

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-AR80.1

Date: 12 August 2022

Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Burton Hall
Judge Liu Daqun
Judge Aminatta Lois Runeni N'gum
Judge José Ricardo de Prada Solaesa

Registrar: Mr. Abubacarr M. Tambadou

Decision of: 12 August 2022

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON AN APPEAL OF A DECISION ON FÉLICIEN
KABUGA'S FITNESS TO STAND TRIAL**

Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Rashid S. Rashid
Mr. Rupert Elderkin

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively)¹ is seised of an appeal filed by Mr. Félicien Kabuga (“Kabuga”) on 30 June 2022² against the decision issued by the Trial Chamber of the Mechanism (“Trial Chamber”) on 13 June 2022, finding that the Defence has not established that Kabuga is presently unfit to stand trial.³ The Prosecution filed a response on 8 July 2022.⁴ Kabuga did not file a reply.

I. BACKGROUND

2. Kabuga was indicted before the International Criminal Tribunal for Rwanda in November 1997,⁵ but remained a fugitive until his arrest in France on 16 May 2020.⁶ On 26 October 2020, he was temporarily transferred to the Hague branch of the Mechanism for a detailed medical assessment.⁷ The proceedings against Kabuga are in the pre-trial phase.⁸

3. On 22 January 2021, the Defence filed a motion before the Trial Chamber seeking, pursuant to Rule 84(A) of the Rules of Procedure and Evidence of the Mechanism, medical examination by independent experts to assess, *inter alia*, Kabuga’s fitness to stand trial.⁹ On 15 April 2021, the Trial Chamber granted, in part, the request and ordered the Registrar of the Mechanism (“Registrar”) to appoint an independent expert gerontologist to examine Kabuga and assist in

¹ See Order Assigning an Appeal to a Bench of the Appeals Chamber, 30 June 2022, p. 1.

² Document in Support of the Appeal Against the “Decision on Félicien Kabuga’s Fitness to Stand Trial and to be Transferred to and Detained in Arusha” Issued by the Trial Chamber on 13 June 2022, 30 June 2022 (originally filed in French; English translation filed on 18 July 2022) (“Appeal”). See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Félicien Kabuga’s Motion for Certification to Appeal the Decision of 13 June 2022 (“Decision of 13 June 2022”), p. 2.

³ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Félicien Kabuga’s Fitness to Stand Trial and to be Transferred to and Detained in Arusha, 13 June 2022 (“Impugned Decision”), para. 62.

⁴ Prosecution Response to Appeal of Decision on Kabuga’s Fitness to Stand Trial, 8 July 2022 (public with confidential annex) (“Response”).

⁵ See *Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997 (confidential). See also *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Prosecution’s Second Amended Indictment, 1 March 2021 (public with public and confidential annexes); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Prosecution Motion to Amend the Indictment, 24 February 2021, para. 22.

⁶ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Decision on Félicien Kabuga’s Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020 (“Decision of 21 October 2020”), para. 2.

⁷ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Order Scheduling an Initial Appearance, 8 November 2020, pp. 1, 2, referring, *inter alia*, to Decision of 21 October 2020, paras. 11-18.

⁸ See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order Scheduling the Pre-Trial Conference, 7 July 2022.

⁹ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Defence Motion Seeking an Order for an Expert Medical Assessment Pursuant to Rule 84 of the Rules of Procedure and Evidence, 22 January 2021 (confidential) (originally filed in French; English translation filed on 2 February 2021), paras. 23, 47-49, p. 17. See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the “Order for Submissions Related to Health” of 29 January 2021, 10 February 2021 (strictly confidential and *ex parte*; disclosed to Kabuga’s assigned counsel pursuant to the Pre-Trial Judge’s Decision of 24 February 2021); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Prosecution Preliminary Response to Defence Motion Seeking an Order for Expert Medical Assessment Pursuant to Rule 84, 15 February 2021 (confidential).

