



ICTR-01-69-A
02-01-2010
(25/A - 19/A)

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

25/A
Luan

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IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, *Presiding*

Registrar: Mr. Adama Dieng

Date of filing: 2 February 2010

THE PROSECUTOR

v.

HORMIDAS NSENGIMANA

Case No. ICTR-01-69-T

JUDICIAL RECORDS/ARCHIVES
2010 FEB -2 P 3:19

PROSECUTOR'S NOTICE OF APPEAL
[RULES 77(J)]

Office of the Prosecutor

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PROSECUTOR'S NOTICE OF APPEAL

THE PROSECUTOR hereby files, as of right¹, a Notice of Appeal, pursuant to Article 24 of the Tribunal's Statute and Rule 77(J) of the Rules of Procedure and Evidence ["The Rules"], against Trial Chamber I's *Confidential Decision on Prosecution and Defence Requests Concerning Improper Contact with Prosecution Witnesses* ["The Impugned Decision"], rendered on 18 January 2010, in the case *The Prosecutor v. Hormidas Nsengimana*, Case No. ICTR 01-69-T.

IN THE GROUND OF APPEAL that follows, the Prosecutor challenges the Trial Chamber's exercise of its discretionary power under Rule 77(D) of the Rules and its decision to dismiss the Prosecutor's request where there are *sufficient grounds* to instigate contempt proceedings against members of the Nsengimana's Defence team, Léonard Safari and Father Rémi Mazas, for their knowing and wilful violation of the Witness Protection Order issued in the *Nsengimana* case.

FURTHER, the ground of appeal is numbered and described by a heading; it indicates the findings affected and the nature of the error committed by the Trial Chamber.

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

THE PROSECUTOR GIVES NOTICE OF THE FOLLOWING GROUND OF APPEAL:

¹ *Prosecutor v. Seselj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution's Appeal against the Trial Chamber's Decision of 10 June 2008 [Public redacted version], 25 July 2008, paras. 12, 13 [The *Seselj* Decision"].

Ground 1: the Trial Chamber misdirected itself as to the applicable legal standard and the scope of its discretion under Rule 77 (D) of the Rules

1. This ground of appeal affects the Trial Chamber's refusal to initiate proceedings against Defence investigators Léonard Safari and Father Rémi Mazas, despite the fact that there is a *prima facie* case that they met or attempted to meet with protected prosecution witnesses, in knowing violation of the Witness Protection Order.²

(i) *The Impugned Decision is based on an incorrect interpretation of the governing law*

2. The Trial Chamber correctly noted that "in initiating a prosecution for contempt, a Chamber should determine *only* whether a *prima facie* case is established, which is the same standard applied to confirm an indictment."³ The ICTR Appeals Chamber noted in this regard that "[s]ince a *prima facie* case must be established to confirm an indictment, it is therefore logical for a Chamber to employ this standard when ordering the prosecution of an individual."⁴ Pursuant to Article 18 of the Statute, an indictment *shall* be confirmed where a *prima facie* case is established. This Trial Chamber departed from this legal standard.

3. The Trial Chamber first appeared to have accepted the Registry's conclusion that there is *prima facie* case that Léonard Safari and Father Mazas deliberately met with or contacted protected Prosecution witnesses CAY, CAW, CBF CAO, and BV, knowing that they were protected Prosecution witnesses.⁵ Importantly, the identities of Witnesses CAW, CAN, and CAO had been disclosed to the Defence team by June 2007.⁶ Even "Safari and Mazas acknowledge, in retrospect, that their conduct was in breach of the Protection Decision."⁷ The Trial Chamber therefore held in this regard that "the totality of the

² *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 20 September 2002 ["The Witness Protection Order"].

³ Impugned Decision, para. 41. See *Seselj* Decision, para. 16.

⁴ *Prosecutor v. Karemera et al.*, case No. ICTR-98-44-AR.91, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for false Testimony" and Motion for Oral Arguments, 22 January 2009, para. 19.

⁵ Impugned Decision, paras. 8-11, 54, 59; *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, The Registry's Report to the Chamber on Alleged Interference with the Prosecution Witnesses, 21 April 2008 [Registry 1st Report], paras. 8-11; The Registry's Further Submission to the Chamber on Alleged Interference with the Prosecution Witnesses, 2 May 2008 [Registry 2nd Report], para. 3-5

⁶ Impugned Decision, para. 56, referring to Registry 1st Report, Annex II (Prosecution list of dates of disclosures).

