

ICTR-98-44-A
27-8-2007
(1923/A-1918/A)

1923/A
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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Date Filed: 27 August 2007

The PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-AR

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Prosecutor's Response to Nzirorera, Ngirumpatse and Karemera's Appeal from Decision to Proceed in the Absence of the Accused

Office of the Prosecutor:

Mr. Don Webster
Mr. Neville Weston

Counsel for the Defence:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for *Edouard Karemera*
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for *Mathieu Ngirumpatse*
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for *Joseph Nzirorera*

A OVERVIEW

1. Joseph Nzirorera is on trial with his co-accused, Edouard Karemera and Mathieu Ndirumpatse. On 27 June 2006, Joseph Nzirorera became ill and was temporarily unable to attend his trial. Trial Chamber III ruled that the trial could continue in his absence. The Appellants Nzirorera, Ndirumpatse and Karemera have been granted certification to appeal the decision of Trial Chamber III to proceed with the trial in Nzirorera's absence.
2. The Appellant Nzirorera's sole ground of appeal is that "[t]he Trial Chamber erred in proceeding in the absence of an accused who wanted to attend his trial but was medically unfit to do so". The crux of the Appellant Nzirorera's argument is that the Trial Chamber does not have the power to continue trial proceedings in a multi-accused trial when one of the accused is absent because of illness. The Appellant Nzirorera does not specify what remedy he seeks other than a reversal of the Trial Chamber's decision. As best as it can be understood, the Appellants Ndirumpatse and Karemera are relying upon the same argument and are seeking the same order from the Appeals Chamber.
3. It is useful at this point to set out a chronology of events. The witness GBY/Jean Bosco Twahirwa commenced his direct examination on 25 June 2007. His direct examination concluded on 26 June 2007 and counsel for the Appellant Ndirumpatse commenced his cross-examination. On 27 June 2007 the Appellant Nzirorera became ill and no evidence was heard on that day. On 28 June 2007 counsel for Ndirumpatse and Karemera completed their cross-examination of the witness¹. The Appellant Nzirorera was absent but his counsel was present throughout the day. The trial was then adjourned until 2 July 2007 when the Appellant Nzirorera was able to attend court. His counsel was then able to commence his cross-examination of the witness.
4. The Prosecutor (hereinafter the "Respondent") opposes the appeal. There was no error of law committed by the Trial Chamber. As the Appellant Nzirorera points out, an accused does not have an absolute right to be present during his trial.² The control of the trial proceedings is always a matter for the Trial Chamber. Contrary to the submissions of the Appellant Nzirorera, a Trial Chamber can validly continue a trial – particularly a multi-accused trial – where an accused is absent for reasons other than for misconduct or voluntary absence. Ultimately the question is whether in doing so the Trial Chamber reasonably exercised its discretion,³ which for the reasons that will be set out below, it did.
5. In addition the Respondent submits that the remedy sought by the Appellants is not justifiable. Even if there has been any unfair impairment of the fair trial rights of any of the Appellants – and the Respondent submits that there was not – the reversal of the decision would logically

¹ It should be noted that it was placed on the record by senior counsel for the prosecution that the witness had been in Arusha since 8 June 2007 waiting to testify. Further the witness had previously been brought to Arusha in December 2006 to testify, but had not commenced his evidence in that session. Trial Transcript 28 June 2007, p. 5.

² Appellant's Brief, paragraph 14, citing *Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006).

³ The Appeals Chamber has held that "a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion". *Slobodan Milosevic v Prosecutor* Case No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004). In the present case there is no error of fact law or law committed by the Trial Chamber, and the Trial Chamber's exercise of discretion was entirely reasonable.

mean that the totality of GBY/Twahirwa's evidence would be excluded. Given that each of the Appellants was able to cross-examine the witness in accordance with the Rules of Evidence and Procedure this would lead to a grossly disproportionate result.

6. As the Appellant has not demonstrated any error on the part of the Trial Chamber the appeal should be dismissed.

B Argument

Proceedings in the absence of an accused are not confined to instances of disruptive behaviour or voluntary absence.

