

ICTR-98-44C-A
23-02-2007
(14A - 8/A)

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding

Registrar: Mr. Adama Dieng

Date filed: 23 February 2007

THE PROSECUTOR

v.

ANDRE RWAMAKUBA
Case No. ICTR-98-44C-A

JURIMETRIC SERVICES
2007 FEB 23 P 1:01

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PROSECUTOR'S NOTICE OF APPEAL

Office of the Prosecutor

Hassan Bubacar Jallow
James Stewart
George Mugwanya
Neville Weston

Counsel for Appellant

Mr. David Hooper
Mr. Andreas O'Shea

THE PROSECUTOR hereby files a Notice of Appeal, pursuant to Article 24 of the Tribunal's Statute and Rule 108 of the *Rules of Evidence and Procedure*, against a decision of Trial Chamber III, namely, *Decision on Appropriate Remedy*, dated 31 January 2007.¹

IN THE GROUNDS OF APPEAL that follow further below a reference to an error on a question of law means a question of law invalidating the decision, within the scope of Article 24(1)(a) of the Statute, unless otherwise specified, and a reference to an error of fact means an error of fact, which has occasioned a miscarriage of justice, within the scope of Article 24(1)(b) of the Statute, unless otherwise specified.

FURTHER, each ground of appeal is numbered and described by a heading, and indicates the nature of the error or errors, and the relief sought on the appeal.

AND FURTHER, paragraph references are to paragraphs in the Impugned Decision of the Trial Chamber.

THE PROSECUTOR GIVES NOTICE OF THE FOLLOWING GROUNDS OF APPEAL:

Ground 1- The Trial Chamber erred in making an order for compensation against the Tribunal itself, or its organ, for wrongs allegedly committed by the Tribunal. The Trial Chamber lacks the power to make such order.

1. This ground of appeal affects the decision to award financial compensation, and other orders entered by the Trial Chamber in the Impugned Decision.
2. The Trial Chamber committed errors of law in relation to paragraphs 16 through 18, and paragraphs 35 through 79. In a nutshell, the Trial Chamber committed an error of

¹ The Prosecutor respectfully brings this appeal pursuant to Article 24 and Rule 108 of the Rules, given that the decision (hereinafter "the Impugned Decision") flows from a final Judgement rendered by the Trial Chamber on 20 September 2006, and more specifically in relation to the acquittal of Rwamakuba (hereinafter "the Respondent"). It follows that the law just mentioned governs the instant appeal, as opposed to that in relation to interlocutory appeals. Given that the Judgement of 20 September 2006 did not deal with the award of compensation, and only invited the Respondent, if he so wished, to file an application for compensation after the Judgement, the Prosecutor could not have brought the instant appeal immediately after the Judgement, but only after the delivery of the instant Impugned Decision. The Prosecutor respectfully submits that the time prescribed in the Rules of Procedure and Evidence began to run after the delivery of the Impugned Decision.

law to award financial and other compensation against the Tribunal itself, or its organ, for wrongs allegedly committed to an individual by the Tribunal itself, in the absence of a grant of such a power to any Trial Chamber, either by the Tribunal's Statute, or by the Rules of Procedure and Evidence.

3. The Trial Chamber's reliance on Appeals Chamber jurisprudence is misdirected, given *inter alia* the following: The jurisprudence relied on was reached *per incuriam* or *ex improviso*. For instance, the invocation of Rule 5 of the Statute is not correct. That Rule is limited to non-compliance by *a party to a case* with the Rules (where relief is subject to proof of material prejudice), and does not extend to empower Trial Chambers to order financial compensation to individuals the *Tribunal itself* is alleged to have wronged.

4. Even assuming non-compliance with Rule 5 extends to other parties, including the Tribunal, the Rule restricts the award of relief to only where there is proof of material prejudice suffered by the party in question. In the instant case, the Trial Chamber itself found that the alleged breach did not cause the Respondent a serious or irreparable prejudice. No financial compensation should thus have been awarded by the Trial Chamber.

