

ICTR-98-44-AR73.17
30-03-2009
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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-AR73.17

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 30 March 2009

THE PROSECUTOR

v.

EDOUARD KAREMERA,
MATHIEU NGIRUMPATSE, and
JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S APPEAL OF DECISION
ON ADMISSION OF EVIDENCE REBUTTING
ADJUDICATED FACTS

The Office of the Prosecutor:

Mr. Don Webster
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully appeals, pursuant to certification, the Trial Chamber's *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Motion to Admit Testimony of Elizaphan Ntakirutimana* (24 March 2009).

Procedural History

2. On 11 December 2006, the Trial Chamber, over Mr. Nzirorera's objection, took judicial notice of 102 adjudicated facts from various judgements, including that of Pastor Elizaphan Ntakirutimana. Among the facts judicially noticed were:

116 Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994, and the group was searching for Tutsi refugees and chasing them. Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests."¹ Ntakirutimana, par. 594.

3. On 22 January 2007, Pastor Ntakirutimana died in Arusha, shortly after completing his sentence.

4. On 18 August 2008, in connection with his defence case-in-chief, Joseph Nzirorera moved to admit, pursuant to Rule 92 *bis* (D), the relevant portions of the transcript of the testimony of Pastor Ntakirutimana at his own trial.²

5. Pastor Elizaphan Ntakirutimana testified in his own trial that he never went to Bisesero, that he did not know the sole witness (Witness CC) whose testimony was the basis of this allegation, and that in fact he warned people not to go to Bisesero.³

6. The prosecution opposed the motion.⁴ Mr. Nzirorera replied.⁵

7. On 10 November 2008, the Trial Chamber denied the motion. It reasoned that Mr. Nzirorera did not have standing to challenge an adjudicated fact that did not involve him.⁶

¹ *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006)

² *Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (18 August 2008)

³ The excerpts of testimony of Pastor Ntakirutimana on 7 and 8 May 2002 were contained in Annex "A" to the motion.

⁴ *Prosecutor's Response to Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (20 August 2008)

⁵ *Reply Brief: Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (18 August 2008)

⁶ *Decision on Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (10 November 2008) at para. 7

8. Significantly, the Trial Chamber explicitly rejected the argument of the prosecution that it later adopted as its own:

The Prosecution contends that Joseph Nzirorera's motion is illogical because the fact at issue cannot be rebutted, as it comes from a judgement where the Chamber saw live testimony from Witness CC and Elizaphan Ntakirutimana, and ultimately chose Witness CC as the credible witness. The Chamber notes that it took judicial notice of the fact at issue under Rule 94(B); furthermore, the Chamber recalls that facts noticed under Rule 94(B) are merely presumptions that may be rebutted by the defence with evidence at trial. Accordingly, the Chamber concludes that Nzirorera's motion is not illogical because the fact at issue is clearly rebuttable.⁷

9. Mr. Nzirorera sought certification to appeal the decision.⁸ The prosecution responded by agreeing that the Chamber's reasoning was erroneous, but requesting that the decision be affirmed on the grounds it had originally asserted and which had been rejected by the Chamber.⁹

10. On 24 March 2009, the Trial Chamber issued its *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Motion to Admit Testimony of Elizaphan Ntakirutimana* (24 March 2009) (the "Impugned Decision"). In the decision, it did the about-face that the prosecution had requested—switching its rationale for denying admission of Pastor Ntakirutimana's testimony—and granted certification to appeal.

