

ICTR-01-74-R
(29-8-2011)
(605/A-595/A)

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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APPEALS CHAMBER

Before: Judge Patrick Robinson, President

Registrar: Mr. Adama Dieng

Date filed: 29 August 2011

FRANÇOIS KARERA

v.

THE PROSECUTOR

Case No. ICTR-01-74-R

JUDICIAL RECORDS ARCHIVES
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PROSECUTOR'S RESPONSE

TO THE « REQUETE RELATIVE AU RECOURS GRACIEUX CONTRE LA DÉCISION DU 28 FEVRIER 2011 À LA DEMANDE EN RÉVISION ET À LA DÉPOSITION D'AUTRES FAITS NOUVEAUX DÉCOUVERTS RÉCEMMENT ».

Office of the Prosecutor

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The Applicant

François Karera

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A. OVERVIEW OF THE APPLICATION

1. On 15 August 2011, François Karera, filed a consolidated motion namely “*Requête relative au recours gracieux contre la décision du 28 février 2011 à la demande en révision et à la déposition d’autres faits nouveaux découverts récemment*” (the “Motion”), seeking a reconsideration of the Appeals Chamber Decision of 28 February 2011¹(“Impugned Decision”) and a review of the judgment rendered by the Appeals Chamber on 2 February 2009² (the “Final Judgement”)

2. He seeks reconsideration on the claim that he was deprived of his right to a fair hearing. He argues that had the Appeals Chamber considered the Judgement in the Nyamata case, Munyeshuli’s Affidavit, Renzaho’s statement and the book “*La mort ne veut pas de moi*” written by Yolande Mukagasana the Chamber would have reached a different conclusion. He further argues that the Appeals Chamber’s decision not to consider the aforementioned documents on the basis that they were raised for the first time in Karera’s reply, is inconsistent with the provisions of Rule 85.³

3. Moreover, Karera seeks further review of the final judgement on the basis that he has found new information which he alleges was not available to the Trial or Appeals Chamber when they rendered their respective judgements.⁴

4. In view of the fact that the Motion seeks two remedies, namely, reconsideration and review, the Motion has two applicable deadlines. The Prosecutor has respectfully taken the 40-days time-line applicable to request for Review pursuant to Rule 120 (B) of the Rules.

¹ Decision on Requests for Review and Assignment of Counsel, 28 February 2011.

² Karera, Appeals Judgment, Case No. ICTR-2001-74-A, 2 February 2009.

³ Paras.14-15, 36-37, 51 of the Motion.

⁴ Paras. 19-35, 40-50 and 54-66 of the Motion.

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B. REQUEST FOR RECONSIDERATION:

5. Karera's Request for reconsideration is flawed since it has no basis in law. It is established Tribunal jurisprudence that decisions rejecting requests for review are final decisions closing the proceedings and, as such, are not subject to reconsideration.⁵

6. Moreover, Karera's reference to Rule 85 in his Motion is also misguided. The Prosecutor recalls that any request for review is governed by Rule 120 which does not provide any possibility for the respondent to file a rejoinder. As a result, Karera's reliance upon Rule 85 to contend that the Prosecutor was entitled to file a rejoinder but chose not to do so is erroneous.⁶

7. Karera has therefore not demonstrated any alleged error made by the Appeals Chamber when it declined to consider issues Karera raised for the first time in his reply, thus depriving the Prosecutor of the opportunity to respond to them.⁷

C. REQUEST FOR REVIEW

Applicable Law

8. For a Chamber to grant the exceptional remedy of review of its final decision, the moving party must demonstrate *all* of the following: (i) that there is a new fact; (ii) that the new fact must not have been known to the moving party at the time of the proceedings before the Trial Chamber or the Appeals Chamber; (iii) that the absence of discovery of the new fact must not

⁵ The Prosecutor v. *Niyitegeka*, Case No. ICTR- 96- 14- R, "Decision on Motion for Reconsideration of Fifth Review Decision", C) 25 March 2010, para. 5 citing "The Decision on Request for Reconsideration of the Decision on Request for Review", 27 September 2006, p. 3, the Appeals chamber defined a final judgment as a decision which terminates the proceedings in a case. *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision of the Prosecutor's Request for review or reconsideration, 31 March 2000, para.49

⁶ Request, para 14.

