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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR73.10
05 October 2007
[1968/H – 1962/H]

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 5 October 2007

2007 OCT -8 A 11: 32

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-AR73.10

ICTR Appeals Chamber
Date: 5 October 2007
Action: P.T.
Copied To: Concerned Judge, Parties, SLOS, LSS, Archives

DECISION ON NZIRORERA'S INTERLOCUTORY APPEAL CONCERNING HIS RIGHT TO BE PRESENT AT TRIAL

Office of the Prosecutor:

Mr. James Stewart
Mr. Don Webster
Mr. George W. Mugwanya
Ms. Inneke Onsea

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Tribunal pénal international pour le Rwanda
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Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mr. Mathieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Mr. Joseph Nzirorera

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 seized of an interlocutory appeal filed by Joseph Nzirorera ("Appellant") on 16 July 2007[1] against a decision rendered by Trial Chamber III on 11 July 2007, concerning the right of an accused to be present at trial.[2] The Prosecution responded on 27 August 2007,[3] and the Appellant replied on 28 August 2007.[4]

A. Background

2. On 27 June 2007, counsel for the Appellant informed the Trial Chamber that the Appellant was ill and that a medical doctor had pronounced him unfit to attend trial for three days.[5] Counsel requested the Trial Chamber to adjourn the proceedings until the Appellant would be medically fit to attend his trial.[6] The Trial Chamber denied the request by oral decision and held that it would proceed with the cross-examination of Prosecution Witness Twahirwa in the absence of the Appellant.[7] The Trial Chamber also requested the assistance of the Registry in ensuring "that the relevant transcripts as well as the minutes of the proceedings" would be provided to the Appellant as soon as available.[8] The Trial Chamber then held an *in camera* conference with the parties and adjourned the proceedings until the following day.[9]

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[1] Joseph Nzirorera's Appeal from Decision to Proceed in the Absence of the Accused, 16 July 2007 ("Nzirorera's Appeal").

[2] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Stay of Proceedings while Unfit to Attend Trial or Certification to Appeal – Article 20 of the Statute, Rule 73(B) of the Rules of Procedure and Evidence, 11 July 2007 ("Impugned Decision").

[3] Mr. Ngirumpatse and Mr. Karemera also filed appeals against the Impugned Decision on 14 August 2007 and on 21 August 2007, respectively (*Mémoire d'appel pour M. Ngirumpatse contre la Décision* 'on Joseph Nzirorera's Motion for Stay of Proceedings While He Is Unfit to Attend Trial or Certification to Appeal', 14 August 2007; *Mémoire d'appel relatif à la décision rendue le 11 juillet 2007 par la Chambre III. Sur* [sic] *la suspension de la procédure lorsque l'accusé n'est pas en mesure d'assister au procès*, 21 August 2007). On 27 August 2007, the Prosecution filed a consolidated Response to Nzirorera, Ngirumpatse and Karemera's Appeal from Decision to Proceed in the Absence of the Accused ("Response"). In its Decision on Requests for Extension of Time, issued on 29 August 2007, the Appeals Chamber found that Mr. Karemera and Mr. Ngirumpatse had not been granted certification to appeal and it *inter alia* rejected their appeal briefs, *see* Decision on Requests for Extension of Time, 29 August 2007, para. 7. On 30 August 2007, Mr. Ngirumpatse filed a "*Mémoire en intervention pour M. Ngirumpatse au soutien de l'appel de Nzirorera contre la décision* 'on Joseph Nzirorera's Motion for Stay of Proceedings while He Is Unfit to Attend Trial or Certification to Appeal'", which has been rejected by the Appeals Chamber, *see* Decision on Ngirumpatse's Motion for Reconsideration, 5 October 2007. The Appeals Chamber also recognized the Response as validly filed, *see* Decision on Nzirorera's Motion to Reject Prosecution Response, 5 October 2007, p. 4.

[4] Reply Brief: Joseph Nzirorera's Appeal from Decision to Proceed in the Absence of the Accused, 28 August 2007 ("Reply").

[5] *See* T. 27 June 2007, p. 11.

[6] *See* T. 27 June 2007, p. 9.

[7] *Id.*, p. 11.

[8] *Id.*

[9] *See* T. 27 June 2007, p. 23.

3. On 28 June 2007, the Appellant requested reconsideration of the Trial Chamber's oral decision to proceed with the cross-examination of Witness Twahirwa in his absence or certification to appeal.[10] The Trial Chamber reconsidered its decision in part and orally ruled that Witness Twahirwa's cross-examination by the Appellant should be stayed until his return to court but that this witness's cross-examination by the Appellant's co-accused should proceed in the Appellant's absence.[11] The Trial Chamber stated that it would set out the reasons for its decision in writing.[12]

4. The Appellant's co-accused continued with their cross-examination of Witness Twahirwa on Thursday, 28 June 2007, in the Appellant's absence, but in the presence of the Appellant's counsel. One of the Appellant's co-accused was unable to conclude his cross-examination on that day, and the Trial Chamber adjourned the proceedings until Monday, 2 July 2007.[13] On that day, Witness Twahirwa's cross-examination and re-examination were completed in the presence of the Appellant and his counsel.[14]