ascertaining his fitness to stand trial in Arusha.¹⁰ On 19 May 2021, the Registrar appointed Professor Francesco Mattace-Raso as an independent expert gerontologist.¹¹ In his expert report, filed on 18 June 2021, Professor Mattace-Raso assessed that Kabuga has cognitive impairments but that the “cognitive impairments have no clear consequences on his functioning and/or behaviour, which means that there can be no question of [...] dementia” and that “[w]ith adequate translation and explanation, Mr. Kabuga is able to understand the essence of the procedure that applies”.¹² In his supplemental expert report, filed on 26 November 2021, Professor Mattace-Raso assessed that Kabuga had “cognitive decline” but that, taking into account various considerations, it cannot be concluded that Kabuga has dementia.¹³ However, in view of a recent event and possible progression of cognitive decline, Professor Mattace-Raso advised a consultation with a forensic psychiatrist to assess Kabuga’s ability to attend trial proceedings and effectively exercise his fair trial rights.¹⁴ In light of Professor Mattace-Raso’s recommendation, on 1 December 2021, the Trial Chamber ordered a further examination of Kabuga by an independent forensic psychiatrist.¹⁵

4. On 14 December 2021, the Registrar appointed Professor Gillian Mezey, a forensic psychiatrist, who submitted a report on 28 January 2022.¹⁶ In her expert report, Professor Mezey considered Kabuga to be “moderately to severely cognitively impaired” with an “overall clinical picture” of “mixed dementia, *i.e.*, a combination of vascular dementia and Alzheimer[’]s Disease”.¹⁷ Professor Mezey stated that Kabuga’s dementia is “moderate to severe in nature and is clearly progressive” and concluded that, “on balance”, Kabuga was unfit for trial.¹⁸ With respect to Professor Mattace-Raso’s assessment that Kabuga was not suffering from dementia, Professor

¹⁰ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Defence Motion Seeking an Order for Expert Medical Assessments Pursuant to Rule 84, 15 April 2021 (confidential), paras. 15-17, 19.

¹¹ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Notification of Appointment of Medical Expert, 21 May 2021 (confidential with confidential annex), para. 2.

¹² *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the “Decision on Defence Motion Seeking an Order for Expert Medical Assessments Pursuant to Rule 84” of 15 April 2021, 18 June 2021 (confidential with confidential annex), Registry Pagination (“RP.”) 1495, 1494.

¹³ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the “Order for Further Independent Expert Evaluation and for Additional Information from the Registry” of 13 August 2021, 26 November 2021 (confidential with confidential annex) (“Professor Mattace-Raso Report of 26 November 2021”), RP. 2716-2714.

¹⁴ Professor Mattace-Raso Report of 26 November 2021, RP. 2714, 2713.

¹⁵ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order for Further Independent Medical Expert Evaluation, 1 December 2021 (confidential), pp. 2, 3.

¹⁶ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the “Order for Further Independent Medical Expert Evaluation” of 1 December 2021, 15 December 2021 (confidential with confidential annex), para. 2; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar’s Submission in Relation to the “Supplemental Order on Order for Further Independent Medical Expert Evaluation” of 14 January 2022, 31 January 2022 (confidential with confidential annex), Annex (“Professor Mezey Report of 28 January 2022”).

¹⁷ Professor Mezey Report of 28 January 2022, paras. 55, 57. See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Supplemental Order on Order for Further Independent Medical Expert Evaluation, 14 January 2022, p. 2.

¹⁸ Professor Mezey Report of 28 January 2022, paras. 58, 87; T. 1 June 2022 p. 53 (private session). See also Impugned Decision, n. 49.

Mezey suggested that Professor Mattace-Raso may wish to examine Kabuga again, in view of new information, including results of an MRI scan.¹⁹

5. On 16 February 2022, Professor Mattace-Raso submitted a supplement to his existing reports, stating that Professor Mezey's Report of 28 January 2022 is complete and complementary to his November 2021 report.²⁰ Professor Mattace-Raso also commented that the radiological findings give information "on the nature of the process" of dementia, and that "[c]ognitive disorders have progressive character and [,] in individuals with frailty and co-morbidities [,] it is expected to deteriorate over time".²¹

