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RMM



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44D-AR77
11 May 2011
{499/H - 493/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 11 May 2011

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: KDEFI KUMELID A. AEFANDE
SIGNATURE: [Signature] DATE: 11 May 2011

CALLIXTE NZABONIMANA

v.

THE PROSECUTOR

Case No. ICTR-98-44D-AR77

DECISION ON CALLIXTE NZABONIMANA'S INTERLOCUTORY
APPEAL OF THE TRIAL CHAMBER'S DECISION
DATED 10 FEBRUARY 2011

ICTR Appeals Chamber
Date: 11 May 2011
Action:
Copied To:

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Concerned Judges,
Parties, Judicial Archives,
LG, HSS
[Signature]

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 seised of an interlocutory appeal filed by Callixte Nzabonimana (“Nzabonimana”) on 11 March 2011 (“Appeal”)¹ against a decision of Trial Chamber III of the Tribunal (“Trial Chamber”) rendered on 10 February 2011 (“Impugned Decision”).²

A. Background

2. On 15 December 2009, the Trial Chamber directed the Registry to appoint an *amicus curiae* to investigate Defence investigator Jean-Claude Misano on allegations of disclosing protected information concerning Prosecution witnesses.³ On 12 July 2010, the Trial Chamber granted the parties’ request for disclosure of the report filed confidentially and *ex parte* by the appointed *amicus curiae* on 30 March 2010 (“*Amicus Curiae* Report”).⁴ On 19 November 2010, the Trial Chamber issued a decision rejecting the *Amicus Curiae* Report and directing the Registry pursuant to Rule 77(C)(ii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) to appoint a new *amicus curiae* tasked with investigating the allegations against Mr. Misano.⁵

3. On 10 February 2011, the Trial Chamber rendered the Impugned Decision, granting the Prosecution’s request to expand the mandate of the new *amicus curiae* to encompass the allegation that Nzabonimana’s Co-Counsel, Philippe Larochelle, or other members of the Defence team revealed protected information pertaining to a Prosecution witness.⁶

¹ Appeal on the Decision on the Prosecutor’s Motion for Prohibition of Conduct Contrary to Rule 77 (A) (II) of the Rules of Procedure and Evidence (RPE), 11 March 2011.

² *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecutor’s Motion for Prohibition of Conduct Contrary to Rule 77 (A) (II) of the Rules of Procedure and Evidence, 10 February 2011.

³ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on the Prosecution’s Urgent Motion Alleging Contempt of the Tribunal, 15 December 2009, p. 6.

⁴ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Order to Disclose Amicus Curiae Report to the Parties, 12 July 2010, p. 3.

⁵ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Report of Amicus Curiae on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements, 19 November 2010, p. 11.

⁶ Impugned Decision, p. 11.

4. Nzabonimana filed a confidential notice of appeal against the Impugned Decision on 25 February 2011,⁷ and his Appeal on 11 March 2011. The Prosecution filed a confidential response to the Appeal on 28 March 2011,⁸ to which Nzabonimana replied on 1 April 2011.⁹

B. Applicable Law

5. Rule 77(A) of the Rules provides, in relevant part, that

The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

[...]

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

[...]

6. Under Rule 77(C)(ii) of the Rules, a Chamber that “has reason to believe that a person may be in contempt of the Tribunal” may “direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings”.

7. Rule 77(J) of the Rules provides that “[a]ny decision rendered by a Trial Chamber under [Rule 77] shall be subject to appeal.”

C. Submissions

8. In his Appeal, Nzabonimana requests the Appeals Chamber to set aside the Impugned Decision, find that there is no reason to believe that the Co-Counsel or any other member of the Defence team may have acted in contempt, and issue an order prohibiting the newly appointed *amicus curiae* from investigating contempt allegations against the Defence team.¹⁰ In the alternative, Nzabonimana requests the Appeals Chamber to appoint a different Trial Chamber or a “special bench composed of judges from different Trial Chambers [to] determine whether there is a reason to believe that the Defence Co-Counsel or the rest of the Defence Team may have acted in contempt of the Tribunal”, or decide itself to determine the issue.¹¹ In addition, Nzabonimana

⁷ Notice of Appeal on the Decision on the Prosecutor’s Motion for Prohibition of Conduct Contrary to Rule 77 (A) (II) of the Rules of Procedure and Evidence (RPE), Dated 10 February 2011, confidential, 25 February 2011 (“Notice of Appeal”).

