
APPEALS CHAMBER

Before The Presiding Judge
Registrar Adama Dieng
Date of filing 30th July 2012

Pheneas MUNYARUGARAMA

V

THE PROSECUTOR

Appeal from Case No. ICTR-02-79- R 11 bis

DUTY COUNSEL SUBMISSIONS IN SUPPORT OF THE GROUNDS OF APPEAL

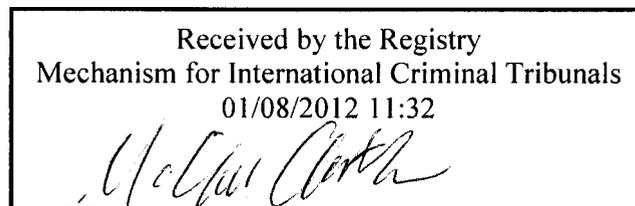
Pursuant to the NOTICE OF APPEAL that was filed on the 11th July 2012

Office of the Prosecution

Hassan Bubacar Jallow
James J. Arguin
George Mungwanya
Inneke Onsea
Abdoulaye Seye
Francois Nsanzuwera
Erica Bussey

Duty Counsel

Francis K. Stolla



THE APPELLANTS SUBMISSIONS

A.: INTRODUCTION

1. On the 13th Day of June 2012 the Prosecution filed a motion seeking the transfer of the case of Pheneas MUNYARUGARAMA to Rwanda pursuant to rule 11 bis of the Rules of Procedure and Evidence. Generally from paragraph 1 to 12 of the Motion, the Prosecution tried to impress upon the Tribunal that the Rwandan Authorities can handle the case. It was the Defense submissions that as far as this case was concerned general circumstances do not allow this case to be transferred to Rwanda and, it was the Defense submission ,that the case be tried by the International Criminal Tribunal for Rwanda (ICTR).
2. On the 28th June 2012 the Trial Chamber delivered a ruling to the effect that the Prosecutors Motions was allowed to the effect that the accused person on Phineas Munyarugarama be referred to Rwanda for Trial by the state courts of Rwanda.
3. In the NOTICE AF APPEAL filed on the 11th July 2012 notice was given to the effect that the Appellant being aggrieved by the decision of the Trial Chamber of International Criminal Tribunal For Rwanda on the Prosecutor's request for referral of the case to the Republic of Rwanda, delivered on the 28th JUNE 2012 intends to appeal to the Appellate Chambers of the Tribunal on the following grounds;

That the Rwandan Judiciary is not impartial thus no fair trial will be afforded to the accused.

That the Referral Chamber erred in law and fact, as held on paragraph 35 on page 9, paragraph 43 46, 47, and 48 on page 11, paragraph 49, 50, 51 and 52 on page 12, paragraph 67, 68 and 69 on page 15 of the ruling, to hold that the Rwandan Judiciary is impartial while the Judges are Rwandan Citizens who, according to their age, experienced the commission of genocide a fact that makes them biased and therefore not impartial.

Reliefs sought

Given the circumstances the defence shall pray that the Appeals Chambers order that the order to refer the accused to the Judiciary of Rwanda be reversed and the said accused be tried by the Trial Chambers of the ICTR.

4. The Application for extension of time or to file submission out of time

(1) If it pleases the Chambers, I, the Duty Counsel for the Appellant apply for the extension of time within which to file the submissions in support of the grounds of appeal. Alternatively I pray for leave to file the submissions in support of the grounds of appeal out of time.

(2) The reasons for the delay

The Appellant's side is aware that the Appeals Chamber has consistently stressed that, without showing of good cause, violations of time limits imposed by rules and practice directives for filing notices of appeal and briefs will not be tolerated. This is because these time limits are indispensable for the proper functioning of the Tribunal and to the fulfillment of its mission to do justice. Similarly the filing of this notice of appeal out of time without even trying to explain good cause will not be allowed¹

(3) I did not file the Appellant submission brief timely because I had a family matter of emergence that I attended. The matter is that I rushed on the 23rd July 2012 from Dar es Salaam where I regularly work to Bariadi, Shinyanga region in Tanzania to attend my sick mother who lives in the said Bariadi district. There was no scanning facilities that could assist me to scan and send the submissions timely to the tribunal. I arrived in Dar es Salaam during the night of the 30th July 2012. Thus on the 31st July 2012 I finalized the submissions and made arrangements to send to the Tribunal.

