequently denying Kamuhanda's request to interview Witness GEK based on lack of consent.

[37] *See supra* n. 34 and references contained therein.
[38] Registrar's Submission, Annex, RP. 2/1554bis ("I fully understand the meaning and implications of my personal decision and therefore commit myself, through this document, not to hold WISP and the Mechanism in general accountable for any moral and material prejudice which I might suffer from my decision *as to whether to participate in such an interview*.") (Emphasis added).
[39] *See* Registrar's Submission, Annex, RP. 1/1554bis ("I fear for my safety because even when I appeared before the Tribunal previously, I did so as a protected witness. If they want to interview me, I am prepared to meet with them in court. In all other respects, my response is no.").

VI. DISPOSITION

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

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

Done this 6th day of October 2017,
At The Hague,
The Netherlands

Judge Theodor Meron
Presiding Judge

[Seal of the Mechanism]

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