

125/A BIS

Am

THE APPEALS CHAMBER

Case No. ICTR-99-52B-R

ENGLISH

Original: FRENCH

Before: Judge Theodor Meron, presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Adama Dieng

Date of filing: 4 June 2012

ICTR-99-52B-R
25-10-2012
(125/A BIS- 118/A BIS)

FERDINAND NAHIMANA
v.
THE PROSECUTOR

**SUPPLEMENTARY BRIEF IN SUPPORT OF FERDINAND NAHIMANA'S
REQUEST FOR RECONSIDERATION**

Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
Erica Bussey

Counsel for Ferdinand Nahimana:

Jean-Marie Biju-Duval
Diana Ellis QC
Joanna Evans

A12-0192 (E)

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JUDICIAL REFEREE/ASSISTANT
REGISTRAR

MAY IT PLEASE THE APPEALS CHAMBER

1. Counsel for Ferdinand Nahimana, acting *pro bono*, hereby submit brief supplementary remarks in reply to the Prosecutor's submissions set out in his Brief of 5 April 2012. The remarks pertain to specific points and do not call into question the previous requests and remarks submitted since 27 March 2008 by Ferdinand Nahimana and his Counsel.
2. The present remarks notwithstanding, Counsel are at the disposal of the Appeals Chamber should they be summoned or required to provide further detail.

1 – POWER OF THE APPEALS CHAMBER TO RECONSIDER ITS APPEAL JUDGEMENT OF 28 NOVEMBER 2007*Controversial principle regarding an extremely important issue*

3. The Defence is fully aware that since the 26 June 2006 Decision in the *Prosecutor v. Žigić*, the Appeals Chamber has maintained the principle that it has no power to reconsider a "final Judgement." However, prior to this Decision, the Appeals Chamber had, on the contrary, proclaimed in the *Čelebići* case, on 8 April 2003, that it has an inherent power to reconsider any decision, including a "final Judgement," where it is necessary to do so in order to prevent injustice.
4. Thus, the fact that the Appeals Chamber has successively adopted different and even contrasting positions shows that this is an extremely delicate, controversial¹ issue regarding an extremely important subject: the need to correct an injustice resulting from a judicial decision.

¹ See Judge Shahabudeen's Dissenting Opinion in *Prosecutor v. Žigić* and *The Prosecutor v. Niyitegeka* (27 September, 2006).

5. Therefore, were the principle henceforth adopted by the court to be maintained, it has to be applied with discernment and with the greatest caution, on a case-by-case basis, taking into account the specific circumstances of each case.

Specific circumstances of the instant case

6. As submitted by the Defence in its motion of 27 March 2008, the present request for reconsideration is not comparable to the one considered in *Prosecutor v. Žigić* nor, in general, to those in respect of which reconsideration of a final judgement was denied.
7. In fact, Ferdinand Nahimana's motion for reconsideration is based on the fact that the Appeals Chamber erred in its Judgement of 27 November 2007 in finding that the Defence had failed to make objections to Expert Witness Deforges' testimony regarding some facts which were not within her area of expertise.
8. However, this point, namely the Defence's failure to make relevant objections to the said testimony at the appropriate time, was never raised prior to being considered by the Appeals Chamber in its final judgement and sentence:
 - This issue is not raised by the Prosecutor in his final trial brief;
 - This point is not raised in the Trial Judgement;
 - The issue is not raised in the Prosecutor's appeal briefs;
 - This point was not raised during the appeal hearings.
9. Hence, at no time was this point ever debated by both parties prior to it being considered by the Judges in their Judgement of 27 November 2007; this point therefore appeared for the first time in this final decision.

10. Thus, Ferdinand Nahimana is not requesting that a point which has already been litigated in judicial proceedings be re-litigated; he is seeking reconsideration of a point that has been asserted against him by the Appeals Chamber, even though it had never been litigated.

Need to relax the principle

11. In fact, a motion for reconsideration seeking a new examination of a point that has already been litigated in judicial proceedings (witness the case of *Prosecutor v. Žigić*) cannot be treated in the same manner as a motion for reconsideration seeking examination of a point which appears for the first time in the Appeal Judgement, and which, therefore, could never have been contested by the Accused.
12. It is reasonable to consider that when an appeal judgement is underpinned by factual and legal arguments advanced for the first time by appeal judges in their “final Judgement”, and that such arguments constitute a discernible error likely to occasion a serious miscarriage of justice, it is incumbent upon the Judges to reconsider their decision.
13. Such is the case in the instant case.

2 – DISCERNIBLE ERROR

14. By holding that the Defence failed to raise objections to the impugned testimony of Expert Witness Deforges, the Chamber committed a discernible error; Nahimana and his Counsel have, in their previous filings and after the 27 March 2008 motion for reconsideration, provided all relevant explanations on this point; the reality and scope of the said objections were not contested by the Prosecutor who was personally a witness thereto.

15. The Trial Chamber Judges expressly took formal note of the objections at the time they were made and assured the Defence that they would be taken into consideration, which was not the case.
16. The Appeals Chamber's error, which arose from an incomplete record of Trial Chamber proceedings, is therefore clear and incontrovertible.

