

ICTR-07-91-AR77

10-12-2010

(481/A - 475/A)

481/A
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

BEFORE THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Registrar: Mr. Adama Dieng, Registrar

Date Filed: 10 December 2010

JUDICIAL RECORDS SECTION
2010 DEC 10 P 1:12
[Signature]

LÉONIDAS NSHOGOZA

v.

THE PROSECUTOR

Case #: ICTR-2007-91-AR

LÉONIDAS NSHOGOZA'S NOTICE OF APPEAL

Office of the Prosecutor

Richard Karegyesa
Paul Ng'arua
Abdoulaye Seye
Dennis Mabura

Counsel for Léonidas Nshogoza

Allison Turner

TO THE HONOURABLE APPEALS CHAMBER, THE DEFENCE
RESPECTFULLY SUBMITS

1. On 7 July 2009, Trial Chamber III ('Trial Chamber' or 'Chamber') of the International Criminal Tribunal for Rwanda ('Tribunal') issued its Judgement ('Trial Judgement') finding Léonidas Nshogoza guilty of contempt of the Tribunal for violating a witness protection order (Count 1) and sentenced him to ten months' imprisonment. Mr Nshogoza was acquitted of all remaining Counts of alleged witness bribery.¹ The Appeals Chamber upheld Mr Nshogoza's conviction and 10-month custodial sentence for violating a witness protection order, with President Robinson dissenting from the majority decision on the 10-month custodial sentence.²

2. During the *Nshogoza* trial, Defence witnesses testified that when they were covered by a defence witness protection order in previous cases before the Tribunal, members of the ICTR Prosecutor's Office contacted them and took statements from them. In its Judgement, the Trial Chamber found this evidence demonstrated a *prima facie* case of violation of witness protection orders by the Prosecutor's Office,³ and subsequently ordered the Parties to file further submissions in this regard.⁴ The Prosecution and the Defence filed their respective submissions on 7 August 2009.⁵ Mr Nshogoza moved the Trial Chamber to "either direct an *amicus curiae* to prosecute the matter or to prosecute the matter itself pursuant to Rule 77 (D)(ii), and alternatively requested the Chamber to direct the Registrar to appoint an *amicus curiae* pursuant to Rule 77 (C)(ii) to conduct further investigations.⁶ Fifteen months later, on 25 November 2010, the Trial Chamber rendered its decision on the Defence motion.⁷

¹ *Nshogoza* Trial Judgement, 7 July 2009.

² *Nshogoza* Appeal Judgement, 15 March 2010.

³ *Nshogoza* Trial Judgement, 7 July 2009, paras. 43 and 44.

⁴ Order for Submissions from the Parties on the Conduct of Staff of the Prosecution and the Possible Violation of Witness Protective Measures, 16 July 2009 ('Order for Submissions').

⁵ Mr Nshogoza's Submissions on Prosecution Interference with Protected Defence Witnesses ('Defence Submissions'), filed 7 August 2009; Prosecutor's Submissions on "Order for Submissions from the Parties on the Conduct of Staff of the Prosecution and the Possible Violation of Witness Protective Measures" ('Prosecution Submissions'), filed 7 August 2009.

⁶ Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010 ('Impugned Decision' or 'Decision'), at para. 11.

⁷ Impugned Decision.

3. The Defence submits that the Trial Chamber's decision contains errors of law and errors of fact and that its findings were so unfair and unreasonable that the decision constitutes an abuse of the Chamber's discretion, and files the present Notice of Appeal in respect of the acts of Contempt of the Tribunal by Hélène Moenback, Kitila Makumbo, Aaron Musonda, Pierre Duclos, Collette Murebwayire and Loretta Lynch.

