



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

820/H

ICTR-01-72-A  
27<sup>th</sup> October 2009  
{820/H – 815/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 27 October 2009

ICTR Appeals Chamber  
Date: 27<sup>th</sup> October 2009  
Action: R. Jumbi  
Copied To: Concerned Judges,  
SLO's (ALO's Parties)

EM/Arusha, LSS,  
J. Y. J.

Simon BIKINDI

v.

THE PROSECUTOR

Case No. ICTR-01-72-A

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
COPIE CERTIFIÉE CONFORMÉ À L'ORIGINAL PAR MOI  
NAME / NOM: KEEI, KUMELIA, A. ARIARA  
SIGNATURE: [Handwritten Signature] DATE: 27 Oct. 2009

**DECISION ON MOTION FOR PARTIAL RECONSIDERATION OF  
DECISION ON REQUEST FOR ADMISSION OF ADDITIONAL EVIDENCE  
PURSUANT TO RULE 115 OF THE RULES**

Counsel for the Appellant:

Mr. Andreas O'Shea

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow  
Mr. Alex Obote-Odora  
Ms. Dior Fall

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of an oral motion submitted by Simon Bikindi during the Appeals Hearing on 30 September 2009 ("Motion")<sup>1</sup> seeking partial reconsideration of a decision of the Appeals Chamber made pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>2</sup> The Parties' oral submissions on the merits of the Motion were heard on the same day.<sup>3</sup>

#### A. Background

2. On 2 December 2008, Trial Chamber III convicted Mr. Bikindi of one count of direct and public incitement to commit genocide based on the evidence of Witnesses AKK and AKJ that he exhorted the killing of Tutsis on the Kivumu-Kayove road in Gisenyi Prefecture in late June 1994.<sup>4</sup> It sentenced him to 15 years of imprisonment.<sup>5</sup> Mr. Bikindi has appealed his conviction and sentence,<sup>6</sup> and the Prosecution has appealed his sentence.<sup>7</sup>

3. The Trial Chamber found, based on the evidence of Prosecution Witnesses AKJ and AKK, that Mr. Bikindi attended an MRND political rally at a football field in Kivumu in Gisenyi Prefecture "in 1993".<sup>8</sup> The Trial Chamber did not convict Mr. Bikindi based on this event.

4. In his Rule 115 Motion, Mr. Bikindi sought leave to call various witnesses and to admit several items of evidence provided by people who saw Mr. Bikindi and his dance troupe on tour in Germany between 2 and 28 June 1993.<sup>9</sup> He argued that this evidence undermined the overall credibility and reliability of the testimony of Witnesses AKK and AKJ that he attended the rally in Kivumu,<sup>10</sup> including testimony from Witness AKJ which placed this event on 15 June 1993.<sup>11</sup> He

<sup>1</sup> T. 30 September 2009 pp. 20, 55-58.

<sup>2</sup> Decision on Simon Bikindi's Motions to Admit Additional Evidence Pursuant to Rule 115 of the Rules, 16 September 2009 ("Impugned Decision"). The Impugned Decision dismissed four Defence motion to admit additional evidence or take judicial notice. Namely: Defence Motion to Admit Additional Evidence on Bikindi's Presence in Germany, 9 June 2009 ("Rule 115 Motion"); Defence Motion to Take Judicial Notice and/or Admit Additional Evidence, 9 June 2009; Defence Motion to Admit Additional Evidence on Sentencing, 9 June 2009; Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu, 9 July 2009 and *Corrigendum* to Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu, 10 July 2009.

<sup>3</sup> T. 30 September 2009 pp. 55-59.

<sup>4</sup> Trial Judgement, paras. 426, 441.

<sup>5</sup> Trial Judgement, para. 460.

<sup>6</sup> Notice of Appeal, 31 December 2008.

<sup>7</sup> Prosecutor's Notice of Appeal, 31 December 2008.

<sup>8</sup> Trial Judgement, paras. 141, 183.

<sup>9</sup> Rule 115 Motion, paras. 13, 14, Annexures A to C.