11. Mr. Nzirorera now files a timely appeal from that decision.

The Impugned Decision

12. The Trial Chamber agreed with Mr. Nzirorera that its original decision had been erroneous and "withdrew its reasoning". It then decided to reconsider the issue *proprio motu*.¹⁰

13. The Trial Chamber went on to deny the motion on a different ground. Reasoning that the Trial Chamber in Pastor Ntakirutimana's trial had already decided to believe the prosecution witness over the Pastor, the Trial Chamber held that "evidence

⁷ *Decision on Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (10 November 2008) at para. 4

⁸ *Joseph Nzirorera's Application for Certification to Appeal Decision on Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (12 November 2008)

⁹ *Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal Decision on Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (17 November 2008)

¹⁰ Impugned Decision at para. 10

which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact.”¹¹

14. The Trial Chamber justified its decision with the following reasoning:

- (A) the first Trial Chamber was in a much better position to make determinations as to reliability and credibility having heard the evidence *viva voce*;
- (B) re-engaging in this determination would be to act in review of the first Trial Chamber and therefore “outside of its jurisdiction”; and
- (C) judicial economy would not be achieved if parties were entitled to challenge adjudicated facts with evidence that had already been rejected in relation to that finding.¹²

15. Since, according to the Trial Chamber, adjudicated facts may only be rebutted by introducing reliable and credible evidence, it denied admission of the transcript of Pastor Ntakirutimana’s testimony.¹³

Ground of Appeal

16. The Trial Chamber made an incorrect interpretation of governing law in ruling that testimony from the underlying trial could not be admitted to rebut a judicially noticed fact from that trial.

Standard of Review

17. The Appeals Chamber has frequently held that the Trial Chamber’s exercise of discretion will be reversed only if it is demonstrated that the Trial Chamber made a discernible error because its decision was based upon an incorrect interpretation of governing law, on a patently incorrect conclusion of fact, or because it was so unfair and so unreasonable to constitute an abuse of the Trial Chamber’s discretion.¹⁴

¹¹ Impugned Decision at para. 11

¹² Impugned Decision at para. 12

¹³ Impugned Decision at para. 11

¹⁴ *Decision on Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para. 7 and cases cited therein.

Argument

18. Rule 94(B) provides that:

At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

19. The Appeals Chamber has explained that adjudicated facts are “facts that have been established in a proceeding between other parties on the basis of the evidence that the parties to that proceeding chose to introduce, in the particular context of that proceeding.”¹⁵

20. Consequently, it held that adjudicated facts are merely presumptions which may be rebutted by the defence with evidence at trial.¹⁶ The Appeals Chamber held that the effect of taking judicial notice of an adjudicated fact is to relieve the prosecution of its initial burden to produce evidence on the point; “the defence may then put the point into question by introducing reliable and credible evidence to the contrary.”¹⁷

21. A Trial Chamber of the ICTY has explained that judicial notice of adjudicated facts does not infringe upon the presumption of innocence because the defence is fully entitled to adduce evidence during the course of its case to rebut the factual circumstances encapsulated in the adjudicated facts in question.¹⁸

22. This appeal deals with the nature of evidence which can be introduced by the defence to rebut an adjudicated fact.

23. Mr. Nzirorera contends that he should not be precluded from introducing the testimony of a witness who was heard at the underlying trial. While that testimony may not have carried the day in the context of the underlying trial, it may, when combined with additional evidence elicited by Mr. Nzirorera at his own trial, add weight to the rebuttal of the adjudicated fact.

¹⁵ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 40

¹⁶ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 42

¹⁷ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 42

¹⁸ *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Request for Reconsideration or of Certification to Appeal the Decision on Prosecution's Motion for Notice of Adjudicated Facts* (31 October 2008) at para. 14

24. For example, Pastor Ntakirutimana was tried in 2002. Now, seven years later, many factors concerning the availability of evidence have changed. Defence counsel are able to investigate in Rwanda more easily. Many persons who participated in the various crimes have had their cases adjudicated in Gacaca proceedings and are now free to speak about the attacks and who participated in them. Therefore, in seeking to rebut an adjudicated fact, the defence should be free to include Pastor Ntakirutimana's account among the evidence which Mr. Nzirorera's Trial Chamber considers in determining whether the adjudicated fact has been rebutted.

25. Thus while in the context of the evidence presented at Pastor Ntakirutimana's own trial, the original Chamber may not have credited his testimony, the Trial Chamber in Mr. Nzirorera's case may well come to a different conclusion when considering the evidence in the context of the other evidence brought in Mr. Nzirorera's case.

