MICT-12-09-AR14
07-08-2012
(25/A - 16/A)

25/A

Case No. MICT-12-09-AR14

Mechanism for International Criminal Tribunals Date: 7 August 2012

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Carmel Agius
Judge Liu Daqun
Judge Prisca Matimba Nyambe

Registrar: John Hocking

PHÉNÉAS MUNYARUGARAMA

v.

PROSECUTOR

PUBLIC

PROSECUTOR'S RESPONSE BRIEF

The Office of the Prosecutor:
Hassan Bubacar Jallow
James J. Arguin
George Mugwanya
Inneke Onsea
Abdoulaye Seye
François Nsanzuwera
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Counsel for Phénéas Munyarugarama
Francis K. Stolla (Duty Counsel)

Received by the Registry
Mechanism for International Criminal Tribunals
07/08/2012 11:47

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1. The Appellant Phénéas Munyarugarama appeals from the Chamber's decision allowing the Prosecutor's application for referral of his case to Rwanda for trial, in which the Chamber determined that if referred, Munyarugarama's case "will be prosecuted consistent with internationally recognized fair trial standards".[1] Munyarugarama's brief was filed late and without prior leave granted by the Chamber. His appeal should be denied on this basis alone.

2. Even if his untimely brief is considered, no relief is warranted. In his only ground of appeal, Munyarugarama challenges the Chamber's finding in relation to the impartiality of the judiciary in Rwanda.[2] However, by simply repeating his submissions to the Referral Chamber, Munyarugarama fails to demonstrate that the Chamber committed any discernible error in reaching the conclusion that "the judges of Rwanda are capable, experienced and impartial and that the transfer of the present case to Rwanda would not prejudice the rights of the Accused".[3]

A. Munyarugarama has not shown good cause for the late filing of his Appeal Brief

3. The Appeal Brief was scheduled to be filed on 26 July 2012. The brief was filed at almost 5 p.m. on 31 July 2012, five days after it was due to be filed.[4] Duty Counsel submits that he has shown good cause for the late filing of the brief because of a family emergency which was out of his control and which

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[1] *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 28 June 2012 ("Decision"), para. 68.

[2] *The Prosecutor v. Phénéas Munyarugarama*, Case No. MICT-12-09-AR14, Confidential Duty Counsel Submissions in Support of the Grounds of Appeal, 30 July 2012 ("Appeal Brief"), para. 3. The Prosecutor notes that Munyarugarama filed his Appeal Brief confidentially, but there appears to be no justification for this designation. Therefore, the Prosecutor submits this response as a public filing.

[3] Decision, para. 51.

[4] The Appeal Brief was filed before the International Criminal Tribunal for Rwanda ("Tribunal") on 31 July 2012, and cross-filed with the Mechanism for International Criminal Tribunals ("Mechanism") on 1 August 2012.

necessitated his absence from Dar es Salaam from 23 to 30 July 2012, during which time he had no access to scanning facilities.[5]

4. Rule 154(A) of the Rules of the Mechanism (Rule 116(A) of the Rules of the Tribunal) permits the Appeals Chamber to extend a time limit upon a showing of good cause. Moreover, paragraph 19 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal allows the Appeals Chamber to "recognize as validly done any act done after the expiration of a time-limit so prescribed."[6]

5. However, the Appeals Chamber has consistently stressed that, without a showing of good cause, violations of time limits imposed by the Rules and Practice Directions for filing notices of appeal and briefs will not be tolerated.[7] 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.[8]

6. While Duty Counsel submits that the late filing was justified due to his unexpected unavailability as the result of a family emergency, the jurisprudence of this Tribunal has held that good cause generally is not established based on scheduling conflicts or counsel's unexpected unavailability.[9] Moreover, although he had ample time to do so, Duty Counsel did not seek an extension of time for the filing of the brief, but simply filed the brief after the deadline had expired, thus presenting the Appeals Chamber with a *fait accompli*. While Duty Counsel

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[5] Appeal Brief, paras. 1-4.

[6] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 8 December 2006 ("Practice Direction"), para. 19. This Practice Direction applies *mutatis mutandis* to appeals filed before the Mechanism. See Mechanism Practice Direction Related to Appeals, 5 July 2012, para. 1.

[7] *See, e.g.*, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No ICTR-95-1-A, Judgement, 1 June 2001, para. 46.

[8] *Ibid.*; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Protais Zigiranyirazo's Motion for an Extension of Time for the Filing of the Reply Brief, 3 July 2009, para. 6.