<sup>10</sup> Rule 115 Motion, paras. 13, 15-22, 31, 32, 35; Defence Reply Re the Admission of Additional Evidence on Bikindi's Presence in Germany, 22 July 2009, paras. 22-25 ("Reply to Rule 115 Motion").

further submitted that this evidence demonstrated that the Trial Chamber erred in accepting other aspects of their evidence in convicting him.<sup>12</sup>

5. In its Impugned Decision, the Appeals Chamber denied Mr. Bikindi's request.<sup>13</sup> The Appeals Chamber specifically found that Mr. Bikindi failed to demonstrate that the evidence was not available at trial, that the ineffective assistance of counsel explained the "failings in earlier investigations"<sup>14</sup> or that, had the proffered evidence been adduced at trial, it would have had an impact on the verdict.<sup>15</sup> It concluded that the denial of the admission of this evidence on appeal will not result in a miscarriage of justice.<sup>16</sup>

6. The Appeals Chamber noted that there was a "measure of confusion" surrounding the date provided by Witness AKJ for the rally.<sup>17</sup> During the examination-in-chief, Witness AKJ stated that he could only recall the year as 1993,<sup>18</sup> whereas in cross-examination, he clarified that he could recall the month, but not the exact date.<sup>19</sup> The Appeals Chamber further noted that in the English transcripts, Witness AKJ initially stated that the rally occurred in May, but then later affirmed the month as June,<sup>20</sup> whereas in the French transcripts Witness AKJ consistently testified that the rally occurred in June.<sup>21</sup> The Appeals Chamber observed that comments from the Bench at the time suggested that the Trial Chamber understood Witness AKJ's testimony as placing the event in May,<sup>22</sup> which is also how his testimony is summarised in the Trial Judgement.<sup>23</sup>

7. The Appeals Chamber found that it was clear from the Trial Judgement itself that the Trial Chamber was aware of the inconsistency surrounding the date provided by Witness AKJ.<sup>24</sup> It noted that the Trial Chamber did not accept the specific date of either May or June mentioned during the witness's testimony, and its findings instead referred only generally to the event happening in 1993.<sup>25</sup> The Appeals Chamber found no error in this approach, particularly in view of Witness AKJ's initial uncertainty as to when the event happened in 1993, and the fact that Mr. Bikindi's participation in the rally was corroborated by Witness AKK, who did not provide a date.<sup>26</sup> Based on

<sup>11</sup> Rule 115 Motion, paras. 13, 16 *citing* T. 21 September 2006 p. 15; Reply to Rule 115 Motion, para. 23.

<sup>12</sup> Rule 115 Motion, paras. 17-22.

<sup>13</sup> *See* Impugned Decision, para. 14, p. 11.

<sup>14</sup> *See* Impugned Decision, para. 10.

<sup>15</sup> *See* Impugned Decision, paras. 13, 14.

<sup>16</sup> Impugned Decision, para. 14.

<sup>17</sup> *See* Impugned Decision, para. 11.

<sup>18</sup> Impugned Decision, para. 11, fn. 34 *citing* T. 20 September 2006 p. 47.

<sup>19</sup> Impugned Decision, para. 11, fn. 35 *citing* T. 21 September 2006 p. 15.

<sup>20</sup> Impugned Decision, para. 11, fn. 36 *citing* T. 21 September 2006 p. 15.

<sup>21</sup> Impugned Decision, para. 11, fn. 39 *citing* T. 21 September 2006 p. 17.

<sup>22</sup> Impugned Decision, para. 11, fn. 37 *citing* T. 21 September 2006 p. 19.

<sup>23</sup> Impugned Decision, para. 11, fn. 38 *citing* Trial Judgement, para. 135.

<sup>24</sup> Impugned Decision, para. 12.

<sup>25</sup> Impugned Decision, para. 12 *citing* Trial Judgement, paras. 141, 183.