3 – MISCARRIAGE OF JUSTICE

17. This error led the Appeals Chamber to accept and consider Expert Witness Desforges' allegations and, hence, to find as established the fact that Ferdinand Nahimana undertook, during a conversation held in late June – early July 1994 with Yannick Gérard, a French diplomat, in the presence of Jean-Christophe Belliard, to persuade RTLM journalists to desist from airing programmes against UNAMIR. Relying solely on this fact, the Chamber found that it had been sufficiently established that the Accused had effective control over RTLM journalists and, therefore, incurred individual criminal responsibility under Article 6(3).
18. The inadmissibility of this portion of Expert Witness Desforges' testimony and the blatantly unfair manner of its use have been clearly demonstrated by the Defence in its written and oral submissions during the appeal proceedings,¹ as well as in its requests for reconsideration.
19. At this juncture, the Defence's sole wish is to draw the Appeals Chamber's attention to one of the essential aspects of such injustice: two eyewitnesses could testify to the exact content of the controversial information, namely Yannick Gérard, the person with whom the Accused had the conversation, and Christophe Belliard, his deputy. These witnesses are known to the Prosecutor and the Chamber;

¹ Appellant's Brief: Paras. 87 to 93 and paras. 495 to 499; Appeal Hearing; T., 18 January 2007, pp. 41 and 43.

they were at the disposal of the Chamber and are probably at the Appeals Chamber's disposal even today, if the Chamber wants to hear them.

20. However, the Trial Chamber expressly declined to call them to testify on the grounds that their testimonies were not essential to the discovery of the truth² and that, moreover, the conversation in question was not relevant in establishing the responsibility of the Accused.³
21. Yet, it is on the sole basis of this controversial conversation that the Trial Chamber and, subsequently, the Appeals Chamber found that the Accused incurred responsibility with respect to the programmes broadcast after 6 April 1994.
22. The decisive weight accorded by the Judges to statements made in that conversation makes it absolutely imperative for the witnesses to be heard. The Judges could not decline to hear the witnesses and, at the same time, consider the inadmissible evidence of an expert witness who, for no valid reason, came to replace the two material witnesses.
23. On this particular point, the Defence's objections were perfectly clear. Moreover, there was no legal provision requiring the Defence, under pain of disallowing its appeal, to repeatedly reiterate its objections in this regard, since the Trial Chamber had explicitly stated that it had taken formal note thereof.
24. The error as to the reality and relevance of the Defence objections therefore misled the Appeals Chamber, causing it to erroneously accord unfounded probative value to a piece of evidence which was considered as the very basis for the Accused's conviction.

² Decisions of 9 and 13 May 2003: "the Chamber sees no reason to call this witness under rule 98 and does not find it 'essential to truth-seeking' to do so."

³ See, in particular, Hearing of 23 May 2003, T., pp. 269 to 271.

25. Accordingly, Ferdinand Nahimana respectfully requests the Appeals Chamber to hold that, by stating that the Defence failed to object to Expert Witness Deforges' impugned testimony, it committed a discernible error leading it, *in fine*, to consider as sufficiently established the Accused's individual criminal responsibility under Article 6(3) of the Statute.
26. The error has therefore occasioned a serious injustice.
27. It follows that Ferdinand Nahimana's request for reconsideration is admissible and well-founded.
28. Correction of the above-mentioned error would necessarily result in Ferdinand Nahimana's acquittal.

FOR THESE REASONS

- Find that Ferdinand Nahimana's request for reconsideration is admissible and well-founded.
- Accordingly,
- Acquit Ferdinand Nahimana.
- In the alternative, review the sentence imposed on him.

For Ferdinand Nahimana

4 June 2012

[Signed]

Diana Ellis, QC

Jean-Marie Biju-Duval, Counsel

Joanna Evans

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SAINT-JACQUES

SOCIETE CIVILE DE MOYENS

Flore Asselineau Jean-Marie Biju-Duval BARRISTERS AT THE <i>COUR DE CASSATION</i> Former <i>Sécretares à la Conférence</i> Assisted by: Romain Boizet Hélène Gorkiewiez BARRISTERS AT THE <i>COUR DE CASSATION</i>	International Criminal Tribunal for Rwanda The Registrar Via Fax: 00 1 212 963 2848 Dated in Paris, 4 June 2012
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JMBD/B12-149

Re: Nahimana/Reconsideration
Case File: *The Prosecutor v. Nahimana*
ICTR-99-52B-R

Dear Sir,

Acting *pro-bono* for and on behalf of Ferdinand Nahimana, I have the honour to forward to you "Ferdinand Nahimana's Supplementary Motion for Reconsideration" in the annexe hereto, together with the Transmission Sheet.

Kindly have it registered and forwarded to the Appeals Chamber.

While thanking you in advance, I urge you to accept the expression of my highest esteem and consideration.

[Signed]

Jean-Marie Biju-Duval
Counsel

[Stamped and dated]

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