



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

28/H

ICTR-99-54A-R
21st July 2009
{28/H – 22/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 21 July 2009

ICTR Appeals Chamber
Date: 21st July 2009
Action: A. Jume
Copied To: Concerned Judges

Parties, Judicial Archives,
LOs, LSS

JEAN DE DIEU KAMUHANDA

v.

THE PROSECUTOR

Case No. ICTR-99-54A-R

DECISION ON MOTION FOR LEGAL ASSISTANCE

The Applicant

Mr. Jean de Dieu Kamuhanda, *pro se*

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Mr. George W. Mugwanya
Ms. Evelyn Kamau

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: ROSETTE MUZIHO-MORRISON
SIGNATURE: [Signature] DATE: 21/7/09

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 Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Motion for Legal Assistance for Preliminary Proceedings Relating to the Review of the Judgement Delivered by the Appeals Chamber on 19 September 2005", filed by Jean de Dieu Kamuhanda ("Kamuhanda") on 15 May 2009 ("Motion").¹

A. Procedural Background

2. On 22 January 2004, Trial Chamber II of the Tribunal ("Trial Chamber") convicted Kamuhanda for genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute of the Tribunal ("Statute") on the basis of his involvement in a massacre at Gikomero Parish Compound on 12 April 1994 and sentenced him to imprisonment for the remainder of his life.² Kamuhanda lodged an appeal against the Trial Judgement.

3. During the appellate proceedings, the Appeals Chamber granted in part a motion filed by Kamuhanda for admission of additional evidence, admitting new statements from Witnesses GAA and GEX and ordering that these witnesses be heard.³ On 18 May 2005, Witnesses GAA and GEX were heard together with two witnesses called by the Prosecution in rebuttal.⁴ During the evidentiary hearing, Witness GAA testified that he had lied during trial when he stated that he had been at the Gikomero Parish Compound and that he had seen Kamuhanda there.⁵ Witness GEX testified before the Appeals Chamber that, contrary to her earlier statement given to the Prosecution,⁶ she had not seen Kamuhanda at Gikomero, nor had she heard his name spoken there.⁷

4. In an oral decision rendered at the close of the evidentiary hearing on 19 May 2005, the Appeals Chamber directed the Prosecutor, pursuant to Rules 77(C)(i) and 91(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), to investigate allegations of attempted interference with a witness who had given evidence in proceedings before the Tribunal and

¹ Originally filed in French, English version filed on 22 June 2009.

² *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement and Sentence, 22 January 2004 ("Trial Judgement"), paras. 651, 652, 700, 702, 750, 770.

³ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("Appeal Judgement"), para. 442.

⁴ Appeal Judgement, para. 442.

⁵ Appeal Judgement, para. 213.

⁶ Witness GEX provided a statement to the Prosecution prior to the trial phase, which was disclosed to the Defence. Witness GEX was not called to testify at trial. Appeal Judgement, para. 222.

discrepancies arising from testimony given during the hearing of the merits of the appeal and the consequent possibility of false testimony.⁸ As a result, the Prosecutor appointed a Special Counsel to conduct the investigation ("Special Counsel").⁹

5. In its Judgement of 19 September 2005, the Appeals Chamber found Witness GAA's recantation during the evidentiary hearing of May 2005 not credible and Witness GEX's testimony before the Appeals Chamber unreliable.¹⁰ While vacating the convictions for instigating and aiding and abetting genocide and extermination, the Appeals Chamber affirmed the convictions for ordering genocide and extermination as a crime against humanity, as well as the sentences imposed by the Trial Chamber.¹¹

6. On 7 April 2006, the Appeals Chamber dismissed Kamuhanda's motion filed on 13 March 2006 in which he, *inter alia*, asked to be provided with a copy of the investigation report produced by the Special Counsel.¹²