⁷ Paras 21 and 27, of the Impugned Decision.

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have been through the lack of due diligence on the part of the moving party; and (iv) that the new fact, if proved, could have been a decisive factor in reaching the original decision.⁸ These criteria are cumulative.⁹ However, in “wholly exceptional circumstances”, a Chamber may consider reviewing its decision, despite failure to meet criteria (ii) and (iii), “if ignoring the new fact would result in a miscarriage of justice.”¹⁰

9. The Appeals Chamber has defined a “new fact” as “new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings”.¹¹ The requirement that the new fact was not at issue means that it must not have been among the factors that a Chamber could have taken into account in reaching its verdict.¹² Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.¹³

Submissions in Summary

10. Karera’s request for review is unfounded, and should be dismissed in its entirety, for the following reasons in summary: Karera does not produce

⁸ *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006 (“*Niyitegeka* First Review Decision”), para. 6, and footnotes 3 - 8; *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 6 March 2007 (“*Niyitegeka* Second Review Decision”), paras. 4, 5 and footnotes 11-14 with supporting jurisprudence; *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008 (“*Niyitegeka* Third Review Decision”), paras. 13, 14 and footnotes 43 – 48 with supporting jurisprudence; *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review, 22 April 2009 (“*Niyitegeka* Fourth Review Decision”), para. 21 and footnote 38 with supporting jurisprudence.

⁹ *Niyitegeka* First Review Decision, para. 7.

¹⁰ *Niyitegeka* First Review Decision, para. 7; *Niyitegeka* Fourth Review Decision, para. 21 and footnote 39 with supporting jurisprudence.

¹¹ *Niyitegeka* First Review Decision, para. 6 and footnote 3 with supporting jurisprudence.

¹² *Niyitegeka* Fourth Review Decision, para. 22 and footnote 41 with supporting jurisprudence.

¹³ *Naletilić v. The Prosecutor*, Case No. IT-98-34-R, Decision on Mladen Naletilić’s Request for Review, 19 March 2009 (“*Naletilic* Review Decision”), para. 11 and footnote 22; *Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 (“*Rutaganda* Review Decision”), para. 9.

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any of the documents he seeks to rely on as containing the alleged new facts. This alone renders his Motion inadmissible. Moreover, Karera does not demonstrate that any of the alleged information he seeks to rely on in the Motion, is a “new fact” within the meaning of Rule 120. As will be shown below, the issues Karera raises were litigated not only at trial, and appeal, but also in his previous request for review and additional evidence motions. Karera does not bring any thing new. To the contrary, he is impermissibly attempting to re-litigate issues that were addressed previously.

Submissions in Detail

Karera’s failure to produce documents makes it impossible for the Appeals Chamber to determine whether they constitute new facts.

11. The Prosecutor notes Karera’s reference to: an alleged report and statements made by BNF;¹⁴ a *Gacaca* judgment convicting Gasana Djuma, the *sous-préfet* of Bugesera;¹⁵ statements from survivors’ collected by Jean Hatzfeld; an affidavit from Father Etienne Levie;¹⁶ a list of people killed in Rushashi during the events;¹⁷ the *Gacaca* reports of Ntarama, Nyamirambo and Rushashi disclosed in May 2011;¹⁸ and a book authored by Yolande Mukagasana, Joseph Murekezi’s wife.¹⁹

12. The Prosecutor observes that none of the said material was attached to the Motion to substantiate Karera’s submissions. This makes it impossible for the Appeals Chamber to render a thorough analysis of his claim and to

¹⁴ Para. 19 of the Motion.

¹⁵ Paras. 27-28 of the Motion.

¹⁶ Paras. 31, 33 of the Motion.

¹⁷ Para. 54 of the Motion.

¹⁸ Para. 62 of the Motion.