⁷ Impugned Decision, para. 49. See also Impugned Decision, paras. 12, 17,

information may suggest that there is a basis under Rule 77(C) and (D) to warrant further investigations or prosecution.”⁸ In other words, there are *sufficient grounds* to order further investigations or prosecution for contempt, under Rules 77(A) (ii), 77(A) (iv) and 77(B) of the Rules, against Léonard Safari and Father Mazas.

4. The Trial Chamber committed a discernable error of law by exceeding its jurisdiction under Rule 77. The jurisdiction of a Trial Chamber under Rule 77 is to ascertain whether a *prima facie* case exists and if so, to authorize a prosecution. The Trial Chamber exceeded its jurisdiction in this case in that having found a *prima facie* case to exist; it nonetheless, instead of referring the matter for trial, proceeded to examine matters which are properly within the province of the court of trial such as in effect rendering a final finding of contempt.

5. First, the Trial Chamber abused its discretion by deciding, without providing any reasoned opinion, that it was “not convinced that in the present circumstances this would be the most effective and efficient way to ensure compliance with the witness protection measures.”⁹ Its position, at paragraphs 54 and 59 of the impugned decision, which expands the scope its discretionary power, to initiate contempt proceedings under Rule 77(D), is unfounded in law and in fact. The Trial Chamber appears to have relied, erroneously, on the Appeals Chamber’s holding, in the *Karemera et al.* case that “a Chamber will have to consider carefully if [proceedings under Rule 91(B)] are the most effective way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of this case.”¹⁰ The provision of Rule 91(B) is materially different from that of Rule 77(D) of the Rules. The issues in the *Karemera et al.* case are also materially distinct. Criminal prosecution is an effective measure for protecting the integrity of the judicial process against those who seek to undermine it. The Trial Chamber abused its discretion by failing to consider or adequately consider this consideration and instead without any, or any adequate, reason declined to order prosecution of persons found by it *prima facie* to have violated the relevant rules.

⁸ Impugned Decision, para. 54 (Safari). See also Impugned Decision, para. 59 (Mazas).

⁹ Impugned Decision, para. 54.

¹⁰ *Prosecutor v. Karemera et al.*, case No. ICTR-98-44-AR.91, Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for false Testimony” and Motion for Oral Arguments, 22 January 2009, para. 21.

6. In addition, the Trial Chamber's position denied the Prosecutor a fair opportunity to present its case. It also ignores, in effect, that public confidence in the effectiveness of protective measures, Chamber's orders and decisions must be preserved as they are vital to the success of its work.¹¹ There is also need to deter knowing and wilful violations of witness protection orders.

7. Second, there are on the evidence "sufficient grounds" to proceed against Léonard Safari and Father Rémi Mazas for contempt of the Tribunal, pursuant to Rule 77(D) of the Rules.¹² The Trial Chamber however required, in effect, a final finding of contempt for it to exercise its discretion to initiate contempt proceedings. Contrary to its approach, the crucial issue was not whether Safari and Mazas acted "with the *sufficient* knowledge and intent [*sic*]"¹³ when they met, contacted, or attempted to meet with protected Prosecution witnesses. Actual proof of a person's knowledge of the existence of the Trial Chamber's order and the status of a witness at the time they met can only be established and "inferred from a variety of circumstances"¹⁴, following an assessment of the entire evidence and the parties' submissions, at a trial.

8. The Trial Chamber made further assessment and impermissibly reached final findings of fact, regarding, in particular, the *mens rea* element of the offence of contempt of the Tribunal, without requiring further investigations and hearing the parties. It thereby denied the Prosecutor a fair opportunity to present his case.

9. The Impugned decision should be reversed on these bases.

(ii) The Trial Chamber further abused its discretion by taking into account irrelevant and extraneous considerations for the purpose of Rule 77(D) and by unreasonably reaching conclusions of facts

¹¹ Article 21 of the Statute, Rules 39(ii), 69, and 75 of the Rules.

¹² See for example, Impugned Decision, paras. 13-15 (CAY); Impugned Decision, paras. 21, 22; Registry 1st Report, paras. 9-10, 46-48 (CAW); Impugned Decision, para. 29-31 (CAN); Impugned Decision, paras. 33-35 (CAO); Registry 1st Report, paras. 36-39 (CBF); Impugned Decision, paras. 49-54, 57-59.

¹³ Impugned Decision, para. 49.