[9] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing his Brief in Reply, 23 June 2010, pp. 3-4; *Ildephonse Hategekimana v. Prosecutor*, Case No. ICTR-00-55B-A, Decision on Ildephonse Hategekimana's Second Motion for an Extension of Time to File His Appellant's Brief, 20 May 2011.

asserts that he had no access to scanning facilities during the time he was away, he could have coordinated such a filing with colleagues in Dar es Salaam or the Registry of the Tribunal or Mechanism without the need for a scanner. Consequently, the Prosecution submits that Munyarugarama has failed to show good cause for the late filing of his appeal brief.

7. In accordance with paragraph 5 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal,[10] the Prosecutor therefore submits that the Appeals Chamber should strike the Appeal Brief because it was filed after the filing deadline expired without a showing of good cause. Furthermore, because the filing of a notice of appeal is not a substitute for the timely filing of a brief, the undeveloped ground contained in Munyarugarama's notice of appeal should be deemed waived or abandoned.[11]

B. Alternatively, Munyarugarama fails to establish any abuse of discretion in the Referral Chamber's decision.

8. Even if the Appeals Chamber elects to consider the merits of Munyarugarama's appeal, the appeal should be dismissed because Munyarugarama fails to demonstrate any abuse of discretion warranting appellate intervention. Rule 11 *bis* of the Rules of the Tribunal grants Trial Chambers broad discretion to decide whether to refer cases to a national jurisdiction.[12] In exercising this discretion, a Chamber is free to consider whatever information it reasonably deems necessary to satisfy itself that the trial in any referred case will be fair.[13]

9. The Appeals Chamber will intervene in a Chamber's exercise of discretion only where the appellant establishes that the referral decision was based on a

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[10] Practice Direction, para. 5.
[11] *Aloys Ntabakuze v. The Prosecutor,* Case No. ICTR-98-41A-A, Appeal Judgement, 8 May 2012, para. 153, n. 331.
[12] *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 9 October 2008 ("*Munyakazi* Appeal Decision"), para. 5.
[13] *The Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005, para. 50.

discernable error.[14] To sustain this burden, the appellant "must show that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion; gave weight to irrelevant considerations; failed to give sufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; or reached a decision that was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[15]

10. Additionally, with regard to subsidiary factual findings, the appellant must demonstrate that the Chamber's resolution of the parties' competing submissions was unreasonable.[16] In applying this standard, the Appeals Chamber extends a "high degree of deference" to the Chamber's findings.[17]

11. As applied here, the Chamber was satisfied that "the judges of Rwanda are capable, experienced and impartial, and that the transfer of the present case to Rwanda would not prejudice the rights of the Accused."[18] Like other Referral Chambers, the Chamber was "of the view that as professional judges, Rwandan judges benefit from [the] presumption of independence and impartiality – a presumption which cannot be easily rebutted".[19] It found that "Duty Counsel has not provided any specific instances or examples of the bias he attributes to the Rwandan judiciary, and thus has not rebutted this presumption".[20]

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[14] *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 ("*Uwinkindi* Appeal Decision"), para. 23; *Munyakazi* Appeal Decision, para. 5; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 4 December 2008, para. 5; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008, para. 5.
[15] *Uwinkindi* Appeal Decision, para. 23; *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006, para. 9.
[16] *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"), paras. 22, 353.
[17] *Ibid.*, paras. 21, 330.
[18] Decision, para. 51.
[19] *Ibid.*, para. 50.
[20] *Ibid.*, para. 51.

12. In his only ground of appeal, Munyarugarama challenges these findings by arguing that the Referral Chamber erred by: (i) relying on the presumption of impartiality as it was "risky and improper" to do so;[21] (ii) extending this presumption of impartiality to Rwandan judges;[22] and (iii) requiring Munyarugarama to provide evidence of specific instances of bias in order to rebut this presumption, as the Referral Chamber should have taken judicial notice of the fact that Rwandan judges are biased.[23] However, Munyarugarama fails to demonstrate that the Chamber made any discernible error or abused its discretion in arriving at its overall conclusion or subsidiary findings.

13. Munyarugarama first repeats the frontal assault on the validity of the presumption of judicial independence and impartiality that he made before the Referral Chamber, and argues that the Chamber erred in relying on this presumption.[24] As before the Referral Chamber, Munyarugarama again contends that "it is risky and improper in criminal law to rely on the presumption," which, he notes, is "not easily rebuttable."[25]

14. Munyarugarama, however, provides no reasoned analysis to support his conclusion that the presumption is "risky or improper." Certainly, it would be improper to presume an accused's guilt, but that is not what this presumption does. Instead, it merely presumes, in the absence of contrary evidence, that judges will discharge their duties impartially and independently. Moreover, the Referral Chamber's reliance on this presumption is in accordance with the Tribunal's jurisprudence, where a presumption of judicial impartiality and independence is well established.[26] Munyarugarama therefore fails to

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[21] Appeal Brief, para. 7.
[22] *Ibid.*, paras. 7-9.
[23] *Ibid.*, paras. 10-14.
[24] *Ibid.*, para. 7.
[25] *Ibid.*
[26] *See, e.g., Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 48; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 91.

substantiate his submission that the Referral Chamber erred in relying on this presumption here.