26. Neither the prosecutor nor the Trial Chamber has cited any jurisprudence for the proposition that the defence is barred from introducing testimony heard at the original trial in the exercise of its right to rebut an adjudicated fact.¹⁹

27. The Trial Chamber appears to have misconstrued the language of the Appeals Chamber in which it said that "the defence may then put the point into question by introducing reliable and **credible** evidence to the contrary." (emphasis added)²⁰ The reliability of evidence is a legitimate criterion for admissibility; the credibility of evidence is to be weighed at the end of the case after all of the evidence has been heard. Certainly the Appeals Chamber did not insert a credibility criterion for the admission of evidence rebutting adjudicated facts when such a criterion does not exist for admissibility of any other kind of evidence.

28. This very Trial Chamber has, on many occasions, held it has the discretion to admit evidence based upon two criteria only: the evidence must be relevant and have probative value and that only the beginning of proof of indicia of reliability must be established in order for evidence to be admitted.²¹ It has never included credibility as a

¹⁹ *Prosecutor's Response to Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana* (20 August 2008) at para 6; *Impugned Decision* at paras 11-12

²⁰ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 42

²¹ See, for example, *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of UNAMIR Documents* (21 November 2006) at para. 4

criterion for the **admissibility** of evidence, frequently assuring the parties that the weight or credibility of the evidence would be determined at the end of the case, in conjunction with all of the evidence presented during the trial.²²

29. The Trial Chamber in the *Bagosora* case has clearly stated that lack of credibility is not a basis for exclusion of a witness' testimony.²³ Therefore, the Trial Chamber in Mr. Nzirorera's case erred in excluding the transcript of Pastor Ntakirutimana's testimony for lack of credibility.

30. In Mr. Nzirorera's case, the Trial Chamber has admitted the testimony of prosecution witnesses who have previously been found not to be credible in previous judgements of the ICTR. For example, Witness AMM testified in Mr. Nzirorera's trial for the prosecution despite the fact that in the *Musema* case, the Trial Chamber, in its judgement, explicitly found that he was not credible.²⁴ Under the same principle, the testimony of Pastor Ntakirutimana should have been admitted despite the fact that it was not credited at his own trial.

31. Besides the lack of any jurisprudence, the Trial Chamber's reasoning for excluding the testimony of Pastor Ntakirutimana is flawed.

32. Its contention that "the first Trial Chamber was in a much better position to make determinations as to reliability and credibility having heard the evidence *viva voce*" fails to take into account that the evidence at the two trials on the adjudicated fact may be different.

33. Its contention that re-engaging in the determination of the adjudicated fact based on the same testimony heard in the original trial would be to act in review of the first Trial Chamber and therefore be "outside of its jurisdiction" also fails to take into account that the evidence at the two trials on the adjudicated fact may be different. In any event, the Appeals Chamber has held that "one Trial Chamber is not bound to follow the decisions of other Trial Chambers, even if comprised of the same judges."²⁵

²² See, for example, *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 6

²³ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Request for Exclusion of Testimony of Witness Jean Kambanda* (6 July 2006) at para. 3

²⁴ Transcript of 20 June 2007 @ 67-69; Exhibit P86

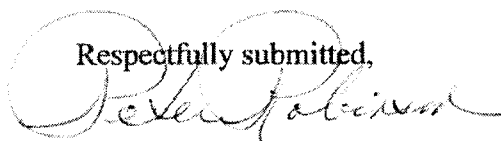
²⁵ *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 188

34. Its contention that judicial economy would not be achieved if parties were entitled to challenge adjudicated facts with evidence that had already been rejected in relation to that finding also fails to take into account that the evidence at the two trials on the adjudicated fact may be different.

35. Therefore, the Trial Chamber incorrectly interpreted governing law in coming to the conclusion that evidence which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact. Its decision refusing to admit the transcript of the testimony of Pastor Elizaphan Ntakirutimana should be reversed.

Word count: 2472

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera



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