<sup>26</sup> Impugned Decision, para. 12.

these circumstances, the Appeals Chamber found that the proposed evidence would not have had an impact on the verdict because it did not undermine the overall credibility of Witnesses AKJ and AKK's evidence, particularly other aspects of their accounts which underpinned his conviction.<sup>27</sup>

### B. Discussion

8. In his present Motion, Mr. Bikindi requests reconsideration of the part of the Impugned Decision in which the Appeals Chamber denied admission of the documentary evidence proffered in his Rule 115 Motion.<sup>28</sup> He requests the Appeals Chamber to allow admission as additional evidence of documents previously refused admission, namely the programme of the dance tour, and the contemporaneous newspaper articles and photographs reporting the trip.<sup>29</sup> He submits that this evidence establishes that he was in Germany during June 1993<sup>30</sup> and goes directly to the credibility and reliability of Witness AKJ's testimony that the rally in Kivumu occurred in June 1993.<sup>31</sup>

9. In support of his Motion, Mr. Bikindi challenges the Appeals Chamber finding that "the Trial Chamber did not accept the specific date of either May or June mentioned during the witness's testimony, and its findings instead referred only generally to the event happening in 1993".<sup>32</sup> He submits that this conclusion is "based on false premise" insofar as the Trial Chamber, at paragraph 135 of the Trial Judgement states that Witness AKJ testified that he first saw Mr. Bikindi at a rally in Kivumu around 15 May 1993<sup>33</sup> and that the Trial Chamber misconstrued the testimony of Witness AKJ.<sup>34</sup>

10. Mr. Bikindi submits that the additional evidence undermines the credibility of Witness AKJ. He argues that a failure on the part of the Appeals Chamber to take this evidence into account would lead to a miscarriage of justice, particularly if it also disregards his own testimony as to his whereabouts in June 1993.<sup>35</sup> Mr. Bikindi cites various paragraphs of the Trial Judgement which, he argues, show that he has suffered both "prejudice" and a "miscarriage of justice".<sup>36</sup> In particular, Mr. Bikindi points out that the Trial Chamber attributed the confusion as to the dates provided by

<sup>27</sup> Impugned Decision, para. 13.

<sup>28</sup> T. 30 September 2009 pp. 20, 55, 56. The Appeals Chamber notes that whereas counsel for Mr. Bikindi first indicates that he requests "review" of the Impugned Decision, when making his oral submissions on this request he states that he in fact seeks "reconsideration" of the decision. See T. 30 September 2009 pp. 20, 55.

<sup>29</sup> Mr. Bikindi indicates that he does not seek the admission of other items of evidence referred to in his original Rule 115 Motion. See T. 30 September 2009 pp. 55, 56.

<sup>30</sup> T. 30 September 2009 pp. 20, 55, 57, 58.

<sup>31</sup> T. 30 September 2009 p. 57.

<sup>32</sup> T. 30 September 2009 p. 56 referring to Impugned Decision, para. 12.

<sup>33</sup> T. 30 September 2009 p. 56.

<sup>34</sup> T. 30 September 2009 p. 56.

<sup>35</sup> T. 30 September 2009 p. 58.

<sup>36</sup> See T. 30 September 2009 p. 57 citing Trial Judgement, paras. 72, 136, 267, 451.

Witness AKJ solely to the method of questioning of defence counsel.<sup>37</sup> He argues that if the proffered evidence establishes that he was in fact in Germany during June 1993, it demonstrates that he was prejudiced by ineffective assistance of counsel in the cross-examination of Witness AKJ, as argued in his fifth ground of appeal.<sup>38</sup> Secondly, he contends that if it is accepted that Mr. Bikindi was in Germany in June 1993, it follows that the Trial Chamber erred in recalling its findings with respect to Mr. Bikindi's participation in a rally in Kivumu in 1993 to support its finding that it believed what Witnesses AKJ and AKK had to say about events in 1994.<sup>39</sup> Finally, Mr. Bikindi submits that the finding that he participated in a rally in Kivumu in 1993 underpins the Trial Chamber's conclusion that he "was perceived to be an influential member of the MRND", a factor which in turn was taken into account in sentencing him.<sup>40</sup> Mr. Bikindi argues that if the credibility and reliability of Witness AKJ's evidence is successfully challenged with respect to his participation in this rally, it goes to the issue of how he was perceived within the MRND.<sup>41</sup>

11. The Prosecution responds that the Motion should be dismissed in its entirety as Mr. Bikindi fails to satisfy the preconditions for reconsideration of a decision.<sup>42</sup> It submits that Mr. Bikindi does not demonstrate the existence of new facts or exceptional circumstances, or that reconsideration is necessary to prevent an injustice.<sup>43</sup> The Prosecution argues that the Impugned Decision addresses all of the issues which Mr. Bikindi now advances, and that Mr. Bikindi merely attempts to re-litigate the issues which he has already raised in his Rule 115 Motion and his Appeal.<sup>44</sup>

12. The Appeals Chamber recalls that it may reconsider a previous decision pursuant to its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.<sup>45</sup> In his Motion, Mr. Bikindi merely claims that the Impugned Decision is based on a "false premise" without showing a clear error of reasoning on the part of the Appeals

<sup>37</sup> T. 30 September 2009 p. 57.