5. On 11 July 2007, the Trial Chamber issued the Impugned Decision setting out its written reasons for denying the Appellant's request to stay the proceedings in his absence and granting the Appellant certification to appeal.[15]

6. The Appellant submits that in proceeding with the cross-examination of Witness Twahirwa by his co-accused in his absence, the Trial Chamber violated his fundamental right to be tried in his presence, as guaranteed by Article 20(4)(d) of the Statute of the Tribunal ("Statute").[16] The Appellant stresses that he wanted to attend his trial but was unfit to do so for medical reasons.[17] Accordingly, the Appellant seeks exclusion of Witness Twahirwa's testimony taken in his absence.[18]

[10] *See* T. 28 June 2007, p. 1.
[11] *See* T. 28 June 2007, p. 7.
[12] *Id.*
[13] *See* T. 28 June 2007, pp. 74-76.
[14] *See* T. 2 July 2007, pp. 1, 3.
[15] *See* Impugned Decision, paras. 5, 22-26.
[16] *See* Nzirorera's Appeal, paras. 5, 8; Nzirorera's Reply, para. 20.
[17] *See* Nzirorera's Appeal, paras. 18, 25.
[18] *See* Nzirorera's Reply, para. 20.

B. Standard of Review

7. Decisions relating to the general conduct of trial proceedings are matters within the discretion of the Trial Chamber.[19] The Impugned Decision, which ruled on the right of the accused to be present at trial, was such a discretionary decision to which the Appeals Chamber must accord deference. Such deference is based on the recognition by the Appeals Chamber of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case."[20] A Trial Chamber's exercise of discretion will thus be reversed only if the Appellant demonstrates that the Trial Chamber made a discernible error in the Impugned Decision because it was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[21]

C. Alleged violation of the right to be present at trial

8. In the Impugned Decision, the Trial Chamber concluded that the cross-examination of Witness Twahirwa by the Appellant's co-accused could proceed in his absence, despite his request for an adjournment, which was based on medical reasons and prevented his presence in court.

9. The Appellant submits that while the right to be present at one's trial is not absolute,[22] the only permissible exceptions are where an accused waives his right to be present or where his obstructionist conduct in the courtroom warrants a restriction of that right by the Chamber.[23] In identifying these circumstances as the only conditions which justify a court proceeding in his absence, the Appellant draws upon the *Zigiranyirazo* Decision, which held that the right to be present at one's trial can only be limited "where an accused disrupts the trial or in other similar circumstances".[24] The Appellant adds that any further limitations to those envisioned in Rules 82*bis*

[19] *See The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeals 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* Decision"); *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 3; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Decision"), para. 9.

[20] *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 9.

[21] *See Kanyabashi* Decision, para. 10; *Zigiranyirazo* Decision, para. 9.

[22] *See* Nzirorera's Appeal, para. 14; Nzirorera's Reply, para. 2.

[23] *See* Nzirorera's Appeal, paras. 15-21.

[24] *See* Nzirorera's Appeal, paras. 23-25.

and 80(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") must come from amendments to the Rules, not *ad hoc* decisions of Trial Chambers.[25]

10. The Prosecution responds that a Trial Chamber can validly continue a trial where an accused is absent for reasons other than misconduct or voluntary absence.[26] In this regard, it disputes the relevance of the precedent mentioned by the Appellant, stressing that this jurisprudence does not involve the present circumstance of an accused's absence from trial due to illness.[27]

11. Article 20(a)(d) of the Statute provides that an accused has a right "to be tried in his or her presence". The Appeals Chamber has interpreted the scope of this right as meaning that an accused has a right to be *physically* present at his trial.[28] However, the Appeals Chambers of both this Tribunal and of the International Criminal Tribunal for the former Yugoslavia ("ICTY") have also held that the right to be present at trial is not absolute.[29] In the *Zigiranyirazo* Decision, this Appeals Chamber held that an accused person can waive or forfeit the right to be present at trial.[30] The Appeals Chamber noted that Rule 80(B) of the Rules allows a Trial Chamber to remove an accused for persistent disruption of the proceedings. It further held that in determining to restrict any statutory right of an accused, the Appeals Chamber must take into account "the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective."[31]

12. In the present case, the Trial Chamber cast the proportionality analysis in the following terms:

> [T]he objective at stake is the need to ensure a reasonably expeditious trial which, as acknowledged by the Appeals Chamber, is of general importance. The issue at stake is whether there are limitations which can be placed on the access of an accused to the examination of a witness, without materially and disproportionably impairing his rights pursuant to Article 20(A)(d) of the Statute to be tried in his presence.[32]

The Trial Chamber also took account of the fact that Witness Twahirwa's testimony only concerned the alleged acts and conduct of one of the Appellant's co-accused.[33]

[25] *See* Nzirorera's Appeal, paras. 35-36, 38.
[26] *See* Response, para. 4.
[27] *See* Response, paras. 8-9, 11-12.
[28] *See Zigiranyirazo* Decision, paras. 11-13.
[29] *See Zigiranyirazo* Decision, para. 14; *Slobodan Milošević v. The Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision"), para. 13.
[30] *See Zigiranyirazo* Decision, para. 14.
[31] *Id.* (footnotes omitted).
[32] *See* Impugned Decision, para. 14.
[33] *See* Impugned Decision, para. 20.