6. Noting that Professor Mezey's conclusion that Kabuga is unfit to stand trial may be a basis for terminating the proceedings, the Trial Chamber considered it essential to receive a second opinion from another independent forensic psychiatrist and, on 15 March 2022, it instructed the Registrar to appoint one.²² In his expert report dated 19 April 2022, the second Registrar-appointed forensic psychiatrist, Professor Henry Gerard Kennedy,²³ estimated that Kabuga "meets some of the criteria for a possible mild neurocognitive disorder in the context of old age and physical frailty", which he stated is not best explained by "Alzheimer's disease, frontotemporal degeneration, Lewy body disease or vascular disease" but likely by "advanced old age and related cardio-vascular disease".²⁴ Professor Kennedy opined that Kabuga demonstrated the "capacity to understand the meaning of a plea of not guilty or guilty [and] [...] the nature of the charges".²⁵ He also opined that Kabuga's ability to understand the course of the proceedings is "sufficient when given appropriate assistance" and that assistance to understand the details of the evidence could be provided, including through a process whereby the amount of evidence to be presented in court is "minimised, summarised and where possible agreed".²⁶ Further, Professor Kennedy stated that Kabuga:

¹⁹ Professor Mezey Report of 28 January 2022, paras. 64, 65.

²⁰ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar's Submission in Relation to the "Order on Further Submissions from the First Independent Expert" of 8 February 2022, 16 February 2022 (confidential with confidential annex) ("Professor Mattace-Raso Supplemental Report"), para. 3, RP. 3131. See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order on Further Submissions from the First Independent Expert, 8 February 2022 (confidential).

²¹ Professor Mattace-Raso Supplemental Report, RP. 3131.

²² *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Prosecution Motion for Further Fitness Evaluation and Order for Independent Expert Evaluation, 15 March 2022 (confidential) ("Decision of 15 March 2022"), paras. 25, 28.

²³ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar's Submission in Relation to the "Decision on Prosecution Motion for Further Fitness Evaluation and Order for Independent Expert Evaluation" of 15 March 2022, 22 March 2022 (confidential with confidential annex).

²⁴ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar's Submission in Relation to the "Decision on Prosecution Motion for Further Fitness Evaluation and Order for Independent Expert Evaluation" of 15 March 2022, 21 April 2022 (confidential with confidential annex), Annex ("Professor Kennedy Report of 19 April 2022"), pp. 49, 50.

²⁵ Professor Kennedy Report of 19 April 2022, pp. 50, 51.

²⁶ Professor Kennedy Report of 19 April 2022, p. 51.

(i) demonstrated an appreciation that the charges are serious and of the possible consequences of the proceedings; (ii) in relation to his ability to instruct counsel, demonstrated the ability to make points relevant to his defence; and (iii) is capable of giving oral evidence in chief if allowed sufficient time, assistance, and support.²⁷

7. On 15 March 2022, the Trial Chamber also granted a Prosecution's request to appoint a Kinyarwanda-speaking medical expert of its choice to conduct a forensic psychiatric examination of Kabuga.²⁸ In his report dated 5 May 2022, the Prosecution-appointed medical expert, Dr. Rutakayile Bizoza,²⁹ concluded that Kabuga was fit to stand trial as he had the ability to: (i) plead; (ii) understand the nature of the charges and the course and consequences of proceedings; (iii) instruct counsel; and (iv) testify, if helped by hearing aids.³⁰

8. On 13 May 2022, the Trial Chamber granted a Defence request for the appointment of its own medical expert, Dr. An Chuc.³¹ In her report dated 31 May 2022, Dr. Chuc concluded that it was not possible, from a medical point of view, to consider that Kabuga is capable of, *inter alia*: (i) entering a plea; (ii) understanding the nature of the charges, the course and implications of the proceedings, and the details of the evidence; (iii) instructing counsel; and (iv) testifying under oath and understanding the consequences of his testimony.³²

9. On 25 May 2022, pursuant to an order of the Pre-Trial Judge, the independent expert forensic psychiatrists, Dr. Mezey and Dr. Kennedy, filed a joint statement on points of agreement and disagreement, detailing their reasons therefor.³³ The Trial Chamber received the oral evidence of Professor Kennedy, Dr. Bizoza, and Professor Mezey on 31 May 2022 and 1 June 2022.³⁴

²⁷ Professor Kennedy Report of 19 April 2022, p. 52.

