



Mechanism for International Criminal Tribunals

Case No: MICT-13-33

Date: 10 July 2017

Original: English

IN THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Registrar: Mr. Olufemi Elias

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC

PROSECUTION RESPONSE TO KAMUHANDA'S APPEAL OF
DECISION ON INTERVIEW OF PROSECUTION WITNESS GEK

The Office of the Prosecutor:

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Peter Robinson

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1. The Appeals Chamber should dismiss Kamuhanda's appeal.¹ Kamuhanda fails to demonstrate how the Single Judge committed a discernable error in dismissing his motion to interview Witness GEK.

Relevant Background

2. On 12 May 2017, Kamuhanda filed his Motion to Interview Witness GEK. In his motion Kamuhanda requested that the WISP seek the consent of Witness GEK to the proposed interview and also sought orders from the Single Judge circumscribing the language used by WISP in soliciting witness consent, alleging, *inter alia*, that the language in use by WISP unfairly discouraged witnesses from agreeing to interviews by the defence.²
3. On 8 June 2017, the Single Judge issued his *Ordonnance aux fins du depot d' Observations* in which he ordered the WISP to contact Witness GEK to establish whether she consented to the requested interview.³ The Single Judge however found that Kamuhanda had failed to demonstrate that the contested language used by WISP would discourage witnesses from consenting to interviews.⁴ Kamuhanda neither appealed this decision nor sought reconsideration.
4. On 27 June 2017, the Single Judge issued the Impugned Decision denying Kamuhanda's motion on the ground that the witness had not consented to the interview.⁵
5. On 29 June 2017, filed the extant appeal contending, *inter alia*, that the Single Judge made an incorrect interpretation of the governing law when he allowed WISP to use the contested language in soliciting Witness GEK's consent, and subsequently denying the motion when Witness GEK refused to consent to the interview.⁶

¹ *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Appeal of Decision on Interview of Prosecution Witness GEK, 29 June 2017 (The Appeal)

² *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Motion to Interview Prosecution Witness GEK, 12 May 2017 (The Motion)

³ *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, *Ordonnance aux fins du depot d' Observations*, 8 June 2017 (*Ordonnance*)

⁴ *Id.*, p. 2-3

⁵ *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, *Decision Relative a une Demande d' Autorisation d' Interroger un Temoin*, 27 June 2017 (Impugned Decision)

Standard of Review

6. The Appeals Chamber will only overturn a discretionary decision of a Trial Chamber or Single Judge if the Impugned Decision was based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or that it was so unfair or unreasonable as to constitute an abuse of discretion.⁷ In this respect, the Appeals Chamber would consider whether the Single Judge has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching the Impugned Decision.⁸

Argument

7. On appeal, Kamuhanda contends that the Single Judge made an incorrect interpretation of the governing law when he allowed WISP to use the contested language in soliciting Witness GEK's consent, and subsequently denying the motion when Witness GEK refused to consent to the interview.⁹
8. *First*, Kamuhanda did not challenge by way of appeal, or a request for reconsideration, the Single Judge's finding that he had failed to demonstrate how the contested language of the form used by WISP could negatively dissuade a witness from granting consent to an interview.¹⁰ On this ground alone the extant appeal should be dismissed.
9. *Second*, Kamuhanda in the extant appeal merely repeats¹¹ his unsuccessful argument for the removal of a contested paragraph in the form used by WISP without demonstrating how the rejection of his argument by the Single Judge constituted a discernable error warranting the Appeal Chamber's intervention.
10. The Single Judge considered Kamuhanda's request that the contested paragraph in the WISP form be removed and found that Kamuhanda had not demonstrated that the paragraph would discourage witnesses as alleged. The Judge also found the language of

⁶ Appeal, paras 13, 23

⁷ *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Decision on Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness, 14 November 2016 para. 7

⁸ *Id*

⁹ Appeal, paras 13, 23; Kamuhanda appears to conflate the *Ordonnance* of 8 June 2017 with the Impugned Decision.

¹⁰ *Ordonnance*, p. 2-3. The decision in the *Ordonnance* rejecting Kamuhanda's request for the removal of the contested paragraph from the WISP consent form distinct from the Impugned Decision on appeal.

the contested paragraph consistent with the overall responsibility of the WISP to inform witnesses of their rights and obligations and the Mechanism's responsibility to ensure the protection of witnesses.¹² It was open to Kamuhanda to challenge that decision by way of appeal or request for reconsideration on the ground that the decision was erroneous and caused him prejudice, but he chose not to. In the circumstances, his appeal, which is essentially an appeal of the *Ordonnance aux fins du depot d' Observations*, rather than of the Impugned Decision should be dismissed for being out of time and without merit.¹³

11. On the merits, Kamuhanda repeats arguments¹⁴ that were rejected by the Single Judge regarding removal of the contested paragraph from the WISP form without demonstrating how the Single Judge misinterpreted the law in denying his motion to interview Witness GEK in the Impugned Decision.
12. Having failed to demonstrate that the contested paragraph in the WISP form would discourage witnesses from granting consent or challenging the *Ordonnance aux fins du depot d' Observations* the Single Judge correctly denied the motion to interview GEK in the Impugned Decision, when she declined to consent to the interview.
13. Kamuhanda's repeated assertion that the contested paragraph would discourage witnesses from consenting to interviews is unsubstantiated and is, as found by a Single Judge on a previous occasion in this case, speculative.¹⁵ Indeed, as stated by WISP in a similar matter in this case, the language used in its consent form is equally applied to both prosecution and defence witnesses without prejudice.¹⁶ Moreover, witnesses have

¹¹ Appeal, paras. 14 – 22; Motion, paras. 15-18

¹² *Ordonnance*, p. 2-3

¹³ The decision in the *Ordonnance* rejecting Kamuhanda's request for the removal of the contested paragraph from the WISP consent form was final and could have been appealed, and is distinct from the Impugned Decision on appeal.

¹⁴ *fn. 11 supra*

¹⁵ *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, decision on request to Re-Contact Witness GAE, 14 October 2016

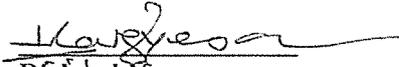
¹⁶ See Correspondence from the MICT Registrar to Kamuhanda's Counsel at Annex B in *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33. Motion for Oral Hearing for Prosecution Witness GET, 17 August 2016

on numerous occasions consented to being interviewed by the adverse party on the basis of WISP consent forms using the contested language.¹⁷

14. Similarly, in another application in this case, where a Single Judge ordered the WISP to verify that a witness had indeed understood the advice given to him/her in the WISP consent form in order to confirm that the advice did or did not have an impact on his/her decision not to consent to an interview,¹⁸ it was in fact shown that the WISP consent form had not dissuaded the witness from consenting to an interview by the Kamuhanda defence.¹⁹
15. For the reasons outlined above, Kamuhanda's appeal should be summarily dismissed for being out of time or for being without merit.

Word Count: 1207

Dated at Arusha this 10 day of July, 2017.


Richard Karegyesa
Senior Legal Officer

¹⁷ E.g., in *The Prosecutor v Ngirabatware*, Case No. MICT-12-29, five protected prosecution witnesses favourably responded to a defence request for interviews on the basis of WISP consent forms containing the contested language.

¹⁸ *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, *Ordonnance Avant Dire Droit Portant Depot d' Observations*, 13 September 2016

¹⁹ *The Prosecutor v Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Annex to Registrar's Submission Pursuant to Interim Order of 13 September 2016, 27 September 2016



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