¹⁹ Paras. 41, 45 of the Motion.

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fully assess whether they constitute new facts as alleged. On that basis, the Prosecutor asks the Appeals Chamber to dismiss his request.²⁰

Karera's attempt to re-litigate arguments that failed in appeal or review is impermissible and an abuse of process

13. In the event that the Appeals Chamber chooses to determine the application on its merits in the absence of the required documents, the Prosecutor wishes to observe the following:

14. Karera alleges that he was not mentioned in the results of investigations that were allegedly conducted by BNF: in Ntarama, Rushashi and Nyamirambo;²¹ in the *Gacaca* Judgment and testimony of Gasana Djuma former *sous-prefet* of Bugesera;²² in the statements of survivors from Nyamata-Ntarama collected by journalist Jean Hatzfeld and an affidavit from Father Etienne Levie;²³ and the *Gacaca* court reports of Ntarama, Nyamirambo and Rushashi.²⁴ He thus contends that these are new facts under Rule 120 that warrants a review. The Prosecutor submits Karera's arguments are flawed, and his application must fail. It is noteworthy that that the Appeals Chamber has already ruled twice that the issue of Karera's presence at Ntarama and his participation in the crimes committed there

²⁰ *Eliezer Niyitegeka v The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for review, 12 March 2009, In para. 46, the Appeals Chamber stated that it was not in a position to properly assess the merits of *Niyitegeka's* request regarding the additional statements since he did not provide them. In the absence of relevant material, the Appeals Chamber was not only unable to fully assess whether they constituted "new facts", but were also unable to order their admission into the record. Further, the fact that *Niyitegeka* elected not to attach the additional statements hindered the Appeals Chamber's ability to provide a thorough analysis of his claim that the additional statements constituted "new facts" and thwarted his own request to have the statements admitted for purposes of review. See also, *Simeon Nchamihigo v Prosecutor*, Case No. ICTR-2001-63-A, Decision on Simeon Nchamihigo's Second Motion for Leave to present Additional Evidence on Appeal, 28 September 2009, para. 16. In this case the Applicant attached a report that was illegible and the Appeals Chamber stated that it is not possible to conclude with certainty that Mr. Nchamihigo's name did not appear in the original report.

²¹ Paras. 19-25 of the Motion.

²² Paras. 26-29 of the Motion.

²³ Paras. 30-35 of the Motion.

²⁴ Paras. 61-66 of the Motion.

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were extensively litigated at trial and on appeal.²⁵ As recalled by the Appeals Chamber, Karera's conviction for the Ntarama events was based on four Prosecution witnesses whom the Trial Chamber found credible and corroborative of each other.²⁶ On his part, Karera called five witnesses who testified that he was neither present nor involved in the attack at Ntarama Church.²⁷ The Trial Chamber found that the testimonies of the defence witnesses carried limited weight.²⁸ Like his previous motions for the admission of additional evidence and for review, Karera's present Motion does not add anything new in terms both of evidentiary material, and argument. His application for review must thus fail.

15. Similarly, Karera's request for review in relation to the identity of the individuals who killed Joseph Murekezi in Nyamirambo, must fail because he is re-litigating a matter that failed at trial, appeal and in his previous review motion. Karera alleges that, according to an extract quoted by the Appeals Chamber in the Impugned Decision, Prosecution Witness BGM is one of the three men who killed Joseph Murekezi.²⁹ In that decision, the Appeals Chamber observed that Karera was relying on the Mukagasana Extract to contest the identity of the attackers of Murekezi and to show that he was not implicated in the murder of Murekezi.³⁰ The Appeals Chamber has already considered the passage in the context of and conjunction with other statements made by Mukagasana, concluding that the extract when read in context, does not describe Murekezi's death and that it was not contradictory

²⁵ See *The Prosecutor v François Karera*, Case No. ICTR-01-74-A, Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 29 October 2008, para.11; Decision on Requests for Review and Assignment of Counsel, para. 29 October 2008, para.11.