²⁸ See Decision of 15 March 2022, paras. 1, 21-23, 28. See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Prosecution Motion for Further Fitness Evaluation and Access to Records, 9 February 2022 (confidential).

²⁹ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Notice of Appointment of Prosecution Medical Expert, 22 March 2022 (confidential), para. 2.

³⁰ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Notice of Filing of Prosecution Medical Expert Report, 6 May 2022 (confidential with confidential Annex A), Annex, pp. 6, 7.

³¹ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Defence Motion for Appointment of a Defence Medical Expert, 13 May 2022 (confidential), p. 2.

³² *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Notification by Félicien Kabuga's Defence of the Filing on the Case Record of a Report by its Expert, 3 June 2022 (confidential with confidential annex) (originally filed in French; English translation filed on 13 June 2022), Annex, pp. 31, 32.

³³ See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Registrar's Submission in Relation to the "Order Instructing the Independent Medical Experts to Prepare a Joint Statement" of 16 May 2022, 25 May 2022 (confidential with confidential annex); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Order Instructing the Independent Medical Experts to Prepare a Joint Statement, 16 May 2022 (confidential).

³⁴ See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, T. 11 May 2022 pp. 6, 10, T. 31 May 2022 pp. 4-114 (private session), T. 1 June 2022 pp. 3-97.

10. In the Impugned Decision, the Trial Chamber found that the Defence had not established that Kabuga is presently unfit for trial.³⁵ The Trial Chamber decided that Kabuga shall remain detained at the Hague branch of the Mechanism and that his trial shall commence and proceed there until otherwise decided.³⁶ On 23 June 2022, upon a Defence request, the Trial Chamber certified for appeal the issue of Kabuga's fitness to stand trial.³⁷

II. DISCUSSION

11. The Appeals Chamber recalls that a trial chamber's decision with respect to the evaluation of expert evidence is discretionary.³⁸ In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.³⁹ The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of governing law or on a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.⁴⁰ The Appeals Chamber further recalls that the applicable standard for determining whether an accused is fit to stand trial is that of "meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings".⁴¹ It is the accused, claiming to be unfit to stand trial, who bears the burden of so proving by a preponderance of the evidence.⁴²

12. The non-exhaustive list of capacities to be evaluated when assessing an accused's fitness to stand trial include the ability to: (i) plead; (ii) understand the nature of the charges; (iii) understand the course of the proceedings; (iv) understand the details of the evidence; (v) instruct counsel; (vi) understand the consequences of the proceedings; and (vii) testify.⁴³ What is required for an

³⁵ Impugned Decision, para. 62.

³⁶ Impugned Decision, para. 62.

³⁷ Decision of 13 June 2022, p. 2.

³⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Judgement, 29 November 2017 (public with confidential Annex C) ("*Prlić et al.* Appeal Judgement"), para. 286; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011 ("*Renzaho* Appeal Judgement"), para. 289; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), para. 58.

³⁹ *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Judgement, 8 June 2021 (public redacted), para. 63; *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-AR73.1, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016 ("*Hadžić* Decision of 4 March 2016"), para. 6.

⁴⁰ *In the Matter of François-Xavier Nzuwonemeye et al.*, Case No. MICT-22-124, Decision on Motions to Appeal Decision of 8 March 2022, for Reconsideration of Decision of 15 March 2022, and to Appear as *Amicus Curiae*, 27 May 2022, para. 17. See *Hadžić* Decision of 4 March 2016, para. 6.

⁴¹ *Hadžić* Decision of 4 March 2016, para. 7, citing *Strugar* Appeal Judgement, para. 55.

⁴² *Strugar* Appeal Judgement, para. 56.