7. Central to the Appellant's argument is the contention that "the only permissible exception to the right of an accused to be present at his trial are those predicated on the doctrine of waiver or forfeiture – voluntary absence or absconding after his trial has begun, and forfeiture inferred from obstructionist conduct in the courtroom".⁴ The Appellant relies upon the *Zigiranyirazo* decision as his sole authority for this proposition. According to the Appellant Trial Chamber III erred in law by not stopping the trial once the Appellant Nzirorera became ill.
8. Contrary to the Appellant's arguments a trial can be lawfully continued when an accused is absent for reasons other than misconduct or voluntary absence. *Zigiranyirazo* is not authority for limiting a Trial Chamber's powers to continue a trial in the absence of a sick accused. First, there is nothing in the judgement which states that a trial can only be continued in the absence of an accused for reasons of misconduct or voluntary absence. The passage relied upon by the Appellants⁵ merely speaks of "substantial trial disruptions" as providing "a useful measure by which to assess other restrictions on the right to be present at trial". The phrase "substantial trial disruptions" is not being used as an exhaustive description of the bases upon which a trial can continue in the absence of an accused. Rather it is a yardstick by which other justifications for continuing a trial in the absence of an accused can be assessed. The Appeals Chamber is clearly stating that other measures might justify continuing a trial in the absence of an accused; the Appeals Chamber certainly does not say that nothing else can justify continuing a trial in the absence of an accused. Presumably if the Appeals Chamber wanted to limit the powers of a Trial Chamber to continue in the absence of an accused in the manner suggested by the Appellants it would have said so.
9. Secondly, the facts in *Zigiranyirazo* establish that a trial can continue in the absence of an accused for reasons other than misconduct. In *Zigiranyirazo* the issue causing the accused to be absent from the court was witness security. In ruling the Trial Chamber's discretion had miscarried the Appeals Chamber held that the Trial Chamber had not properly considered other options which could have balanced the interests of witness safety with the accused's right to be present during his trial. The Appeals Chamber did not hold that the Trial Chamber erred merely because it considered the issue of witness safety to be a valid reason to continue a trial in the absence of an accused. Rather the Trial Chamber had failed to properly weigh the impairment of the accused's right to be present at his trial with the alleged need to protect the witness.

⁴ Appellant Nzirorera's brief at paragraphs 17 and 24.

⁵ Ibid at paragraph 14.

10. Thirdly, the Appeals Chamber has affirmed that a trial can continue if an accused is absent through illness. In *Milosevic* the accused, who was self represented, suffered from ill-health. Over a two year period the trial had been adjourned for 66 sitting days. The Appeals Chamber held that the imposition of assigned counsel did not amount to an unreasonable impairment of the accused's right to self-representation. Importantly the Appeals Chamber held, "[i]f Milosevic's health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will enable the trial to continue even if Milosevic is temporarily unable to participate".⁶ Plainly the Appeals Chamber is sanctioning the proposition that a trial can validly continue when a single accused, who had assigned counsel, is unable to participate in the proceedings through illness. In the present case, where Nzirorera was one of three co-accused, and was represented at all times by a counsel of his choice, the argument that the trial cannot proceed for a day (when the co-accused's counsel are cross-examining) while Nzirorera is unwell becomes untenable.
11. Fourthly, the jurisprudence cited by the Appellant Nzirorera does not support the contention that a trial cannot proceed in the absence of an accused who is ill. In *R. v. Jones*⁷ the House of Lords held that there was no miscarriage of justice when a criminal trial proceeded before a jury when the accused had absconded after his arraignment. Contrary to the Appellant's argument, the issue of illness was not considered by the Court. The passage relied upon by the Appellant is merely *obiter dicta* in the speech of one of the Law Lords. Consequently *R. v. Jones* cannot stand as authority for the proposition advanced by the Appellant that illness of an accused will prevent a court from continuing with the trial.
12. An even stronger criticism can be leveled at the Appellant Nzirorera's reliance upon *Sesay*.⁸ The sole issue for the consideration of the Trial Chamber of the Special Court of Sierra Leone was whether a multi-accused trial should continue when one of the co-accused refused to attend court. The issue of illness was not considered by the Trial Chamber. It is completely unclear why the Appellant Nzirorera relies upon this authority.
13. The conclusion to be drawn is that a Trial Chamber does have the discretionary power to continue with a trial in the absence of an accused who is ill. To hold otherwise would be to unnecessarily fetter the powers of a Trial Chamber to conduct trials in a fair manner while "safeguarding the Tribunal's basic interest in a reasonably expeditious resolution of the cases before it".
14. As the Appellants have not made out their primary argument their appeals must fail. Although it is not specifically raised by the Appellants the Respondent will briefly deal with the question of whether the Trial Chamber's exercise of discretion was reasonable.