7. On 11 June 2007, an indictment charging Witness GAA with false testimony, contempt, and attempts to commit contempt was issued.¹³ Witness GAA concluded a plea agreement with the Prosecution in which he acknowledged having knowingly and willfully given false testimony during the evidentiary hearing before the Appeals Chamber on 18 May 2005 by testifying *inter alia* that he was not present at Gikomero Parish on 12 April 1994.¹⁴ He also stated that his false testimony was induced by Léonidas Nshogoza ("Nshogoza"), a former investigator in Kamuhanda's Defence team who gave him money and offered him a reward for giving false testimony.¹⁵ On 4 December 2007, Trial Chamber III found Witness GAA guilty of giving false testimony under solemn declaration and contempt of the Tribunal and sentenced him to nine months of imprisonment.¹⁶

⁷ Appeal Judgement, para. 223.

⁸ See *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005.

⁹ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-01-54A-A, Prosecutor's Reply by Way of Clarification in Relation to Jean de Dieu Kamuhanda's Response to the "Prosecutor's Disclosure Pursuant to Rule 75(F) of the Rules, of the Confidential Transcript of the Testimony of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*", 20 March 2006, para. 10.

¹⁰ Appeal Judgement, paras. 221, 226.

¹¹ Appeal Judgement, para. 365.

¹² *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Decision on Jean de Dieu Kamuhanda's Request Related to Prosecution Disclosure and Special Investigation, 7 April 2006 ("Decision of 7 April 2006"), paras. 6, 8.

¹³ *The Prosecutor v. GAA*, Case No. ICTR-07-90-R77-I, Judgement and Sentence, 4 December 2007 ("GAA Trial Judgement"), para. 1.

¹⁴ GAA Trial Judgement, para. 5.

¹⁵ GAA Trial Judgement, para. 5.

¹⁶ GAA Trial Judgement, Disposition, p. 6.

8. Subsequently, Nshogoza was indicted and prosecuted for contempt of the Tribunal and attempt to commit acts punishable as contempt of the Tribunal.¹⁷

9. Kamuhanda filed his Motion on 15 May 2009 and the Prosecution responded on 18 May 2009.¹⁸ Kamuhanda did not file a reply.

10. Following the filing of the Motion, the Prosecution disclosed to Kamuhanda, on 28 May 2009, witness statements and trial transcripts from the *Nshogoza* case,¹⁹ including statements of Witness GAA made before the Special Counsel.²⁰

11. On 7 July 2009, Trial Chamber III convicted Nshogoza of committing contempt of the Tribunal by repeatedly meeting with and disclosing protected information of Witnesses GAA and A7/GEX, in knowing violation of, or with reckless indifference to, the protective measures ordered by the *Kamuhanda* Trial Chamber on 7 July 2000 and sentenced him to 10 months of imprisonment.²¹

B. Submissions

12. In his Motion, Kamuhanda requests the assignment of a legal assistant at the expense of the Tribunal to assist him and his former counsel in the preparation of a motion for review of the Appeal Judgement that he intends to file pursuant to Article 25 of the Statute and Rules 120 and 121 of the Rules.²² Kamuhanda submits that his former counsel, Ms. Aïcha Condé, would be willing to assist him *pro bono* in the preparation and drafting of a motion for review but that, due to the workload in her practice, she would need the support of a legal assistant paid by the Tribunal.²³

13. Kamuhanda submits that he has obtained evidence which was not available during the trial and appeal proceedings and which “clearly shows that there has been a miscarriage of justice in [his] case”.²⁴ He also contends that he has been informed of the existence of other relevant evidence

¹⁷ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-I, Indictment, 7 January 2008.

¹⁸ Prosecution’s Response to Kamuhanda’s “*Requête aux fins de demande d’une assistance juridique pour la procédure préliminaire de révision de l’Arrêt rendu par la Chambre d’Appel le 19 septembre 2005*”, 18 May 2009 (“Response”).

¹⁹ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T.