13. The Appellant contends that the Trial Chamber misapplied the proportionality principle set forth in the *Zigiranyirazo* Decision and used it as "an opportunity to proceed in the absence of the accused if it balanced the prejudice to him against the benefits of an expeditious trial."[34] The Appellant also argues that, in proceeding with Witness Twahirwa's testimony on the premise that it only went to the acts and conduct of his co-accused, the Trial Chamber violated the principle set forth in the Rules that in a joint trial, each accused is to be accorded the same rights as if he were being tried separately.[35] He adds that, "under the Prosecution's joint criminal enterprise and conspiracy theories, Mr. Nzirorera can be convicted for the acts of Mr. Ngirumpatse".[36] The Appellant also disputes the Trial Chamber's reliance in the Impugned Decision on Rules 92*bis* and 94(B) of the Rules.[37]

14. The Prosecution responds that the Trial Chamber reasonably applied the proportionality principle, striking an appropriate balance between the reasonably expeditious resolution of the case and the need to protect the fair trial rights of the Appellant.[38] It adds that the reference to Rule 92*bis* of the Rules in the Impugned Decision is correct "merely as a measure by which to assess the fairness of continuing the trial in the absence of the accused."[39]

15. The Appeals Chamber agrees that the right to an expeditious trial as a right guaranteed to all accused by the Statute of the Tribunal was a relevant consideration for the Trial Chamber in balancing whether or not to proceed in the absence of the Appellant. However, in the circumstances of this complex and lengthy case, the Appeals Chamber is not satisfied that the three day delay to the trial was sufficient to outweigh the statutory right of the Appellant to be present at his own trial when the absence of the Appellant was due to no fault of his own. Furthermore, the Appeals Chamber holds that the Trial Chamber's comparison between the limitations placed on the Appellant's "access [...] to the examination of a witness"[40] and the restrictions permitted under Rules 92*bis* and 94(B) of the Rules is misguided. Rules 92*bis* and 94(B) address the proof of facts of a matter other than the acts of the accused. In the present case, the issue was quite different, namely, whether the presence of an accused is required during the cross-examination of a witness by a co-accused or his counsel. In the circumstances of a joint trial, it is irrelevant for the purpose of that determination whether or not the witness's testimony was likely to concern the alleged acts and

[34] Nzirorera's Appeal, paras. 26, 34. In this connection, the Appellant also submits that, had the Trial Chamber been concerned with the expeditiousness of the trial, it should have considered other alternatives, such as the severance of Nzirorera's trial from his co-accused pursuant to Rule 81(B) of the Rules, *see* Nzirorera's Appeal, paras. 30-33.
[35] *See* Nzirorera's Appeal, paras. 30-32. Although the Appellant mentions Rule 81, the Appeals Chamber understands that he is in fact referring to Rule 82 of the Rules.
[36] Nzirorera's Appeal, para. 47.
[37] *See* Nzirorera's Appeal, paras. 39-51.
[38] *See* Response, paras. 15-17.
[39] Response, para. 20.
[40] Impugned Decision, para. 14.

conduct of a co-accused only. The Appeals Chamber is therefore not satisfied that in the present circumstances, the Trial Chamber properly exercised its discretion. The Trial Chamber's restrictions on the Appellant's fair trial rights were unwarranted and excessive and thus fail the proportionality test. Accordingly, the Trial Chamber committed a discernible error.

16. In light of the fact that the parties dispute the relevance of the testimony of Witness Twahirwa,[41] the Appeals Chamber will leave the question of whether the portion of Witness Twahirwa's testimony taken in the Appellant's absence should be excluded and whether that witness should be recalled for cross-examination in the presence of the Appellant,[42] to the discretion of the Trial Chamber, which is best placed to assess the significance of Witness Twahirwa's testimony in relation with the charges against the Appellant. The Trial Chamber may order the remedy, if any, that it deems appropriate to cure any prejudice.

D. Disposition

17. On the basis of the foregoing, the Appeals Chamber **GRANTS** Nzirorera's Appeal, **REVERSES** the Impugned Decision, and **REMANDS** to the Trial Chamber the consideration of the prejudice, if any, accrued to the Appellant by proceeding, in his absence, with the cross-examination of Witness Twahirwa by the other co-accused in a manner consistent with this Decision.

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

Dated this 5th day of October 2007,
at The Hague, The Netherlands.

[Seal of the Tribunal]

Fausto Pocar
Presiding Judge

[41] *See* Nzirorera's Appeal, paras. 45-47; Response, para. 16.
[42] Nzirorera's Reply, para. 20 footnote 13; *see also* Response, para. 5.

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✖ Lead Counsels / *Conseil Principal*: Ms. Dior Diagne, Ms. Chantal Hounkpatin, Mr. Peter Robinson (name / nom)
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