⁸ Prosecution’s Response to Counsel’s Appeal of the Trial Chamber’s Direction to Investigate, confidential, 28 March 2011 (“Response”). See also Decision on Prosecution’s Motion for Extension of Time, 21 March 2011 (granting the Prosecution a seven-day extension of time to file its response to the Appeal).

⁹ Defence Reply to the Prosecutor’s Response to the Defence Appeal on the Decision on the Prosecutor’s Motion for Prohibition of Conduct Contrary to Rule 77 (A) (II) of the Rules of Procedure and Evidence (RPE), 1 April 2011 (“Reply”).

¹⁰ Appeal, para. 3, p. 63.

¹¹ Appeal, p. 63.

requests the Appeals Chamber to suspend the proceedings in his case pending the resolution of the contempt allegation against the Defence team or suspend the contempt proceedings against his Co-Counsel until the final submissions in the main proceedings are made.¹²

9. In support of his Appeal, Nzabonimana submits that the Trial Chamber erred in: (1) concluding that there was a reason to believe that his Co-Counsel may have acted in contempt of the Tribunal;¹³ (2) finding that it was not precluded from directing an *amicus curiae* to investigate contempt allegations against his Co-Counsel;¹⁴ (3) not recusing itself on the grounds of bias or appearance of bias;¹⁵ (4) finding that the Defence had not demonstrated how the investigation would prejudice his defence;¹⁶ (5) misapplying the law in rejecting his request that the Prosecution's motion seeking the expansion of the mandate of the new *amicus curiae* to encompass other members of the Defence team be determined by another Chamber;¹⁷ and (6) ruling that it was under no obligation to disclose the *Amicus Curiae* Report.¹⁸

10. The Prosecution responds that the Appeal is inadmissible.¹⁹ It submits that Rule 77(J) of the Rules only allows for appeals against final decisions and that a direction to open an investigation is not a final decision but "rather a preliminary step in the proceedings."²⁰ The Prosecution argues that allowing appeals against a direction to investigate would: (1) be contrary to the principle of judicial economy;²¹ (2) "absurdly provide suspects of contempt with more stringent procedural safeguards than suspects of genocide";²² (3) be inconsistent with Rules 77(F) and 91(E) of the Rules;²³ and (4) be inconsistent with the fact that Rule 77(J) of the Rules provides for the filing of a notice of appeal.²⁴ In the Prosecution's view, the direction to investigate provided for under Rule 77(C) of the Rules should not be considered to be a decision within the meaning of Rule 77(J) of the Rules.²⁵ The Prosecution also contends that, even if an appeal against the direction to investigate were considered admissible, such an appeal would require certification pursuant to Rule 73(B) of the Rules.²⁶ It submits that Nzabonimana's requests to suspend the proceedings are likewise

¹² Appeal, para. 169, p. 64.

¹³ Appeal, paras. 2, 26-80.

¹⁴ Appeal, paras. 2, 81-98.

¹⁵ Appeal, paras. 2, 99-164.

¹⁶ Appeal, paras. 2, 165-169.

¹⁷ Appeal, paras. 2, 170-183.

¹⁸ Appeal, paras. 2, 184-196.

¹⁹ Prosecution Response, paras. 1-3, 8-20.

²⁰ Response, para. 8, citing *The Prosecutor v. Hormisdas Nsengimana*, Case Nos. ICTR-01-69-A, ICTR-10-92, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, 16 December 2010 ("*Nsengimana* Decision of 16 December 2010"). See also Response, paras. 1, 2, 16, 20, 83.

²¹ Response, paras. 9, 10.

²² Response, para. 9. See also *ibid.*, paras. 2, 11.

²³ Response, paras. 9, 12.

²⁴ Response, paras. 9, 13.

²⁵ Response, paras. 9, 14.