²⁰ See Memorandum from Abdoulaye Seye, Appeals Counsel for the Office of the Prosecutor entitled “Disclosure to Mr. Jean de Dieu Kamuhanda of Witness Statements and trial Transcripts from the Case *The Prosecutor v. Léonidas Nshogoza*”, confidential, 28 May 2009.

²¹ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgement, 7 July 2009, paras. 188, 189, 233.

²² Motion, paras. 1, 5, 83.

²³ Motion, paras. 78, 79. Kamuhanda emphasizes that the following tasks would *inter alia* have to be undertaken: assess the evidence which he intends to rely on; carry out research on the case-law; search on the Tribunal’s database and on EDS; file motions to obtain confidential or unavailable documents. See Motion, para. 79.

²⁴ Motion, para. 4.

in the possession of the Prosecution.²⁵ Kamuhanda specifically refers to the following: (1) the investigation report on false testimony and contempt, and the statements of the persons the Special Counsel interviewed, including Witness GAA;²⁶ (2) the evidence gathered during the trial of Léonidas Nshogoza regarding Kamuhanda's presence at Gikomero Parish on 12 April 1994;²⁷ (3) the evidence from André Rwamakuba's trial, including the testimony of Witness 7/14, the statements of Witnesses 9/31, 3/11, 3/1, 3/22, 7/3, as well as the Judgement delivered in André Rwamakuba's case;²⁸ and (4) other new material consisting of the record of the Gikomero *Gacaca* trial, a list of accused persons drawn up by the *Gacaca* Tribunal of Mutokerezwa *cellule*, and an affidavit by two Judges of Gikomero *Gacaca* Tribunal.²⁹

14. Kamuhanda further alleges that the Prosecution violated its obligations under Rule 68 of the Rules by failing to disclose to him the report containing the conclusions of the Special Counsel's investigation and the written statements of the persons the Special Counsel interviewed, which, in his view, constitute exculpatory material.³⁰ He adds that the Prosecution should have disclosed the said material not only to him and his counsel but also to the Appeals Chamber for its consideration during the deliberations.³¹

15. Kamuhanda submits that his lack of knowledge of law and English, the need to request disclosure from the Prosecution, and the absence of Registry services in the prison of Koulikoro, Mali where he is serving his sentence warrant that he receives the legal assistance sought.³² More specifically, he argues that, because of his lack of technical legal knowledge, he is not able to make use of the materials and evidence, to expose how they justify a review of the Appeal Judgement, and to explain how the Prosecution failed to meet its obligations under Rule 68 of the Rules.³³

16. The Prosecution responds that the Motion is without merit and should be dismissed in its entirety.³⁴ It submits that despite the justifications provided by Kamuhanda, the latter was able to prepare a detailed and extensive briefing "in one of the official languages of the Tribunal, have it transmitted from his place of incarceration to the seat of the Tribunal, and to have it presented to the

²⁵ Motion, para. 4.

²⁶ Motion, paras. 7-37.

²⁷ Motion, paras. 38-40.

²⁸ Motion, paras. 41-52.

²⁹ Motion, paras. 53-57.

³⁰ Motion, paras. 15, 16, 33, 34, 36. Kamuhanda submits that his former Counsel asked without success to obtain the investigative report from the Prosecution. He specifies that on 26 March 2007 the Prosecution appeals section responded that the said report would be made available at the appropriate time. Motion, paras. 7-9.

³¹ Motion, paras. 24, 34, 36.

³² Motion, paras. 59-76.

³³ Motion, paras. 60, 61, 65.

³⁴ Response, paras. 2, 6.