⁴³ *Strugar* Appeal Judgement, paras. 41, 55.

accused to be deemed fit to stand trial is an overall capacity allowing for a meaningful participation in the trial, provided that he is duly represented by counsel.⁴⁴

13. Kabuga contends that the Trial Chamber committed a number of legal and factual errors, and requests that the Appeals Chamber reverse the Impugned Decision and either declare him unfit to stand trial or remand the matter to the Trial Chamber with specific instructions.⁴⁵ In particular, Kabuga argues that the Trial Chamber erred in failing to provide a reasoned opinion by not: (i) explaining why it did not accept Professor Mezey's conclusion that Kabuga is not fit to stand trial,⁴⁶ (ii) addressing Kabuga's objections to Professor Kennedy's methodology, conclusions, and proposed accommodations to assist Kabuga during the trial, or setting out the accommodations that it considered appropriate,⁴⁷ and (iii) explaining the evidence it relied upon in finding that Kabuga has the capacity to understand the course of the trial and the evidence, to instruct counsel, and to testify.⁴⁸ According to Kabuga, the Trial Chamber also erred in disproportionately relying on his ability to interact during a status conference⁴⁹ and by making a determination without the benefit of a neurological expert report to resolve the issue of his diagnosis.⁵⁰ Finally, Kabuga argues that the Trial Chamber: (i) merely stated the standard of proof without articulating its content;⁵¹ (ii) did not make a clear finding on whether he is fit or unfit to stand trial, failing to give him "the benefit of the doubt" despite finding that there was uncertainty;⁵² and (iii) failed to ascertain that he possessed the relevant capacities for fitness to stand trial that the Trial Chamber had listed.⁵³

14. The Prosecution responds that the Appeal should be denied as the Trial Chamber clearly explained the reasons for its conclusions and evaluated Professor Mezey's opinion in light of other expert evidence on the record, as well as in view of Kabuga's conduct at two status conferences.⁵⁴ The Prosecution further submits that the Trial Chamber addressed Kabuga's arguments, correctly defined and applied the legal standard for determining Kabuga's fitness to stand trial, and correctly based its decision on the information before it, focusing on the assessment of Kabuga's relevant

⁴⁴ *Strugar* Appeal Judgement, para. 60.

⁴⁵ Appeal, paras. 34, 88, p. 22 (requesting that the Trial Chamber be instructed to: (i) "determine in a precise and detailed matter the standard of proof applicable for fitness"; (ii) "obtain a complete expert neurological assessment" of Kabuga; and (iii) "provide reasoning for its decision").

⁴⁶ Appeal, paras. 89-91, 108.

⁴⁷ Appeal, paras. 92-97.

⁴⁸ Appeal, para. 98.

⁴⁹ Appeal, para. 99.

⁵⁰ Appeal, paras. 100-104.

⁵¹ Appeal, para. 107.

⁵² Appeal, paras. 109, 110.

⁵³ Appeal, para. 111.

⁵⁴ Response, paras. 4, 5, 13.

capacities, rather than on the examination of his illness.⁵⁵ The Prosecution concludes that any necessary accommodations to assist Kabuga during the trial, as proposed by Professor Kennedy, are still to be determined.⁵⁶

15. The Appeals Chamber finds no merit in Kabuga's arguments that the Trial Chamber erred in failing to provide a reasoned opinion. In the Impugned Decision, the Trial Chamber extensively discussed Professor Mezey's conclusions, alongside the findings of Professor Kennedy, Dr. Bizoza, Professor Mattace-Raso, and Dr. Chuc, as well as in the context of the medical reports prepared by the United Nations Detention Unit ("UNDU") Medical Officer and its own observations of Kabuga during various status conferences.⁵⁷ The Trial Chamber specifically held that both Professor Mezey and Professor Kennedy "drew on various pertinent sources of information in reaching their diagnoses" and that the record did not clearly demonstrate that "either expert's process in diagnosing Kabuga or that either diagnosis is more compelling than the other".⁵⁸ The Trial Chamber also considered that there was no "persuasive evidentiary basis to wholly disregard" either Professor Mezey's or Professor Kennedy's conclusions regarding Kabuga's capacities to understand the course of the proceedings and the evidence, to instruct counsel, and to testify.⁵⁹

