

ICTR-96-13-R
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(42/A - 38/A)

International Criminal Tribunal for Rwanda

42/A
R



UNITED NATIONS
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APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun

Registrar: Mr. Adama Dieng

Date filed: 12 March 2009

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ALFRED MUSEMA

v.

THE PROSECUTOR

Case No. ICTR-96-13-R

**PROSECUTOR'S RESPONSE TO
MUSEMA'S REQUEST FOR REVIEW OF DECISION ON REQUEST
FOR ASSIGNMENT OF COUNSEL**

Office of the Prosecutor

Alex Obote-Odora
George W. Mugwanya

The Applicant

Alfred Musema

RESPONSE

41/A

1. On 9 March 2009, the Applicant, Alfred Musema, filed his *Requête de l'Appellant en revision de la « Decision on Request for Assignment of Counsel » de la Chambre d'Appel rendue le 27 février 2009* (Motion).¹ In this Motion, the Applicant seeks review of the Appeals Chamber's decision denying the Applicant's request for assignment of counsel to assist him with a potential request for review of the Appeal Judgement², arguing that:

- The Appeals Chamber erroneously considered that the Applicant did not file a Reply;³
- The Appeals Chamber erroneously considered that the Applicant failed to provide any information on the basis for a potential request for review.⁴

2. In response, the Prosecutor submits that the Applicant's Motion is without merit. The Appeals Chamber has consistently held that, as an extraordinary measure, review proceedings, governed by Article 25 of the Statute and Rules 120 and 121 of the Rules of Procedure and Evidence, are only available in relation to *final judgements*, namely decisions terminating the proceedings, and not with respect to interlocutory decisions.⁵ The Impugned Decision deals with the assignment of counsel, rather than the review itself. In essence, the proceedings will not effectively be terminated by this decision.⁶

¹ On 10 March 2009, the Registry distributed a Corrigendum, including the same Motion with Annexes.

² *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-R, Decision on Request for Assignment of Counsel, 27 February 2009 (Impugned Decision).

³ Motion, paras. 3-18. See also *Alfred Musema-Uwimana c. Le Procureur*, Affaire No. ICTR-96-13-R, Réplique du Requéérant à « Prosecutor's Response to Musema's Motion for Assignment of Counsel », filed on 23 February 2009, but dated 9 February 2009 (Reply).

⁴ Motion, paras. 19-28.

⁵ See *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 49; *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, para. 24; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-Misc.1, Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007, para. 21.

⁶ See *Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-R, Decision on Emmanuel Ndindabahizi's Urgent Request for Clarification of the Appeals Chamber's Decision of 24 September 2008, 27 February 2009, footnote 6 (*Ndindabahizi* Decision), in which the Appeals Chamber differentiated Ndindabahizi's request for reconsideration of an Appeals Chamber decision denying his request for assignment of counsel from a request once filed by *Niyitegeka* to reconsider an Appeals Chamber's decision rejecting his requests for review of *Niyitegeka*'s Appeal Judgement. In *Niyitegeka*, the Appeals Chamber considered that it had no power to entertain his request for reconsideration, since the impugned decision was a final one closing the proceedings in that case (*Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27

Therefore, the Prosecutor submits that the Appeals Chamber has no power to review the Impugned Decision.

3. Alternatively, if the Applicant's Motion were viewed as a request for reconsideration of the Impugned Decision (although the Motion is not properly construed as such), the Applicant has failed to show a clear error of reasoning on the part of the Appeals Chamber in dismissing his request for assignment of counsel under the Tribunal's legal aid scheme, or that reconsideration of the Impugned Decision is necessary in order to prevent an injustice.⁷

4. First, the alleged error with respect to the filing of a Reply does not warrant a reconsideration of the Impugned Decision.⁸ In his Reply, the Applicant does not provide any specific information on the nature of the alleged new facts in his possession that would justify the assignment of counsel at the expense of the Tribunal.⁹ Therefore, even if the Appeals Chamber would have taken the Reply into account, the reasoning of the Appeals Chamber would not have changed. As a result, the Applicant has not demonstrated a "clear error" in the Appeals Chamber's reasoning, nor the necessity of a reconsideration to prevent an injustice.

September 2006, pp. 2, 3). In *Ndindabahizi*, on the contrary, the Appeals Chamber dealt with his request for reconsideration since the proceedings were not effectively terminated by the impugned decision.

