

9712/H



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

IN THE APPEALS CHAMBER

**ICTR-99-52-A
12 January 2007
(9712/H – 9708/H)**

P.T.

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 12 January 2007

**Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)**

ICTR Appeals Chamber

Date: 12 January 2007
Action: P.T.

Copied To: concerned Judge
Parties, SLOS, LOS, MOLF, S,

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v.

**THE PROSECUTOR
(Respondent)**

Case No. ICTR-99-52-A

PUBLIC REDACTED VERSION

**DECISION ON HASSAN NGEZE'S MOTION FOR LEAVE TO PRESENT
REJOINDER EVIDENCE**

Counsel for Hassan Ngeze

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Counsel for Ferdinand Nahimana

Mr. Jean-Marie Biju-Duval

Ms. Diana Ellis

Counsel for Jean-Bosco Barayagwiza

Mr. D. Peter Herbert

Ms. Tanoo Mylvaganam

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Mr. James Stewart

Mr. Neville Weston

Ms. Linda Bianchi

Mr. Abdoulaye Seye

Mr. Alfred Orono Orono

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Appellant Hassan Ngeze's Urgent Motion under Rule 85(A)(iv) and Rule 89(B) of the Rules of Procedure and Evidence for Leave to Call Rejoinder Evidence in Reply to the Prosecutor's Rebuttal Evidence Permitted by the Appeals Chamber Vide [sic] its Decision of 13th December 2006" filed confidentially by Counsel for Hassan Ngeze ("Appellant") on 21 December 2006 ("Motion"). The Office of the Prosecutor ("Prosecution") did not respond to the Motion.

I. PROCEDURAL BACKGROUND

2. Trial Chamber I of the Tribunal ("Trial Chamber") rendered its Judgement in this case on 3 December 2003.¹ The Appellant filed his Notice of Appeal on 9 February 2004,² amended on 9 May 2005,³ and Appellant's Brief on 2 May 2005.⁴ The Prosecution filed its Respondent's Brief on 22 November 2005.⁵ The Appellant replied on 15 December 2005.⁶

3. By its Decision of 23 February 2006,⁷ the Appeals Chamber admitted as additional evidence on appeal handwritten and typed copies of Witness EB's purported recantation statement dated April 2005 ("Recantation Statement")⁸ and the Forensic Report of Mr. Antipas Nyanjwa, an expert in handwriting, who assessed the authenticity of Witness EB's statement,⁹ pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), and ordered that Witness EB be heard by the Appeals Chamber, pursuant to Rules 98 and 107 of the Rules.¹⁰ On 14 June 2006, the Appeals Chamber ordered Witness EB to appear, as its witness, at an evidentiary hearing, pursuant to Rule 115 of the Rules.¹¹ By its Decision of 27 November 2006,¹² the Appeals Chamber admitted

¹ *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").

² Defence Notice of Appeal (Pursuant to Rule 108 of the Rules of Procedure and Evidence), 9 February 2004.

³ Confidential Amended Notice of Appeal, 9 May 2005.

⁴ Confidential Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005.

⁵ Consolidated Respondent's Brief, 22 November 2005.

⁶ Appellant Hassan Ngeze's Reply Brief (Article 113 of the Rules of Procedures and Evidence), 15 December 2005.

⁷ Confidential Decision on Appellant Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("Decision of 23 February 2006").

⁸ Decision of 23 February 2006, para. 29; Confidential Decision on the Prosecutor's Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006 ("Decision of 14 June 2006"), p. 3.

⁹ Report of the Forensic Document Examiner, Inspector Antipas Nyanjwa, dated 20 June 2005, Annex 4 to the "Prosecutor's Additional Submissions In Response to 'Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB'", filed confidentially on 7 July 2005 ("Forensic Report"). See Decision of 23 February 2006, para. 41.

¹⁰ Decision of 23 February 2006, para. 81.

¹¹ Decision of 14 June 2006, p. 5.

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as additional evidence on appeal a copy of the statement, in Kinyarwanda, purportedly written by Witness EB dated 15 or 16 December [year illegible] affirming his Recantation Statement ("Additional Statement") and its translations into English and French.¹³ By the same decision, the Appeals Chamber admitted as rebuttal material copies of the envelopes in which copies of the Additional Statement were received by the Prosecution.¹⁴

4. Finally, by its Decision of 13 December 2006,¹⁵ the Appeals Chamber admitted as rebuttal material on appeal copies of the following documents:

- Declaration of Moussa Sanogo dated 21 November 2006, index numbers 8841/A-8835/A, to the extent specified in paragraph 9 above;
- *Compte-rendu de la fin de la mission du 16 au 18 octobre 2006 à Gisenyi*, dated 18 October 2006, index numbers 8834/A-8829/A;
- Investigation Report dated 23 August 2006 with its annexes, index numbers 8789/A-8745/A;
- Statements of Witness EB dated 22 May and 23 June 2005, index numbers 8742/A-8730/A.

