

MICT-12-29-R
16-09-2016
(1370 - 1367)

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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-12-29-R

THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Joseph Chiondo Masanche
Judge Aydin Sefa Akay
Judge Aminatta Lois Runeni N'Gum
Judge Gberdao Gustave Kam

Registrar: Mr. John Hocking

Date Filed: 16 September 2016

THE PROSECUTOR

v.

AUGUSTIN NGIRABATWARE

Public Redacted Version

REPLY BRIEF: MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor
Mr. Serge Brammertz
Mr. Abubacarr Tambadou

Government of Tanzania

Augustin Ngirabatware:
Mr. Peter Robinson

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Thurairapoo

1. Dr. Augustin Ngirabatware has moved, pursuant to Rule 68(I), for provisional release for the period between now and a final decision on his *Motion for Review of Judgement*.¹

2. On 13 September 2016, there was filed the *Prosecution Response to Motion for Provisional Release*.² Dr. Ngirabatware now replies.

Special Circumstances

3. The Prosecution, relying upon the *Stanisic* decision from the ICTY and the *Ntabakuze* decision from the ICTR, contends that the Appeals Chamber is precluded from relying on the merits of the motion for review when determining the existence of special circumstances that may warrant provisional release.³

4. In the *Stanisic* case, the appellants sought a new trial based upon the alleged bias of a Judge who had been disqualified from another case. The Appeals Chamber declined to find special circumstances to release the appellants pending a decision on the merits. The Appeals Chamber reasoned that “applying the rationale behind *Stanisic*’s submissions would lead to provisionally release any appellant who raises an issue which allegedly has ‘serious consequences’.”⁴

6. In the *Ntabakuze* case, the appellant sought provisional release, contending that the joinder of his appeal with that of his co-accused unnecessarily delayed the resolution of his appeal, and that he should be released in the meantime. The Appeals Chamber held that the prospect of success of his appeal, which the appellant had touted in his motion, was not a basis upon which it could grant provisional release.⁵

7. The situation is different here. [redacted]. This is not simply an issue that has “serious consequences”, or is not a mere inconvenience based upon delay. The Prosecution’s case has collapsed. It means that an innocent man is sitting in prison convicted of crimes he did not commit. Every day that passes irreparably compounds

¹ *Motion for Provisional Release* (1 September 2016)

² The response was filed confidentially, but contains little information of a confidential nature. The Appeals Chamber is requested to order the Prosecution to file a public redacted version, redacting references to the information recently received from the Prosecution witnesses.

³ *Response*, paras. 4-5

⁴ *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on behalf of Mico Stanisic seeking Provisional Release* (19 December 2013), para. 18

⁵ *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze’s Motions for Provisional Release and Leave to File Corrigendum* (2 September 2009), para. 22

this injustice.

8. Provisional release requires a case-by-case individual determination. The *Stanisic* and *Ntabakuze* cases do not establish a bar to provisional release when the special circumstances relate to the merits of the appeal. They simply stand for the proposition that claims of a meritorious appeal will not, in and of themselves, constitute special circumstances.

9. There is frequently recourse to the merits of a case when deciding on issues of detention or provisional release. The prosecution is able to detain someone by obtaining an arrest warrant based upon a *prima facie* case.⁶ This, of necessity, requires a confirming Judge to look to the merits of the case. Conversely, here there is a *prima facie* case that Dr. Ngirabatware may not have committed the crimes for which he has been convicted. The Mechanism cannot be empowered to detain a person by looking at the merits but without the power to look at those same merits when releasing a person.

10. Take the situation posited hypothetically by Judge Meron in another ICTR review case. Suppose the alleged victim of a murder for which an accused is convicted suddenly appears after the conviction is final.⁷ Were that the sole basis for the conviction, would the Mechanism be powerless to release the wrongfully convicted person provisionally until it could consider a motion for review, convene a hearing, and produce a final judgement, simply because it was not allowed to consider the merits?

11. Dr. Ngirabatware understands that it is difficult and uncomfortable for a Court to make a decision when it has not yet heard the evidence. But the Court is being asked to make a *provisional* decision, pending a full determination on the merits. Just as it is provisionally necessary to detain someone on a *prima facie* showing that they may have committed a crime before making a final determination at the conclusion of a trial, it is also provisionally necessary to release someone pending review when a *prima facie* showing is made that they may not have committed the crime for which they have been convicted. Both actions are taken to avoid a miscarriage of justice.

12. The Prosecution's contention that special circumstances cannot be found by looking to the merits of a case when considering detention or release is unfounded.

⁶ MICT Article 17(1)

⁷ See *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (6 March 2007) *Separate Opinion of Judge Theodor Meron*, para. 3

Flight Risk

13. The prosecution points to Dr. Ngirabatware's eight years as a fugitive and long sentence of imprisonment as evidence that he is not likely to appear for his review hearing or surrender when ordered.⁸

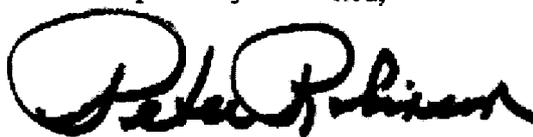
14. While those circumstances are relevant, the incentive for Dr. Ngirabatware to appear and clear his name and conviction for crimes he never committed is great. Dr. Ngirabatware is only requesting to be released to the safe house in Arusha, where his movements can be monitored and restricted as directed by the Appeals Chamber. Any further concerns about his appearance and whereabouts can be addressed by additional conditions of release, which may include daily reporting to the MICT office in Arusha, restrictions on the areas to which he can travel, or even electronic monitoring via an ankle bracelet.

Conclusion

15. The Appeals Chamber is not powerless to release an innocent man pending a full review of the merits. Granting provisional release for Dr. Ngirabatware to live at a safe house while it considers his *Motion for Review of Judgement* strikes an appropriate balance between ensuring his appearance and mitigating an injustice.

Word Count: 1069

Respectfully submitted,



PETER ROBINSON
Counsel for Augustin Ngirabatware

⁸ *Response*, para. 7



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