GROUNDS OF APPEAL

ERRORS OF LAW

Appeal Ground 1: In declining to investigate/prosecute persons working for the ICTR-OTP for contempt of the Tribunal, the Trial Chamber applied an incorrect legal standard to the issue of the reasonable discretion a Trial Chamber can exercise in decisions pursuant to Rule 77 Contempt of the Tribunal, generally, and, in particular, when it concluded that "the important goal of deterrence and denunciation" constitutes a valid consideration in the exercise of discretion under Rule 77 Contempt of the Tribunal, whereas there is no authority to support this finding;

Appeal Ground 2: In declining to investigate/prosecute persons working for the ICTR-OTP for contempt of the Tribunal, the Trial Chamber applied an incorrect legal standard when it accepted "that the members of the OTP may have acted on the mistaken belief that they were authorized to meet with the relevant defence witnesses" as though a general and vague written submission constituted evidence of an "underlying motive"; and furthermore, when it found that an alleged "mistaken belief", which is not a valid defence to contempt, constitutes grounds *not to* initiate contempt proceedings;

Appeal Ground 3: In declining to investigate/prosecute persons working for the ICTR-OTP for contempt of the Tribunal, the Trial Chamber applied an incorrect legal standard when it denied Mr Nshogoza's fundamental right to the presumption of innocence and the Trial Chamber's acquittals of all witness bribery charges in its legal analysis of the what constituted criteria for assessing the gravity of allegations of contempt;

Appeal Ground 4: In declining to investigate/prosecute persons working for the ICTR-OTP for contempt of the Tribunal, the Trial Chamber applied an incorrect legal standard when it confounded aspects of procedural and substantive criminal law to draw a factually and legally incorrect distinction between the gravity of the case of Léonidas Nshogoza and those of persons working for the OTP;

Appeal Ground 5: In declining to investigate/prosecute persons working for the ICTR-OTP for contempt of the Tribunal, the Trial Chamber applied an incorrect legal standard when it first decided that the contempt of persons working for the OTP was sufficiently serious to initiate proceedings in the form of requesting submissions by the Parties and then reconsidered this decision in the Impugned Decision, although it did not have before it any new material circumstances warranting reconsideration.

ERROR OF FACT

Appeal Ground 6: In declining to investigate/prosecute persons working for the ICTR-OTP for contempt of the Tribunal, the Trial Chamber reached a patently incorrect conclusion of fact when it found that “[t]he testimonies of witnesses Seminega, Nyagatare and Nyarwaya do not support such serious allegations against members of the OTP who met with them”, although it heard the testimony of witness Seminega and read the submissions of the Defence which support the allegation of contempt for intimidation by OTP members punishable under Rule 77(A)(iv).

ABUSE OF DISCRETION

Appeal Ground 7: The Impugned Decision is so unfair and unreasonable that it constitutes an abuse of discretion and exposes a double standard whereby the Trial Chamber found that a violation of a witness protection order by Mr Nshogoza warranted *the heaviest custodial sentence ever imposed by an ad hoc Tribunal* (at the time), and then declined to initiate contempt proceedings for *multiple* instances of witness protection order violations by OTP members;

Appeal Ground 8: The Impugned Decision is so unfair and unreasonable that it constitutes an abuse of discretion and stands in stark contrast to its own jurisprudence in the case of Mr

Nshogoza including, *inter alia*, the consideration of a possible “underlying motive” of mistaken belief by OTP members as grounds not to *investigate* contempt (whereas no assessment of an underlying motivation was made in the case of Mr Nshogoza) and the absence of a consideration as to whether OTP violations of witness protection measures were “knowing and willful” (whereas in *Nshogoza* that “the knowing and willful violation of protective measures ordered by the Trial Chamber is *punishable* as contempt of the Tribunal”);