<sup>38</sup> T. 30 September 2009 p. 57.

<sup>39</sup> T. 30 September 2009 p. 57.

<sup>40</sup> T. 30 September 2009 p. 57 *citing* Trial Judgement, paras. 72, 451.

<sup>41</sup> T. 30 September 2009 p. 57.

<sup>42</sup> T. 30 September 2009 p. 58.

<sup>43</sup> T. 30 September 2009 p. 58.

<sup>44</sup> T. 30 September 2009 p. 58.

<sup>45</sup> See *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52A-R, Decision on Jean-Bosco Barayagwiza's Motion of 2 May 2008, 9 September 2008, p. 3 *citing* *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on Motion for Reconsideration of the Decision on Request to Admit Additional Evidence, 16 November 2007, p. 2. See also *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Ngirumpatse's Motion for Reconsideration, 5 October 2007, p. 3; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on Motion for Reconsideration of the Decision on Motion for Disclosure and Request for Admission of Additional Evidence, 23 November 2007, para. 4; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Motions for Reconsideration, 1 December 2006, para. 6; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on the Appellant's Request for Reconsideration of the Order Concerning Aloys Simba's Appellant's Brief, 8 November 2006, p. 2; *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, 23 May 2005, Judgement, para. 203; *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2.

Chamber, or that the admission of the additional evidence is necessary in order to prevent an injustice. Indeed, Mr. Bikindi goes on to challenge the Trial Chamber's reasoning with regard to Witness AKJ's evidence on the issue of the date of the rally in Kivumu, rather than the reasoning of the Appeals Chamber in the Impugned Decision itself.<sup>46</sup> Mr. Bikindi's remaining submissions with respect to the alleged "prejudice" or "miscarriage of justice" suffered merely reiterates arguments advanced in his original Rule 115 Motion<sup>47</sup> and his Appeal<sup>48</sup> without demonstrating either a clear error of reasoning on the part of the Appeals Chamber in its Impugned Decision, or that admission of the evidence is necessary to prevent an injustice.

### C. Disposition

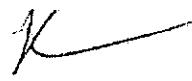
13. For the foregoing reasons, the Appeals Chamber:

**DENIES** the Motion in its entirety

Done in English and French, the English version being authoritative.

Dated this 27<sup>th</sup> day of October 2009  
At The Hague,  
The Netherlands.



  
Patrick Robinson  
Presiding Judge

[Seal of the Tribunal]

<sup>46</sup> See T. 30 September 2009 p. 56 wherein Defence Counsel O'Shea states: "Now, while the [Trial] Chamber may not have stated that it accepted or rejected May, by setting out the testimony of AKJ and then stating that it believed that evidence and then subsequently relying upon it, my submission is that even though the [Trial] Chamber recognised the difficulties and confusions over the dates generally in the judgement, it did, in fact, misconstrue the testimony of AKJ."

<sup>47</sup> See Rule 115 Motion, paras. 15-22, 31, 34, 35, 37-39; Reply to Rule 115 Motion, paras. 20-25.

<sup>48</sup> See Bikindi's Notice of Appeal, para. 12, Corrigendum to Defence Appellant's Brief, 19 March 2009, para. 39 ("Bikindi's Appellant's Brief") (Ground 2 – evidence relating to assessment of credibility and/or reliability); Bikindi's Notice of Appeal, paras. 6, 7, Bikindi's Appellant's Brief, para. 71 (Ground 5 - ineffective assistance of Counsel); Bikindi's Notice of Appeal, pp. 7, 8. Bikindi's Appellant's Brief, paras. 90, 104, 105, Defence Appellant's Reply Brief, 11 May 2009, para. 71 (Ground 6 - errors regarding Mr. Bikindi's status within the MRND and *Interahamwe*).