15. Munyarugarama further fails to establish that the Referral Chamber erred in extending this presumption to the Rwandan judiciary.[27] In essence, Munyarugarama repeats his submission to the Referral Chamber that Rwanda's judges are not and could not be impartial because, as Rwandan citizens, they "must have either witnessed or experienced or felt" the crimes committed during the genocide.[28] The Referral Chamber correctly dismissed these allegations as unfounded. Munyarugarama offered not a shred of evidence to support his sweeping assumptions that *all* of Rwanda's current judges "witnessed or experienced or felt" the crimes committed during the genocide, let alone that they could not separate any personal feelings they may harbour from their solemn responsibilities as judges.

16. The Chamber's approach was consistent with the approach of other Referral Chambers, as every Referral Chamber to address the issue has extended the same presumption of independence and impartiality applicable to the Tribunal's judges to Rwanda's judges.[29] As trained and experienced professionals, Rwanda's judges, like the Tribunal's judges, are fully capable of separating events that occurred outside the courtroom from the evidence presented inside

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[27] *See* Appeal Brief, paras. 7-9.

[28] *See The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-2002-79-R11*bis*, Duty Counsel Submissions in Response to the Prosecutors [*sic*] Request for Referral of the Case of Pheneas Munyarugarama to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Evidence and Procedure, 27 June 2012, para. 12.

[29] *See The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 ("*Uwinkindi* Trial Decision"), para. 166; *The Prosecutor v. Ladislas Ntaganzwa*, Case No. ICTR-96-9-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 8 May 2012 ("*Ntaganzwa* Trial Decision"), para. 73; *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012, para. 185; *The Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 20 June 2012 ("*Ryandikayo* Trial Decision"), para. 64; *The Prosecutor v. Aloys Ndimbati*, Case No. ICTR-95-1F-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case of Aloys Ndimbati to Rwanda, 25 June 2012 ("*Ndimbati* Trial Decision"), para. 57.

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the courtroom.[30] Thus, absent reliable or sufficient evidence to show otherwise,[31] Rwanda's judges, like the Tribunal's judges, should be presumed able to "disabuse their minds of any irrelevant personal beliefs or predispositions" that they may have relating to the crimes committed during the genocide.[32] Munyarugarama has not shown how the Referral Chamber erred in so finding.

17. Munyarugarama also fails to demonstrate how the Referral Chamber erred "in law and in fact" in finding that, as he had not provided any specific examples of the bias he attributes to the judiciary, the presumption of impartiality had not been rebutted.[33] On appeal, Munyarugarama contends that the Referral Chamber erred in holding that he was under any obligation to rebut the presumption.[34] Instead, he submits that the Chamber should have taken judicial notice that genocide occurred in Rwanda between January and December 1994 and that all Rwandan judges are therefore biased as it is "obvious that the [judges] must have been affected either physically or mentally or both physically and mentally by the genocide".[35] As Munyarugarama did not raise this argument when he reasonably could have before the Referral Chamber, he cannot raise it for the first time on appeal.[36]

18. In any event, while the Referral Chamber might take judicial notice of the fact that the genocide occurred in Rwanda, it is far from "obvious" that, as a

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[30] *Nahimana* Appeal Judgement, paras. 78, 84; *Rutaganda* Appeal Judgement, paras. 42-43.
[31] There is no suggestion that any of the High Court or Supreme Court judges who might sit on the panel of this case, if it is referred, have any personal connection to Munyarugarama's alleged crimes. Even if such a connection were shown (which it has not been), there is no reason that this individual judge could not be recused from the panel. *See The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-2002-79-I, Prosecutor's Request for the Referral of the Case of Phénéas Munyarugarama to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 13 June 2012 ("Prosecutor's Request"), Annex Q (Rwanda *Amicus Curiae* Brief – *Uwinkindi*), para. 121 (RP 569) (citing Article 171 of Organic Law No. 51/2008 of 9 September 2008).
[32] *Nahimana* Appeal Judgement, para. 48.
[33] *See* Appeal Brief, para. 10.
[34] *Ibid.*
[35] *Ibid.*, paras. 10-14.
[36] *André Rwamakuba v. The Prosecutor,* Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, para. 6; *Édouard Karemera v. Prosecutor,* Case No. ICTR-98-44-AR72.2, Decision on Validity of Appeal of Preliminary Motion of Édouard Karemera Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 11 June 2004, p. 4.