16. The Appeals Chamber recalls that it is for the Trial Chamber to accept or reject, in whole or in part, the contribution of an expert witness.⁶⁰ Just as with any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.⁶¹ Having reviewed the record as a whole,⁶² and particularly having taken into account Kabuga's demonstrated ability to participate meaningfully in the proceedings, as well as the most recent reports by the UNDU Medical Officer, the Trial Chamber found that the Defence had not demonstrated, by a preponderance of evidence, that Kabuga was unfit to stand trial.⁶³ In view of the Trial Chamber's detailed discussion of the record before it, Kabuga does not demonstrate that the Trial Chamber committed a discernible error in failing to provide a reasoned opinion for not adopting Professor Mezey's conclusion.

⁵⁵ See Response, paras. 6-8, 10-19.

⁵⁶ Response, para. 9.

⁵⁷ See Impugned Decision, paras. 44-55.

⁵⁸ Impugned Decision, para. 50.

⁵⁹ Impugned Decision, para. 54.

⁶⁰ *Prlić et al.* Appeal Judgement, para. 286; *Renzaho* Appeal Judgement, para. 289; *Strugar* Appeal Judgement, para. 58.

⁶¹ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 1295; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement"), para. 249; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 174.

⁶² See Impugned Decision, paras. 44-54.

⁶³ Impugned Decision, paras. 55, 56.

17. Similarly unpersuasive is Kabuga's argument that the Trial Chamber erred in not providing a reasoned opinion by failing to address his objections to Professor Kennedy's evidence. The Appeals Chamber recalls that, while a trial chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission.⁶⁴ In the Impugned Decision, the Trial Chamber expressly noted the Defence oral submissions, highlighting deficits in Professor Kennedy's evidence and his examination of Kabuga, as well as the Defence position that the accommodations proposed by the expert were not practical and could not compensate for an accused who is clearly unfit.⁶⁵ The Trial Chamber expressly stated that, having carefully examined the method used by Professor Kennedy to form his diagnosis of Kabuga, it was persuaded that the method was thorough and driven by his vast and impartial medical expertise.⁶⁶ Having outlined the conclusions of Professor Kennedy and Professor Mezey,⁶⁷ the Trial Chamber was not required to discuss each and every detail of the experts' evidence. The Appeals Chamber is therefore satisfied that the Trial Chamber did consider and address Kabuga's objections to Professor Kennedy's evidence but was not persuaded by them. Kabuga fails to demonstrate that the Trial Chamber ignored evidence that was clearly relevant to its finding on whether the Defence has discharged its burden of proof.

18. In relation to the accommodations proposed by Professor Kennedy to help Kabuga understand the course of the proceedings and the evidence, instruct counsel, and testify,⁶⁸ the Trial Chamber disagreed with the Defence submissions that "*a priori*, the accommodations [...] [were] not practicable", and envisaged that certain accommodations may be put in place.⁶⁹ For example, the Trial Chamber noted earlier that the Prosecution was prepared to waive its cross-examination of Kabuga to accommodate his ability to testify.⁷⁰ The Trial Chamber determined that it was "not persuaded that Kabuga is unfit to participate meaningfully in a trial, especially with the accommodations that can be put in place, which the Prosecution has accepted are appropriate in this

⁶⁴ *Prlić et al.* Appeal Judgement, para. 135; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, Decision on Interlocutory Appeal Against Decision on Defence Motion for a Fair Trial and the Presumption of Innocence, 27 February 2017, para. 25; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015, para. 105. See also *Prosecutor v. Marie Rose Fatuma et al.*, Case No. MICT-18-116-A, Judgement, 29 June 2022, para. 53.

⁶⁵ Impugned Decision, para. 38, referring to *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, T. 7 June 2022 pp. 21-25, 27-29.

⁶⁶ Impugned Decision, para. 50 (indicating that the statement is applicable to both Professor Kennedy and Professor Mezey).

⁶⁷ See Impugned Decision, paras. 15, 16, 19, 20, 25-32, 47-53.

⁶⁸ See Impugned Decision, para. 51.

⁶⁹ Impugned Decision, paras. 51, 56.