²⁶ Decision on Requests for Review and Assignment of Counsel, para. 29 October 2008, para.23; Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, para. 11.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Para 40-44 of the Motion

³⁰ Para. 29 of the Motion

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to the Trial Chamber's findings.³¹ Consequently, Mukagasana book does not bring anything new that was not litigated at trial, review and previous review motion.³² Thus, Karera's application for review on this point must fail.

16. Karera's further requests for review based the claim that that since Renzaho was found liable as a superior of communal policemen, *Interahamwe*, militias and armed civilians in Kigali *préfecture* by the Trial and Appeals Chamber, Karera is therefore not liable as a superior of the police deployed in Nyamirambo and the killing of Murekezi.³³ This argument is devoid of merit. Firstly, Karera's authority over the three communal policemen that were stationed at his house in Nyamirambo during the events of 1994 was litigated at trial and appeal,³⁴ and his Motion does not bring anything new to justify a review. Secondly, the Prosecutor notes that the fact that Renzaho was charged and found liable as a superior of communal policemen (among others) does not exclude Karera's superior responsibility in relation to the same group of perpetrators.³⁵ In that regard, the trial and appeal judgements of Renzaho and his indictment do not bring in any new fact.

17. Karera further alleges that paragraph 2E of the Renzaho Indictment states that no person could have left Kigali without an authorization signed by the latter during the events. He therefore infers that it was impossible for Gakuru to travel out of Kigali without getting a pass from *Préfet* Renzaho.³⁶ The Prosecutor observes that the issue of the murder of Gakuru was examined and decided by the Trial and Appeals Chamber Judgements.³⁷

³¹ Para. 29 of the Motion.

³² Trial Judgment, paras 186- 188, 192; Appeal Judgment, paras. 193-195.

³³ Paras. 47-50 of the Motion

³⁴ Trial Judgment, paras. 110-122; Appeal Judgement, paras. 96-140.

³⁵ *Prosecutor v. Krnojelac* (ICTY Trial Judgement), para. 93.

³⁶ Para. 57-58 of the Motion

³⁷ Trial Judgment, paras 88-122, 186-192, 439-456; Appeal Judgment paras. 96-140, 188-205, 298-323). Impugned Decision, para. 35

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18. Indeed, the matter was the subject of his previous review motion. In the Impugned Decision, the Appeals Chamber found that the issue of Gakuru's murder was litigated at trial and the Trial Chamber found on the basis of credible eyewitness testimony that Gakuru was killed in April or May 1994.³⁸ Karera does not bring any thing new in his Motion to justify a review of the judgement. The fact that the Renzaho indictment alleges that people wishing to leave Kigali *needed authorization*, does not mean that in fact Renzaho issued a travel document to whoever travelled from Kigali. Therefore, the Renzaho indictment can not be considered to provide new information of an evidentiary nature of a fact that was not in issue during the earlier proceedings, nor does it constitute any material that would have impacted the trial judgement even if it had been considered by the Trial Chamber.

19. Therefore, Karera has not established the existence of a new fact justifying review, and is attempting to re-litigate matters that failed not only at trial and appeal, but also in relation to his previous motions to the Appeals Chamber for review and admission of additional evidence. As the Appeals Chamber underscored, review proceedings are not an opportunity to re-litigate unsuccessful appeals or requests for review.³⁹ Karera's Motion is thus impermissible and an abuse of process.

The alleged failure of the material Karera relies to mention his name as one of the perpetrators of crimes, is not a new fact for the purpose of Review under Rule 120

20. Karera alleges that he was not mentioned in the results of investigations that were allegedly conducted by BNF: in Ntarama, Rushashi

Witness BMR, T.1 February 2006, pp 5-7, Witness BMO, T 2 February 2006, pp59-60, Witness BMM T. 1 February 2006, pp73-74. These eye witnesses testified on the presence of Gakuru in Rushahsi during the events.