²⁶ Response, paras. 9, 15, 16, 20.

inadmissible.²⁷ It further argues that Nzabonimana's Notice of Appeal is invalid as it fails to set forth the grounds of appeal.²⁸ Alternatively, the Prosecution submits that the Appeal, including the requests for suspension, is without merit.²⁹

11. In his Reply, Nzabonimana submits that the argument that there is no appeal against a Trial Chamber's direction to investigate contempt allegations "is misguided and flows from a miscomprehension of Rule 77 (J)."³⁰ He contends that the use of the word "any" in Rule 77(J) of the Rules leaves no room for doubt that a decision under Rule 77(C) of the Rules is appealable.³¹ He further submits that the Prosecution's characterisation of the Impugned Decision as a "direction" instead of a "decision" to investigate is misleading,³² and that its argument regarding the requirement of certification for the Appeal is unsupported by law.³³ Nzabonimana also contends that his Notice of Appeal was not invalid as neither Rule 77, nor the relevant practice direction obliges the applicant to set forth the grounds of appeal in the notice of appeal.³⁴

D. Discussion

12. As a preliminary matter, the Appeals Chamber will address whether there is a right of appeal against the Impugned Decision under Rule 77(J) of the Rules.

13. As recalled above, Rule 77(J) of the Rules provides that "[a]ny decision rendered by a Trial Chamber under [Rule 77] shall be subject to appeal." The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has interpreted an identical provision of the ICTY Rules of Procedure and Evidence as granting appeals as of right only with respect to decisions *disposing* of a contempt case.³⁵ Accordingly, the Appeals Chamber has interpreted Rule 77(J) of the Rules as applying to appeals against judgements on contempt, decisions denying a request for investigation into allegations of contempt, and decisions dismissing a request to initiate

²⁷ Response, paras. 61-67.

²⁸ Response, paras. 3, 17-20.

²⁹ Response, paras. 1, 4-7, 21-60, 68-83.

³⁰ Reply, para. 7.

³¹ Reply, paras. 8, 9.

³² Reply, paras. 10, 11.

³³ Reply, paras. 12-14, 25.

³⁴ Reply, paras. 15, 16, referring to Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 8 December 2006, para. 4.

³⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.18, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Motion for Reconsideration of Decision of 21 January 2010 and Application of Rule 73(D) of the Rules to Prlić's Defence, 20 October 2010, para. 5, fn. 7; *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal Against Trial Judgement, 4 September 2008, para. 13; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, public redacted version, 25 July 2008, para. 8 ("Šešelj Decision of 25 July 2008"); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.1, Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Decision of 19 July 2007, 14 December 2007, p. 2.

contempt proceedings.³⁶ The Impugned Decision differs from these as it does not dispose of a contempt case, but rather allows the investigation of allegations of contempt. In these circumstances, the Appeals Chamber, Judge Liu dissenting, considers that the Impugned Decision is not subject to appeal as of right. In the absence of certification under Rule 73(B) of the Rules, the Appeals Chamber therefore finds, Judge Liu dissenting, that Nzabonimana's Appeal, including his requests for suspension of the trial or contempt proceedings, should be dismissed.

14. Based upon the foregoing, it is not necessary for the Appeals Chamber to consider the merits of the Appeal.

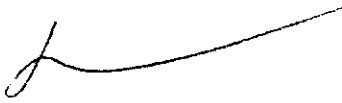
E. Disposition

15. For the aforementioned reasons, the Appeals Chamber, Judge Liu dissenting, **DISMISSES** Nzabonimana's Appeal.

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

Done this 11th day of May 2011,
at The Hague,
The Netherlands.





Judge Patrick Robinson
Presiding

Judge Liu appends a dissenting opinion.

[Seal of the Tribunal]

³⁶ See *Callixte Nzabonimana v. The Prosecutor*, Case No. ICTR-98-44D-AR77, Decision on Callixte Nzabonimana's Interlocutory Appeal of the Trial Chamber's Decision dated 9 July 2010, 28 October 2010, para. 9; *Šešelj* Decision of 25 July 2008, para. 12. See also *In the Case Against Vojislav Šešelj*, Case No. IT-03-67-AR77.2-A, public redacted version, Judgement, 19 May 2010; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010. See also *Nsengimana* Decision of 16 December 2010, paras. 5, 10, 11 (in which the Appeals Chamber assessed the merits of an appeal against a decision dismissing a request to initiate contempt proceedings).