II. DISCUSSION

5. In rejoinder to the rebuttal material admitted on appeal with respect to Witness EB, the Appellant presently seeks to call three witnesses to testify before the Appeals Chamber: Witness AFX, Mukeshimana Abdoul Karim and the President of the Gacaca Court of [REDACTED] *Cellule* in [REDACTED]. The Appellant submits that these witnesses will refute the anticipated testimony of Witness Moussa Sanogo as well as the documentary evidence that the Prosecution intends to adduce.¹⁶ More specifically, the Appellant submits that (i) Witness AFX will testify as to the extent that Witness EB's Recantation Statement and Additional Statement were made by [Witness EB] of [REDACTED] free will; (ii) Mukeshimana Abdoul Karim will testify with respect to the information [REDACTED] described in *Compte-rendu de la fin de la mission du 16 au 18 octobre 2006 à Gisenyi* admitted as rebuttal material on appeal; and that (iii) the President of Gacaca Court in [REDACTED] *Cellule* will testify as to Witness EB's testimonies before the Gacaca Court as referred to in paragraphs 27 and 28 of the *Compte-rendu de la fin de la mission du 16 au 18 octobre 2006 à Gisenyi*.

¹² Confidential Decision on Motions Relating to the Appellant Hassan Ngeza's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 ("Decision of 27 November 2006"); see Public Redacted Version filed on 1 December 2006.

¹³ *Ibid.*, paras 39 and 44. The purported original of the Additional Statement was produced by the Appellant on 8 January 2007.

¹⁴ *Ibid.*, paras 42 and 44.

¹⁵ Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006 ("Decision of 13 December 2006").

¹⁶ Motion, para. 4.

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6. The Appeals Chamber reiterates that an appeal pursuant to Article 24 of the Statute of the Tribunal is not a trial *de novo*.¹⁷ Rule 115 of the Rules specifically governs the admission of additional evidence on appeal, as well as rebuttal material, where the particular circumstances in the case so require. However, no provision is made under Rule 115 for seeking admission of rejoinder evidence to rebuttal material. Moreover, the Appeals Chamber does not consider that Rule 85(A) of the Rules, which specifically governs the presentation of evidence at trial, can be directly transposed to the presentation of additional evidence on appeal, which is covered by the provisions of Rule 115. While Rule 89(B) read in conjunction with Rule 107 of the Rules¹⁸ generally stipulates that the Appeals Chamber, in cases not specifically provided for under the section of the Rules on evidence, "shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law", it does not require that the Appeals Chamber allow for the admission of rejoinder evidence in Rule 115 proceedings. Thus, nothing in the Rules explicitly entitles parties to seek admission of rejoinder evidence on appeal and the Appeals Chamber will only allow admission of such evidence where the particular circumstances of the case so require for a fair determination of the matter before it.

7. In the present case, the Appeals Chamber recalls that the substance of the additional evidence admitted by the Appeals Chamber relates to Witness EB's purported wish to recant his testimony provided at trial, notably with respect to the Appellant's participation in the killings in Gisenyi on 7 – 9 April 1994.¹⁹ The material admitted in rebuttal is anticipated to directly relate to the substance of the additional evidence, in particular with respect to the Prosecution's investigation into the circumstances of the purported recantation of Witness EB's trial testimony.²⁰ In light of the documentary material already admitted in this appeal, the Appeals Chamber is not convinced that the anticipated testimony of the three witnesses referred to by the Appellant would make a material difference to his case, that it would be helpful in assessing the rebuttal material, or that it is necessary for a fair determination of the issue of Witness EB's purported recantation.²¹

¹⁷ Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("Decision of 8 December 2006"), para. 4; Confidential Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("Decision of 23 February 2006"), para. 5; Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005 ("Decision of 4 October 2005"), p. 3; Decision on Appellant Hassan Ngeze's Motion for Approval of the Investigation at the Appeal Stage, 3 May 2005, p. 3 ("Decision of 3 May 2005"); *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177.

¹⁸ Rule 107 of the Rules provides that "[t]he Rules of Procedure and Evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

¹⁹ Decision of 13 December 2006, para. 8.

²⁰ *Id.*

²¹ See by analogy, *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 – cf. T. 19 May 2005 (Appeals Hearing), p. 49 *et seq.*

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III. DISPOSITION

8. For the forgoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

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

Dated this 12th day of January 2007,

At The Hague, The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the Tribunal]






**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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