³⁸ Para. 35 of the Impugned Decision

³⁹ *Eliezer Niyitegeka v The Prosecutor*, Case No. ICTR-96-14-R; Decision on Third Request for Review, para 7; Decision on First Request for review, para. 72; Decision on Fifth Request for review, 27 January 2010, para. 10;

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and Nyamirambo;⁴⁰ in the Gacaca Judgment; and testimony of Gasana Djuma former *sous-prefet* of Bugesera;⁴¹ in the statements of survivors collected by journalist Jean Hatzfeld;⁴² an affidavit from Father Etienne Levie; and the *Gacaca* court reports of Ntarama, Nyamirambo and Rushashi.⁴³ He contends that consequently, these are new facts under Rule 120 that warrants a review.

21. Karera also makes reference to some passages in the Renzaho trial and appeal judgments to purport that Renzaho was the only superior to the policemen and population of Nyamirambo from October 1990 to July 1994.⁴⁴ He alleges that his name is not mentioned in these judgments as taking the office of *sous-préfet* or acting *préfét* in Nyamirambo during the events, therefore he could not have had any authority over policemen and population in Nyamirambo during the events.⁴⁵ In addition, he argues that some of the abovementioned documents⁴⁶ amounted to exculpatory evidence requiring prior disclosure under Rule 68.

22. The Prosecutor submits that the non-mentioning of Karera in these alleged documents is irrelevant either to justify a disclosure under Rule 68 or to contend that it constitutes new facts warranting a review.⁴⁷ Its further noted that the focus of these alleged documents was not on Karera.

⁴⁰ Paras. 19-25 of the Motion

⁴¹ Paras. 26-29 of the Motion

⁴² Paras. 30-35 of the Motion

⁴³ Paras. 61-66 of the Motion

⁴⁴ Para. 48 of the Motion.

⁴⁵ Para. 48 of the Motion.

⁴⁶ Paras. 21, 27-28 of the Motion. Karera refers to the alleged BNF's report and statements as well as the *Gacaca* Judgment in the case of Gasana Djuma.

⁴⁷ *Simeon Nchamihigo v Prosecutor*, Case No. ICTR-2001-63-A, Decision on Simeon Nchamihigo's Second Motion for Leave to present Additional Evidence on Appeal, 28 September 2009, para. 16. *The Prosecutor v. Kajelijeli*, Case No. Case No. ICTR-98-44A-A, Decision on Second Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, Appeals Chamber, 7 march 2005.

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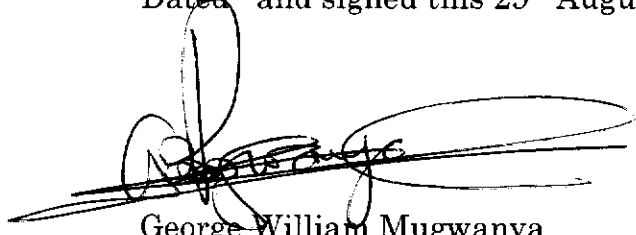
D. CONCLUSION

23. In conclusion, Karera has failed to demonstrate the existence of any “new facts” warranting review. It should be recalled that review of a final judgment is an exceptional procedure, which does not provide an opportunity for any party to re-litigate matters that failed at trial and appeal without demonstrating that the material sought to be brought to the attention of the Chamber are new and could or would have had an impact on the judgement if they were available.⁴⁸ As shown above, Karera’s Motion seeks to re-re-litigate matters that were not only addressed at trial and appeal, but also in relation to his previous requests for review and admissions of new evidence. The Motion does not any thing new both in terms of evidence and argument. It follows that the present Motion is impermissible and an abuse of process.

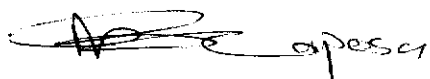
E. RELIEF SOUGHT

24. For all of the foregoing reasons, the Prosecutor respectfully requests that the Appeals Chamber dismisses Karera’s Request for Reconsideration and Review in its entirety.

Dated and signed this 29 August 2011, at Arusha, Tanzania.



George William Mugwanya
Senior Appeals Counsel



Memory Maposa
Appeals Counsel.

⁴⁸ *Niyitegeka* Fourth Review Decision, para. 21; *Niyitegeka* Fifth Review Decision, para. 10



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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