Appeal Ground 9: The Impugned Decision is so unfair and unreasonable that it constitutes an abuse of discretion in that it fails to substantiate or attempt to explain why the Trial Chamber accepts the Prosecution’s submission that the interviews of the concerned defence witnesses may have been undertaken by members of the OTP on a good faith basis whereas earlier in the Impugned Decision the Chamber recalled that “mistake of law is not a valid defence to contempt, and does not excuse a violation of a protective order” (and the Chamber did not accept the clear explanations of Mr Nshogoza and witness Aicha Condé), nor does the Chamber substantiate nor explain why it did not “consider that pursuit of contempt proceedings is necessary to achieve the important goals of deterrence and denunciation in this case”;

Appeal Ground 10: The Impugned Decision is so unfair and unreasonable that it constitutes an abuse of discretion in that the Trial Chamber acknowledged that the Defence moved the Chamber to prosecute persons working for the OTP and that a *prima facie* case (for prosecution) had been met, however, it did not decide this motion (without explaining why) and instead limited its analysis to the question whether “the Chamber [should] direct the Registrar to Appoint Amicus Curiae to Investigate Possible Contempt”⁸ when it found *prima facie* contempt by members of the OTP;

Appeal Ground 11: The Impugned Decision is so unfair and unreasonable that it constitutes an abuse of discretion in that the Trial Chamber declined to continue proceedings against OTP members after it recognized the “possibility for abuse”⁹ and had before it *several examples* of such OTP contempt;

⁸ Impugned Decision, p. 5.

⁹ Impugned Decision, para. 17.

Appeal Ground 12: The Impugned Decision is so unfair and unreasonable that it constitutes an abuse of discretion in that the Trial Chamber limited its examination of OTP conduct to submissions on the violation of witness protection orders by OTP members, and was silent on all Defence submissions of OTP intimidation of and threats to witnesses GAA and GEX/A7 (when their status as protected witnesses was an irrelevant consideration), and submissions of OTP intimidation of witness Seminega pursuant to Rule 77(A) (iv) and (v), and thereby effectively suppressed evidence of OTP intimidation and threats in the context of the Defence's motion for prosecution of such conduct, calling into question the integrity of the Tribunal

CONCLUSIONS SOUGHT

GRANT this Appeal;

REVERSE the Impugned Decision;

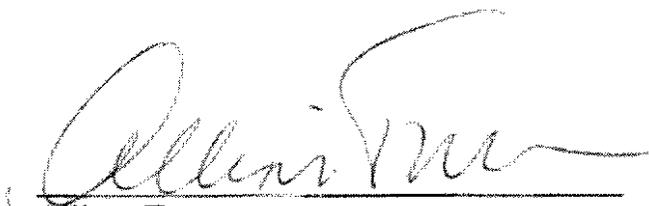
DIRECT the Trial Chamber or the ICTR Registrar to appoint an *Amicus Curiae* to initiate and execute contempt proceedings against Hélène Moenback, Aaron Musonda, Kitila Mukumbo, Pierre Duclos, Collette Murebwayire for violations of witness protection orders; and

DIRECT the Trial Chamber or the ICTR Registrar to appoint an *Amicus Curiae* to initiate and execute contempt proceedings against Hélène Moenback, Aaron Musonda, Kitila Mukumbo, Pierre Duclos, Collette Murebwayire, and Ms Loretta Lynch for threats to and intimidation of witnesses pursuant to Rule 77(A)(iv) and (v).

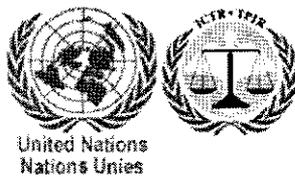
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THE WHOLE respectfully submitted,

10 December 2010

A handwritten signature in black ink, appearing to read "Allison Turner", written over a horizontal line.

Allison Turner
Counsel for Léonidas NSHOGOZA



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

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From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence ALLISON TURNER (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. LÉONIDAS NSHOGOZA			Case Number: ICTR-2007-91-AR
Dates:	Transmitted: 10 December 10		Document's date: 10 December 2010	
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Title of Document:	Leonidas Nshogoza's Notice of Appeal			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte <input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input checked="" type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities		

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

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<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
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