Prosecution and Appeals Chamber”.³⁵ According to the Prosecution, the issues at stake are sufficiently briefed in the Motion to be considered by the Appeals Chamber without further elaboration.³⁶

C. Discussion

17. The Appeals Chamber recalls that as a matter of principle it is not for the Tribunal to assist a convicted person whose case has reached finality. It is only in exceptional circumstances that a convicted person will be granted legal assistance at the expense of the Tribunal after a final judgement has been rendered against him.³⁷ This type of legal assistance may take different forms, such as the assignment of a counsel or a legal assistant, where the convicted person is indigent. At the preliminary examination stage of a request for review, such assistance will be granted only if the Appeals Chamber deems it “necessary to ensure the fairness of the proceedings”.³⁸ This necessity is, to a great extent, assessed in light of the potential grounds for review put forward by the applicant.³⁹

18. The Appeals Chamber cannot rule on Kamuhanda’s potential grounds for review as currently presented; the Motion is neither fully articulated in this respect nor is it intended to be a request for review *per se*, and Kamuhanda has yet to consider the material disclosed to him by the Prosecution in May 2009. Nevertheless, unlike other requests for legal assistance for review proceedings brought before the Appeals Chamber, Kamuhanda’s Motion provides information on the materials he considers to be “new facts” and explains how they could have been a decisive factor in reaching the original decision. Having carefully considered Kamuhanda’s arguments, as well as the material recently disclosed by the Prosecution, the Appeals Chamber is not in a position to exclude that Kamuhanda’s potential grounds of review may have a chance of success.⁴⁰

19. The Appeals Chamber observes that Kamuhanda was able to file a detailed and coherent request despite his asserted lack of technical legal skills. However, in the exceptional circumstances of this particularly complex case, involving false testimony and subsequent contempt proceedings, the Appeals Chamber is of the view that Kamuhanda lacks the necessary legal expertise to properly

³⁵ Response, para. 5.

³⁶ Response, para. 4.

³⁷ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, Public Redacted Version, signed on 12 March 2009 and filed on 21 April 2009 (“*Niyitegeka Fourth Review Decision*”), para. 52.

³⁸ *Niyitegeka Fourth Review Decision*, para. 52.

³⁹ *Ibid.*

⁴⁰ This determination is without prejudice to the evaluation of the grounds of review that the Appeals Chamber would undertake if a motion for review were to be filed.

assess and weigh the material now in his possession to determine whether a request for review is warranted and, if need be, to prepare such a request.

20. Accordingly, the Appeals Chamber finds that Kamuhanda has shown that it is necessary in order to ensure the fairness of the proceedings at the preliminary examination stage that he be afforded limited legal assistance under the auspices of the Tribunal's legal aid system. In light of Ms. Condé's reported willingness to assist Kamuhanda *pro bono*, the Appeals Chamber considers that this legal assistance should take the form of the assignment of a legal assistant for a period of three months. The Appeals Chamber emphasizes that, pursuant to Rule 44(A) of the Rules, it is incumbent on Ms. Condé to file her power of attorney with the Registrar at the earliest opportunity.

21. Finally, the Appeals Chamber considers that the Prosecution should clarify whether it was provided with a report containing the conclusions of the Special Counsel's investigation. The Appeals Chamber notes that counsel for the Office of the Prosecutor declared in the *Nshogoza* case that no such report existed.⁴¹ However, the Prosecution has failed to inform Kamuhanda whether this report which he has been requesting actually exists.

⁴¹ *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, T. 30 October 2008 pp. 10, 11. See also *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber's "Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch", 19 February 2009, para. 10.

D. Disposition

22. For the foregoing reasons, the Appeals Chamber

GRANTS the Motion;

DIRECTS the Registrar, after consulting with Ms. Aïcha Condé, to assign a legal assistant for a period of three months, starting when, and provided that, Ms. Aïcha Condé files her power of attorney with the Registrar to represent Kamuhanda *pro bono*, for the purpose of assisting Kamuhanda at this preliminary stage of potential review proceedings; and

ORDERS the Prosecution to clarify whether it was provided with a report containing the conclusions of the Special Counsel's investigation within one week of the date of this Decision.

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

Done this twenty-first day of July 2009,
At The Hague,
The Netherlands.



[Seal of the Tribunal]

Judge Patrick Robinson
Presiding