(4) That the emergence I attended being the family matter was beyond my control thus constituting a reasonable or good cause.

¹ See Prosecutor vrs Clement Kayishema and Obedi Ruzindana, Judgment 1st June 2001 paragraph 46. And Protas Zigiranyirazo vs The Prosecutor Case No. ICTR – 01-73 A- a decision in Protas Zigiranyirazo's Motion for extension of time for the filing of the reply brief 3rd July 2009 para 6.

(5) That I consider that what happened is a good cause for the tribunal to allow this submission to be considered in support of the ground of appeal.

I therefore pray that this submission be allowed and considered by the Appeal's Tribunal.

5. The arguments on the ground of appeal

The ground of appeal is hinged under the provisions of Rule 11(c) bis of the Rules of Procedure and Evidence provides, among other things,

Rule 11 bis:

(A). "If the indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, The President may designate a trial chamber which shall determine whether the case should be referred to the authorities of a state:

- (i). in whose territory the crime was committed; or*
- (ii). in which the accused was arrested*
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case.*

So that those authorities should refer a case to the appropriate court for trial within that state.

*(B). The Trial chamber may order that that referral **proprio motu** or at the request of the Prosecutor, after having given the prosecutor and, where the accused is in the custody of the tribunal, the accused the opportunity to be heard.*

*(C). In determining whether to refer a case in accordance with paragraph (A) **the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the Courts of the State concerned** and that the death penalty will not be imposed or carried out. [emphasis supplied].*

6. .. Thus the MOST IMPORTANT and FUNDAMENTAL condition which carries the spirit if rule 11 bis (C)) of the Rules of Procedure and Evidence is the question of FAIR TRIAL. More specifically this rule emphasizes that;

(C). *In determining whether to refer a case in accordance with paragraph (A) the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the Courts of the State concerned and that the death penalty will not be imposed or carried out.*

WHETHER THE ACCUSED WILL RECEIVE FAIR TRIAL

The Chamber is of the opinion that the issue of protective measures for defence witnesses is prima facie guaranteed, nor has the defence proffered any evidence to the contrary.

(a) Judicial independence, impartiality and competence in Rwanda

7. Judicial independence, impartiality and competence are in controversy, in that they involve a lot of considerations;

(i) Judicial independence

Judicial independence that is talked about in the ruling is institutional, that is to say, the set up of the judiciary according to the Constitution and Laws of Rwanda. The Appellant does not attach this institutional independence of the Rwandan Judiciary.

(ii) Impartiality

The big issue is here. It is the Appellant's submission that the Rwandan Judges are not and can not be impartial when trying genocide cases in Rwanda. This lack of impartiality on Rwandan Judges is not attached to the Rwandan Judiciary as an institution but it is attached to the judges personally. It is the defence submission that the Rwandan Judiciary may be independent as an institution but its judges may be biased. Equally an individual judge may be very very competent as a professional but may be biased in certain circumstances. It is under this principle the Defence argues that the Rwandan Judges despite the fact that they may be competent but they can not avoid being biased as individual persons because in all respects they must have been affected by genocide incidences in that happened in Rwanda between January 1994 and December 1994.

The Prosecution Motion stated from paragraph 85 to 99 that the Judges in Rwanda are independent, impartial and competent. But in paragraph 97 the Prosecutors motion stated that it is a presumption that the Judges of the High Court and Supreme Court are independent and impartial. The Prosecution on this aspect can not rely on the presumption that the Judges in Rwanda those who are the Citizens of Rwanda are independent and impartial. It is also risky and improper in criminal law to rely on the presumption and the fact that the said presumption is not easily rebuttable.

In the decision of the Trial Chambers it is held that;

It is well established in Tribunal jurisprudence that there exists a presumption of impartiality which attaches to a judge or Tribunal. The Chamber notes that though absolute neutrality can hardly if ever be achieved, in the absence of evidence to the contrary, it must be assumed that judges can "disabuse their minds of any irrelevant personal beliefs or predispositions."²

(iii) Competence

The question of competence of judge is not material or is not at issue in this submission because as pointed out earlier in this submission a competent judge may be equally biased. It is thus the Appellant's submission that those competent Judges in Rwanda are biased as they are also affected physically and mentally by the genocide incidences.