5. Moreover, elsewhere, the President of the Appeals Chamber, like the President of the Tribunal, has expressly stated that there is absence of a power for the Tribunal to award financial compensation. This is the correct position at law. As noted above, the Tribunal's Statute and the Rules do not provide for such power. The drafting history of the Statute provides further support for this position.

6. Given, *inter alia*, the explicit provisions of the Tribunal's constituent Statute and the Rules of Procedure and Evidence that exclude financial compensation to persons allegedly wronged by the Tribunal, as well as the further support for this position that can be discerned from the relevant drafting history of the Tribunal's instruments, the Trial Chamber's reliance on inherent powers its supposedly had to grant such compensation, was an error.

7. Furthermore, even assuming the jurisprudence invoked by the Impugned Decision were to be accepted, the same does not advance the Appellant's case. The jurisprudence does not stand for the proposition that any failing, or delay (for instance, assigning counsel), constitutes a violation, or one for which financial compensation must follow. The gravity, or material prejudice suffered by an accused, are material considerations. Moreover, the factual bases of the alleged violations in the jurisprudence invoked by the Impugned Decision are distinguishable from those alleged in the instant case. In the instant case, the Trial Chamber itself found that the alleged breach did not cause the Respondent a serious or irreparable prejudice.

8. In any case, and without prejudice to the foregoing, under international law, it appears that the award of financial compensation is reserved to exceptional circumstances. The alleged failing in the instant case does not meet the exceptionality test.

9. The Appeals Chamber should correct the errors by reversing the decision of the Trial Chamber.

Ground 2—In the alternative and without prejudice to the first ground of appeal, the Prosecutor submits that the Trial Chamber committed errors by grounding its award of financial compensation on an incorrect evaluation of the seriousness of the alleged violation and failing to take into account material considerations

10. This ground of appeal affects the decision to award financial compensation, and other orders entered by the Trial Chamber in the Impugned Decision.

11. The Trial Chamber committed errors of law and of fact, in relation to paragraphs 16 through 18, and paragraphs 35 through 79. In a nutshell, the Trial Chamber committed an error by grounding its award of compensation, financial and other, on the basis of an incorrect evaluation of the seriousness of the alleged violation, and a failure to take into account relevant factors.

12. The Trial Chamber erred by holding that any delay to assign duty counsel to an accused, regardless of the reasons for such delay, is a violation that entitles the accused to a remedy. The Trial Chamber misreads the relevant rules, including Rule 44 *bis*, and

generally established international jurisprudence, particularly international human rights jurisprudence as developed under global and regional human rights regimes.

13. The Trial Chamber failed to take into account several material factors explaining the delay. In the first place, the assignment of Duty Counsel is preceded by a determination whether or not the accused is an indigent, or whether the accused preferred to engage his or her own counsel. As soon as the Respondent arrived in Arusha, the Registry embarked on that determination, including by asking the Respondent to advise whether or not he was indigent or preferred to engage his own counsel.² At the same time, the Registry initiated the procedure for assigning Duty Counsel. As explained by the Registrar in his "Submissions Regarding Andre Rwamakuba's Request for an Appropriate Remedy,"³ the Respondent took about 12 days to respond to the first inquiry. In his response, the Respondent asked for three weeks to consult his family. It was not until 17 February 1999 that the Respondent responded to the Registrar, and requested counsel to be assigned. In total, the Respondent took about four months to indicate that he was indigent, and/or whether he preferred to engage his own counsel. This delay caused by the Respondent himself is pertinent in a determination of the reasonableness of the delay in assigning him duty counsel. Established international human rights jurisprudence in relation to alleged violations of rights due to delays, (e.g., in trying an accused), holds that the conduct of an accused is a material consideration in any determination as to whether the delay was reasonable. Indeed, the jurisprudence holds that a delay arising from an accused's conduct will serve to lengthen the period of reasonableness.