⁷⁰ Impugned Decision, para. 39, referring to *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, T. 7 June 2022 pp. 44, 45.

case, and having regard to the persuasive evidence of Professor Kennedy.”⁷¹ In addition, the Trial Chamber invited the Defence to consider the recommendation to include a Kinyarwanda-speaking lawyer or legal assistant on its team.⁷² The Appeals Chamber considers that the Trial Chamber provided sufficient reasoning for its decision and was not required to set out in detail any further accommodations that could be instituted during the course of the trial. It is pertinent to note that, having recognized that “fitness is a dynamic concept”, the Trial Chamber introduced a reporting regime by independent experts to monitor Kabuga’s ability to meaningfully participate in the trial.⁷³

19. The Appeals Chamber also dismisses, as unsubstantiated, Kabuga’s submission that the Trial Chamber did not identify the evidence it relied upon in finding that Kabuga has the capacity to understand the course of the trial and the evidence, to instruct counsel, and to testify. In the Impugned Decision, the Trial Chamber explicitly noted that the disputed capacities relevant to its conclusion concern Kabuga’s ability to understand the course of the proceedings, understand the evidence, instruct counsel, and testify.⁷⁴ In relation to these capacities, the Trial Chamber outlined in detail the evidence of Professor Kennedy and Professor Mezey,⁷⁵ finding that there was no persuasive evidentiary basis to wholly disregard either expert’s conclusions.⁷⁶ The Trial Chamber then referred to Kabuga’s conduct during a status conference in February 2022, which reflected that he could follow the proceedings, acquire and process the information presented, and communicate his own and distinct positions on matters central to his defence.⁷⁷ The Trial Chamber also referred to the most recent reports provided by the UNDU Medical Officer, which showed that Kabuga’s condition has been relatively stable.⁷⁸ In view of the extensive discussion contained in the Impugned Decision, the Appeals Chamber considers that the Trial Chamber clearly identified the evidence it relied upon in assessing Kabuga’s capacity to understand the course of the trial and the evidence, to instruct counsel, and to testify.

20. In relation to Kabuga’s submission that the Trial Chamber erred in disproportionately relying on his ability to interact during the February 2022 status conference, the Appeals Chamber considers that he merely disagrees with the Trial Chamber’s assessment, without demonstrating that the Trial Chamber committed a discernible error in this regard. The Appeals Chamber, Judge N’gum dissenting, considers similarly unsubstantiated Kabuga’s submission that the Trial Chamber

⁷¹ Impugned Decision, para. 56.

⁷² Impugned Decision, para. 62.

⁷³ Impugned Decision, para. 57.

⁷⁴ Impugned Decision, para. 51.

⁷⁵ Impugned Decision, paras. 52, 53.

⁷⁶ Impugned Decision, para. 54.

⁷⁷ Impugned Decision, para. 55.

⁷⁸ Impugned Decision, para. 55.

erred in making a determination without appointing a neurological expert to resolve the issue of his diagnosis. The Trial Chamber correctly held that a precise medical diagnosis is not essential to its determination,⁷⁹ which is in line with prior jurisprudence indicating that medical diagnoses alone, no matter how numerous, do not suffice to assess an accused's competency to stand trial.⁸⁰

21. Finally, the Appeals Chamber finds no merit in Kabuga's arguments that the Trial Chamber erred in relation to the standard of proof that it applied.⁸¹ The Trial Chamber correctly held that an accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence.⁸² The Trial Chamber elaborated on this standard by noting that it is consistent with the standard used in common law jurisdictions, where it is considered to be discharged if the party can show its claim on a balance of probabilities.⁸³ The Appeals Chamber is also not persuaded by Kabuga's argument that the Trial Chamber misapplied the standard of proof. While the Trial Chamber noted that "the record reflects some uncertainty as to the precise extent to which Kabuga possesses the contested capacities", it found that the evidentiary threshold for a finding that Kabuga is unfit to stand trial has not been met by the Defence at the present time.⁸⁴ In arguing that the Trial Chamber's observation regarding the uncertainty reflected in the record before it should have resulted in a finding that he is unfit to stand trial, Kabuga conflates the "preponderance of evidence" standard applicable to the matter at hand with the "beyond reasonable doubt" standard applicable to facts material to the guilt of the accused.⁸⁵ Accordingly, Kabuga fails to show that the Trial Chamber committed a discernible error in this regard.