⁷ For the standard for reconsideration, see, e.g., *Ndindabahizi* Decision, p. 3, and footnote 7: "the Appeals Chamber has inherent discretionary power to reconsider its decisions if a clear error of reasoning has been demonstrated or if it is necessary in order to prevent an injustice."

⁸ See *supra*, footnote nr. 3. In this context, the Applicant also argues, in paragraph 4 of his Motion, that he has filed his Reply well within the time-limit of 4 days after receipt, on Thursday, 5 February 2009, of the Prosecutor's Response to Musema's Motion for Assignment of Counsel (arguably in compliance with paragraph 14 of the *Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal*, which might apply *mutatis mutandis* to motions after appeals from judgement). The Applicant argues though that Saturdays and Sundays are not included in the calculation of time, since these are non-working days of the Tribunal, and that therefore, his Reply was only due on Wednesday, 11 February 2009. It is noteworthy that, pursuant to paragraph 16 of the Practice Direction, the "[t]he time-limits prescribed under this Practice Direction shall run from, but shall not include the day upon which the relevant document is filed. Should the last day of a time prescribed fall upon a non-working day of the Tribunal it shall be considered as falling on the first working day thereafter." Therefore, if the Applicant would have received the Prosecutor's Response on Thursday 5 February 2009, his Reply was due on Monday, 9 February 2009, and not Wednesday, 11 February 2009. However, the Applicant submits, in paragraph 5 of his Motion, that he has filed his Reply for the first time on Monday, 9 February 2009, which would be within the time-limit of 4 days.

⁹ In paragraph 6 of the Reply, the Applicant notes that, if the Appeals Chamber would need the information in question, he would be willing to provide it. However, the Applicant did not present in his Reply the information on the basis for a potential request of review.

5. Second, the additional information provided now by the Applicant - for the first time in his Motion - with respect to nature of the alleged new facts does not justify either the exceptional remedy of reconsideration.¹⁰ Since the Applicant did not present this information before, the Applicant fails to show a clear error of reasoning on the part of the Appeals Chamber in denying his request for assignment of counsel, in the absence of information as to potential grounds for review justifying such an assignment.

6. Moreover, the additional information provided, in the Prosecutor's submission, could not have "satisf[ie]d the Appeals Chamber that [there] are potential grounds for review of the Appeal Judgement."¹¹ The Applicant seems to argue, for example, that the information with respect to a new witness who could testify on the breakdown of the Applicant's car, could bolster his alibi and challenge the credibility of Prosecution witnesses with respect to the mid-May attacks at Myira Hill.¹² These issues, however, have been litigated heavily at trial and on appeal,¹³ and, therefore, could not amount to a new fact, i.e. new information of an evidentiary nature of a fact that was not in issue during the trial or appeals proceedings.¹⁴ In addition, the other information the Applicant refers to, including the references to certain reports, do not provide any details as to potential grounds for review. It seems that the Applicant intends to argue that he is not mentioned in these reports, and therefore, not involved in events for which he has been convicted. The Prosecutor recalls that evidence which does not implicate an applicant in the same event does not necessarily raise a new issue, pursuant to Rule 120 of the Rules.¹⁵ Accordingly, the Applicant has failed to show a "clear error" in the Appeals Chamber's reasoning, nor the necessity of a reconsideration to prevent an injustice.

¹⁰ See *supra*, footnote nr. 4.

¹¹ Impugned Decision, p. 3.

¹² Motion, para. 25.

¹³ See, e.g., *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, paras. 254-318.

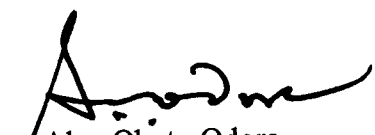
¹⁴ See, e.g., *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008, para. 14.

¹⁵ See, e.g., *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 35.

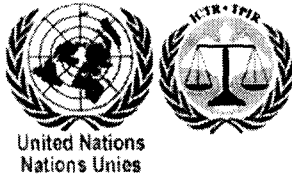
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7. For these reasons, the Prosecutor respectfully submits that the Motion should be dismissed in its entirety.

DATED 12 March 2009, at Arusha, Tanzania.



Alex Obote-Odora
Chief, Appeals and Legal Advisory Division



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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

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