¹⁴ *Prosecutor v. Margetic*, IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007, para. 37, relying on *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001 para. 54 and referring to *Prosecutor v. Marjadic and Rebic*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para. 18; *Prosecutor v. Jovic*, Case Nos. IT-95-14 & IT-95-14/2R77, Judgement, 30 August 2006, paras. 20, 21.

10. The Trial Chamber also committed a discernable error by giving undue weight to considerations that are extraneous or irrelevant for the purpose of Rule 77(D) of the Rules.¹⁵

11. The Trial Chamber erred in law and in fact in its assessment of whether Léonard Safari and Father Rémi Mazas knew who the witnesses were, the time at which the Defence obtained the full particulars of the witnesses, and the sources from which they may have obtained such information.¹⁶

12. The Trial Chamber also impermissibly relied, *a posteriori*, on the findings it made about the credibility of the witnesses in its judgement, issued some 20 months after the Prosecutor's motion to initiate contempt proceeding.¹⁷ Such belated decision and the reliance on the findings therein also denied the Prosecutor a fair opportunity to present his case.

13. Further, the Trial Chamber committed a discernable error by relying on its irrelevant and unfounded holding that the admitted violations *appear* to have had little impact on the proceedings.¹⁸ There is no requirement, under Rule 77(D), or under Rule 77(A) (ii), Rule 77(A) (iv), and Rule 77(B) of the Rules, to prove that the alleged conduct violating an order of a Chamber resulted in any particular consequence with regard to the witnesses' testimonies and the proceedings.¹⁹ Any impact of the contemptuous conduct is more appropriately dealt with as mitigating or aggravating factor in sentencing.

14. Likewise, consideration and acceptance of Safari and Mazas's belated regrets, apologies, and good faith and claim that they did not realise at the time of the meetings that their conduct was unlawful, or whether the witnesses felt threatened or intimidated can only be properly dealt with in sentencing.

15. The Impugned decision should be also reversed on these bases.

¹⁵ *Seselj* Decision, para. 4.

¹⁶ Impugned Decision, paras. 10, 20, 35, 53, 56 and footnote 74, 58.

¹⁷ Impugned Decision, para. 48. See *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, Prosecutor's Application for Leave to File Contempt of the Tribunal Proceedings Against Mr. Safari Léonard Serugendo, Father Rémi Mazas and Father Denis Sekamana, 26 May 2008.

¹⁸ Impugned Decision, para. 55.

¹⁹ See *The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgement on allegations of contempt, 14 September 2009, para. 21 [internal citations omitted]. See also *Prosecutor v. Jovic*, IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007, paras. 27, 30.

(iii) **Relief sought**

16. The Prosecutor therefore requests the Appeals Chamber to:

- Find that the Trial Chamber exceeded its jurisdiction after having rightly found a *prima facie* case to exist against Léonard Safari and Father Rémi Mazas.
- Find that the Trial Chamber abused its discretionary power by refusing to authorise contempt proceedings against Léonard Safari and Father Rémi Mazas, despite the acknowledgement that there was *prima facie* case to do so; and
- Find that there are sufficient grounds to order further investigations or prosecution for contempt, under Rules 77(A) (ii), 77(A) (iv) and 77(B) of the Rules, against Léonard Safari and Father Mazas.

17. The Prosecutor further requests the Appeals Chamber to:

- Direct the Prosecutor to conduct further investigations and prosecute Léonard Safari and Father Mazas for contempt of the Tribunal; or, alternatively,
- Issue itself an order in lieu of an indictment, and either direct the Registrar to appoint an *amicus curiae* to prosecute the matter or prosecute the matter itself.

Such variation of the grounds of appeal as this Chamber may authorize, upon the Prosecutor's application pursuant to Rule 108.

WORD COUNT:

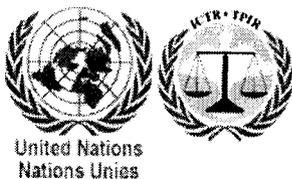
DATED: 2 February 2010

Arusha, Tanzania



Justice Hassan B. Jallow

Prosecutor



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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 type="checkbox"/> Defence (names)		<input checked="" type="checkbox"/> Prosecutor's Office Hassan B. Jallow (names)	
					<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison	
Case Name:	The Prosecutor vs. HORMIDAS NSENGIMANA				Case Number: ICTR-01-69-T	
Dates:	Transmitted: 02 FEBRUARY 2010			Document's date: 02 FEBRUARY 2010		
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