⁷⁹ Impugned Decision, para. 51.

⁸⁰ *Strugar* Appeal Judgement, para. 61.

⁸¹ *See* Appeal, paras. 105-111.

⁸² Impugned Decision, para. 43.

⁸³ Impugned Decision, n. 149, *citing Strugar* Appeal Judgement, para. 56.

⁸⁴ Impugned Decision, para. 56.

⁸⁵ *See, e.g., Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009, para. 20; *Martić* Appeal Judgement, para. 55.

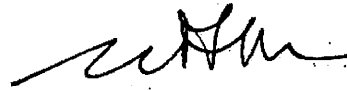
III. DISPOSITION

22. For the foregoing reasons, the Appeals Chamber **DISMISSES**, Judge N'gum partially dissenting, the Appeal in its entirety.

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

Judge Aminatta Lois Runeni N'gum appends a partially dissenting opinion.

Done this 12th day of August 2022
At Arusha,
Tanzania



Judge Carmel Agius
Presiding Judge

[Seal of the Mechanism]

PARTIALLY DISSENTING OPINION OF JUDGE AMINATTA LOIS RUNENI N’GUM

1. I concur with the Majority in dismissing the first, second, third, and fifth grounds of appeal, respectively. However, I respectfully disagree with my Colleagues in dismissing Kabuga’s fourth ground of appeal, submitting that the Trial Chamber committed an error by failing to appoint a neurologist to resolve any uncertainty regarding Kabuga’s fitness to stand trial.¹ Kabuga argues that, in particular, the Trial Chamber should have appointed a neurological expert to definitively decide the question of Kabuga’s diagnosis, as the Defence had requested as early as 2020, and as Professor Mezey and Dr. Chuc had recommended.² In this regard, I note that the Trial Chamber held that a “precise medical diagnosis or identifying the exact cause of the cognitive deficits currently afflicting Kabuga is not essential” to the determination of Kabuga’s fitness to stand trial and that “[w]hat matters is if the evidence, in particular the evidence of the court appointed independent expert forensic psychiatrists, demonstrates that it is more likely than not that Kabuga cannot participate meaningfully in this trial”.³

2. While I am cognizant of the *Strugar* Appeal Judgement, I distinguish it from the present circumstances as the resolution of the issue in this case directly relates to Kabuga’s cognitive impairments, an assessment that all the independent experts appointed by the Registrar, pursuant to the Chamber’s orders, seem to agree on albeit in different degrees.⁴ I consider that where the possibility of dementia, which I find squarely impacts on an accused’s meaningful participation in trial, is raised and disputed, an assessment by an independent neurological expert is necessary for a proper assessment of whether the accused is fit to stand trial. I also consider that the Trial Chamber was of a similar view and it is for that reason that, after having found that the Defence had not established that Kabuga is presently unfit for trial, it put in place a monitoring regime that included an independent neurologist with no prior involvement in this case to file a joint report on Kabuga’s fitness for trial.⁵

3. The present appeal concerns a discretionary decision made by the Trial Chamber. However, it is my considered opinion that the Appeals Chamber can overturn this part of the discretionary

¹ See Appeal, paras. 100-104.

² Appeal, para. 102.

³ Impugned Decision, para. 51.

⁴ See *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 (“*Strugar* Appeal Judgement”), para 61.


⁵ Impugned Decision, para. 57.

decision, because, by failing to include a neurologist expert report before trial it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁶

4. In view of the foregoing, I would grant the Appeal in part and remand the matter to the Trial Chamber with instructions to make a new determination on whether Kabuga is fit to stand trial after it has received a neurological expert report.

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

Done this 12th day of August 2022
At Arusha,
Tanzania



Judge Aminatta Lois Runeni N'gum

[Seal of the Mechanism]

⁶ See Majority Decision, para. 11.



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