8. It is the Appellant's submission that the question of Judges' personal, other than institutional, impartiality is so paramount and should be taken that the it is a strong factor eroding the conditions of independence and impartiality of the Judiciary of Rwanda.
9. The crimes with which the accused *Phineas Munyarugarama* stands charged are serious offences as spelt out in Article 1 and 2 of the Statute of the International Tribunal for Rwanda. Further that the position the accused person was holding was higher. It is the Appellant's submission that the judiciary, as an institution, may be independent of the Government (The Executive) and the Judges may be very competent BUT given the fact that the judges will be from Rwanda coupled with the

² Mnyarugarama's referral decision in paragraph 50 at page 12 of the decision.

fact that any person who is a citizen of Rwanda and qualifies to be a judge today must have either witnessed or experienced or felt the commission of the alleged crimes. This state of affair makes any judge, who is a Rwanda Citizen, lack impartiality in trying cases involving crimes those were committed in Rwanda between the 1st January 1994 up to 31 December 1994.

10. The Trial Chamber also held that

The Chamber also notes that Duty Counsel has not provided any specific instances of examples of the bias he attributes to the Rwandan Judiciary, and thus has not rebutted this presumption. The Chamber finds that the Judges of Rwanda are capable, experienced and impartial and that the transfer of the present case to Rwanda will not prejudice the rights of the accused.³
[Emphasis supplied]

Here again the Trial Chambers erred in law and fact to hold so and, accordingly, It is the Appellant submission that the happening of genocide and that it affected all Rwandan Citizens including Judges in Rwanda is a fact that does not require any proof as it is widely known and the court is obliged to take judicial notice. Once the court is so obliged to take judicial notice that the Appellant was not under any duty or obligation to provide evidence to rebut the presumption that judges are biased or that they are NOT impartial.

11. The Doctrine of **Judicial Notice** can easily affect judged in Rwanda as the event the subject of the charges against Phineas Munyarugarama were so public is so far as the Rwanda citizen are concerned. This state of affair therefore needs the impartial Judicial Mind like the ICTR judges who were not and are not the Rwanda citizens.

12. The law of evidence generally requires that any fact alleged to exist must be proved. But there are exceptional circumstances where a fact alleged may NOT NEED or require to be proved as it is so widely known. Here is where the doctrine of Judicial Notice comes into play.

13. The Court should take Judicial Notice of matters of National and International concern and pronounce principles. The Genocide incidences are such matters which NEED NOT BE PROVED and the Trial Chamber was supposed to take judicial notice of the happening of genocide in Rwanda between January and December 1994.

³ Mnyarugarama's referral decision in paragraph 51 at page 12 of the decision.

14. It is also obvious that the Rwandan Judge must have been affected either physically or mentally or both physically and mentally by the genocide in incidences in Rwanda.

Conclusion

15. The question of fair trial which, the Appellant views as fundamental should be taken as a whole. Some of the measures that the Government of Rwanda has taken to fit itself within the provisions of rule 11 bis are recommendable but not to the extent of guaranteeing a fair trial of the case of this Munyarugarama's nature.

16. Given the combination of all these arguments it is the Appellant's submission and prayer that this appeal be allowed and the decision of the Trial Chamber be reversed and the the Given the circumstances the Appellant further prays that the Appeals Chambers order that **the order to refer the accused to the Judiciary of Rwanda be reversed and the said accused be tried by the Trial Chambers of the ICTR.**

Dated and signed this 31st day of July 2012

Dar es Salaam, Tanzania



Francis K. Stolla
DUTY COUNSEL



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Date Created/ Daté du:	31 ST JULY 2012		Date transmitted/ Transmis le:	1 ST AUGUST 2012
No. of Pages/ No de pages:	EIGHT	Original Language / Langue de l'original:	<input checked="" type="checkbox"/> English/ Anglais	<input type="checkbox"/> French/ Français <input type="checkbox"/> Kinyarwanda
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