Trial Chamber III exercised its discretion in a reasonable manner

15. The Trial Chamber correctly applied the proportionality test laid in *Zigiranyirazo*. The right of an accused to be tried in his or her presence is subject to "the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently

⁶ Slobodan Milosevic v Prosecutor, Case No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004), at paragraph 20.

⁷ (2003) 1 AC.

⁸ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, *Ruling on the Issue of the Refusal of the Third Accused Augustine Gbao to Attend Hearings of the Special Court of Sierra Leone on 7 July and Succeeding Days* (13 July 2004).

important objective and must impair the right no more than is necessary to accomplish the objective". Here the sufficiently important objective was the reasonably expeditious resolution of the case before the Tribunal.⁹ The Trial Chamber's exercise of its discretion in hearing part of the evidence of the witness was reasonable when the following matters are considered.

16. The evidence adduced on the day when the Nzirorera was absent directly concerned another accused, who was able to complete his cross-examination of the witness, as did counsel for Karemera. The Appellant's absence was relatively short and at all relevant times the Appellant was represented by counsel. A transcript of the evidence of the prosecution witness was made which was available to the Appellant. The Appellant's cross-examination of the witness did not commence until after the Appellant had recovered and returned to Court.¹⁰ Importantly the cross-examination by the Appellant's counsel did not commence until the Appellant and his counsel had ample time to confer and prepare the cross-examination. The Appellant was not at anytime denied the chance to confront the witness.
17. Taking all of the above matters into account, the Trial Chamber struck an appropriate balance between the need to protect the fair trial rights of the Appellant and the need to conduct the trial proceedings in a fair and expeditious way. In proceeding with the trial in the temporary absence of the Appellant the Trial Chamber adhered to the proportionality principle espoused by the Appeals Chamber.¹¹ The continuation of the trial served a "sufficiently important objective", namely the expeditious hearing of the testimony of a witness who was a genocide survivor.¹² Given the matters outlined above at paragraph 16 – particularly the fact that the Appellant Nzirorera was absent for only one day while evidence was heard – any impairment of the Appellant Nzirorera's right to be present at his trial was no more than necessary to accomplish this objective.
18. It cannot be said that Trial Chamber III's discretion was not exercised in a reasonable way. There has been no basis demonstrated for the Appeals Chamber to overturn the Trial Chamber's decision.

Other matters

19. The Appellant Nzirorera complains that the Trial Chamber erred in not considering a severance of his case from the co-accused. As no application for severance was brought by the Appellant at the time the question is moot. In any case, as the Appellant was absent from Court for only one day, the Appellant has not demonstrated why severance of his trial would be legally justified. Furthermore there can be no argument that Nzirorera and the other two accused have a conflict of interest – the criteria for severance set forth by rule 82(B) – since all three accused joined in their application to adjourn proceedings while Nzirorera was ill. Consequently, there being no conflict of interest, there is no basis to sever.

⁹ As recognized by Trial Chamber III in its decision at paragraph 21.

¹⁰ It bears noting that even if the Appeal Chamber is not persuaded that the Trial Chamber reasonably exercised the proportionality principle, such error did not prejudice the accused and given the lack of prejudice to Nzirorera it would be grossly disproportionate to exclude the evidence of GBY. Reviewing the trial transcripts from the day Nzirorera was absent, it becomes apparent that matters covered by Ngirumpatse's cross-examination on 28 June 2007, when Nzirorera was absent, were taken up again on 02 July 2007 by Nzirorera's defense counsel in his presence when he returned.

¹¹ *Zigiranyirazo v Prosecutor*, Case No. ICTR-2001-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006), at paragraph 14.

¹² The prosecution clearly alerted the Trial Chamber of the possibility of losing or compromising the testimony of the witness if proceedings were interrupted by a lengthy weekend postponement. See TT 28 June 2007 at p. 6.

20. Further the Appellant Nzirorera complains that the Trial Chamber erred in referring to Rule 92bis in considering whether to proceed in his absence. When read in context it is clear that Trial Chamber III referred to Rule 92bis merely as a measure by which to assess the fairness of continuing the trial in the absence of the accused. For the reasons advanced above the Trial Chamber was correct in doing so.

C DISPOSITION

21. As the Appellants have not demonstrated any error in the approach of Trial Chamber III, the appeal should be dismissed.

Dated 27th of August 2007, at Arusha, Tanzania.

Don Webster
Senior Trial Attorney

Neville Weston
Senior Appeals Counsel

Word Count: 2.719



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