14. Moreover, Rule 44 *bis* (which deals with assignment of duty counsel) and in particular paragraph (D) expressly takes into account practicalities, implying that not every delay will constitute a violation, and more so, one that entitles an accused to a remedy. In other words, it obligates the Registrar *as soon as practicable* to summon counsel to represent the accused or suspect until a counsel is engaged by the accused or suspect, or assigned under Rule 45. Preceding paragraphs of Rule 44 *bis* in general do not rule out the importance of practicalities, including availability of duty counsel at the

² It is noteworthy that the Registry also furnished the Respondent with a statement of the rights possessed by an accused.

³ Of 2 November 2006.

time an accused or suspect is transferred to the Tribunal. Importantly, a consideration of those practicalities is critical in the instant case, given that at the time of the Respondent's transfer to the Tribunal, Rule 44 *bis* had just been included in the Rules, and thus the Registrar was in the infant stages of operationalizing the duty counsel programme. The Registrar, and indeed the Tribunal, does not have its own lawyers or "public defenders" to act for accused, and availability of duty counsel depends on application by lawyers, as expressly provided for in Rule 44 *bis* (A). The Trial Chamber erred by not taking these factors into account, and/or by giving them limited weight.

15. The Appeals Chamber should correct the errors by reversing the decision of the Trial Chamber.

Ground 3 – The Trial Chamber erred by awarding compensation notwithstanding that the Trial Chamber at the same time had found that the Respondent had suffered no material prejudice by the alleged delay

16. This ground of appeal affects the decision to award financial compensation, and other orders entered by the Trial Chamber in the Impugned Decision.

17. The Trial Chamber committed errors of law in relation to paragraphs 16 through 18, and paragraphs 35 through 79. In a nutshell, the Trial Chamber committed an error of law to award financial and other compensation to the Respondent while at the same time it had found that the Respondent had not suffered material prejudice. The award of financial compensation to the Respondent is irreconcilable with the finding that the Respondent had not suffered material prejudice.

18. The Appeals Chamber should correct the errors by reversing the decision of the Trial Chamber.

Ground 4: The Trial Chamber erred by grounding the award of compensation on the basis of alleged moral, psychological or emotional injury suffered by the Accused, given that there was no evidence to support such injury

19. This ground of appeal affects the decision to award financial compensation, and other orders entered by the Trial Chamber in the Impugned Decision.

20. The Trial Chamber committed errors of law in relation to paragraphs 16 through 18, and paragraphs 35 through 79, and more specifically paragraphs 73 and 79 of the Impugned Decision.

21. In summary, the Trial Chamber committed an error of law to award financial and other compensation to the Respondent on basis of alleged moral, psychological or emotional injury suffered by the Accused without evidence to support such injury. The Respondent in his "Application for Appropriate Remedy," of 23 October 2006, does not allege that he suffered any such injury. In any event, in the totality of the circumstances, no such injury could be inferred by the Trial Chamber. As submitted in grounds 2 and 3 above, throughout the time-frame of the alleged violation, the Respondent was informed of the nature of the charges against him, and the Registrar took steps to assign him counsel. The Respondent was never detained *incommunicado*.

22. Without prejudice to the foregoing, even assuming it could be inferred that the Respondent suffered some moral or emotional harm (and the Prosecutor submits that no such inference can be drawn from the circumstances), the alleged harm does not meet the exceptional circumstances under which financial and other compensation may be awarded.

23. The Appeals Chamber should correct the errors by reversing the decision of the Trial Chamber.

Such other grounds of appeal as this Chamber may authorize, on good cause being shown, pursuant to Rule 108, on a motion by the Prosecutor for a variation of these grounds of appeal.

DATED: 23 February 2007
Arusha, Tanzania.



Hassan Bubacar Jallow
Prosecutor.



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| No. of Pages: | 7 | Original Language: | <input checked="" type="checkbox"/> English | <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda |
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