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result of the genocide, all judges in Rwanda are biased.[37] Pursuant to Rule 94(A) of the Rules of the Tribunal (Rule 115(A) of the Rules of the Mechanism), a "Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." The "common knowledge" standard "encompasses facts that are widely known and not reasonably subject to dispute [. . .] such as general facts of history or geography, or the laws of nature."[38]

19. It is not a matter of "common knowledge" that all of Rwanda's judges have been "affected either physically or mentally or both physically and mentally by the genocide," let alone that their experiences with the genocide would preclude them from adjudicating the facts of this case fairly and impartially. The record, in fact, shows that Rwanda's judges have presided over many criminal cases, including genocide cases, and a significant percentage (approximately 30%) of those cases resulted in acquittals at trial or on appeal.[39] This high rate of acquittals hardly comports with the Munyarugarama's bald assertion that all Rwandan judges are biased because they "must have" been affected by the 1994 genocide. Consequently, the Referral Chamber did not err in failing to take judicial notice of this alleged "bias".

20. As the Appeals Chamber held in *Nahimana*, "it is for the appellant doubting the impartiality of a Judge to adduce reliable and sufficient evidence [. ..] to rebut this presumption of impartiality."[40] Moreover, the Referral Chamber in *Ntaganzwa* recently dismissed an argument that Rwandan judges were not impartial because "Duty Counsel [in that case] ha[d] not provided any specific

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[37] See Appeal Brief, para. 14.

[38] *Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Appeal Judgement, 18 March 2010, para. 99; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005 ("*Semanza* Appeal Judgement"), para. 194.

[39] Prosecutor's Request, Annex Q (Rwanda *Amicus Curiae* Brief –*Uwinkindi*), paras. 118-19 (RP 570-569) and Annex V (Rwanda's Report on 36 Genocide Cases) (RP 497-482).

[40] *Nahimana* Appeal Judgement, para. 48. See also *Rutaganda* Appeal Judgement, para. 42; *Semanza* Appeal Judgement, para. 13 (quoting *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Appeal Judgement, 9 July 2004, para. 45); *Akayesu* Appeal Judgement, para. 91 (quoting *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000, para. 197); *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Appeal Judgement, 2 February 2009, para. 254; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Appeal Judgement, 1 April 2011, para. 23.

instances or examples of the bias he attributes to the Rwandan judiciary and therefore ha[d] not rebutted this presumption."[41] Therefore, the Referral Chamber did not err in requiring, consistent with this jurisprudence, that Munyarugarama provide specific allegations of partiality or bias to substantiate his claims.

21. Munyarugarama accordingly fails to demonstrate that the Referral Chamber erred in relying on the presumption of impartiality, in extending this presumption to the Rwandan judiciary, or in finding that Munyarugarama failed to rebut this presumption.

C. Conclusion

22. In sum, the Appeals Chamber should strike the Appeal Brief as Munyarugarama has shown no good cause for its late filing. In the alternative, the Appeals Chamber should dismiss Munyarugarama's single ground of appeal, and affirm the Referral Chamber's decision allowing the Prosecutor's application for the referral of Munyarugarama's case to Rwanda for trial.

Word Count: 2063

Dated and signed this 7th day of August 2012, Arusha, Tanzania.

James J. Arguin
Chief, Appeals and Legal Advisory Division
(Pursuant to the MICT Prosecutor's 26 July 2012 Interim Designation)

[41] *Ntaganzwa* Trial Decision, para. 74. The Referral Chamber concluded that "the judges of Rwanda are capable, experienced and impartial" (*ibid.*). *See also Ryandikayo* Trial Decision, paras. 60-65; *Ndimbati* Trial Decision, paras. 55-57.

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Case Name/ *Affaire*:	**The Prosecutor v. Pheneas Munyarugarama**		**Case Number/ *Affaire No*:**	**MICT-12-09-AR14**	
Date Created/ *Daté du*:	**7 August 2012**		**Date transmitted/ *Transmis le*:**	**7 August 2012**	
No. of Pages/ *No de pages*:	**10**	**Original Language / *Langue de l'original*:**	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda
Title of Document/ *Titre du document*:	**Prosecutor's Response Brief**				
Classification Level/ *Catégories de classement*:	☒ Unclassified/ *Non classé*	☐ Strictly Confidential/ *Strictement confidentiel*	☐ Confidential/ *Confidentiel*	☐ Ex Parte (specify/ *préciser*):	
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