

THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33AR90/108

THE APPEALS CHAMBER

Before: A bench of the Appeals Chamber

Registrar: Mr. John Hocking

Date Filed: 15 October 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

Public

APPEAL OF DECISION ON JURISDICTION TO
INVESTIGATE PROSECUTION WITNESS GEK

Office of the Prosecutor:

Mr. Hassan Jallow

Mr. Richard Karegyesa

Ms. Sunkarie Ballah-Conteh

Jean de dieu Kamuhanda:

Mr. Peter Robinson, Counsel

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Introduction

1. Jean de dieu Kamuhanda hereby appeals, pursuant to Rules 90(J) and 108(I), from the Single Judge's *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK* (16 September 2015) (the "Impugned Decision"). He contends that the Single Judge rendered an incorrect interpretation of governing law when holding that the Residual Mechanism lacked jurisdiction to initiate an investigation into allegations of contempt and false testimony occurring before the ICTR Appeals Chamber.

Statement of Facts

2. Jean de dieu Kamuhanda is an innocent man serving a sentence for a crime he never committed.

3. Mr. Kamuhanda was charged with leading an attack on the Protestant Parish in his native commune of Gikomero on 12 April 1994 in which many Tutsis were killed.¹ From the day of his arrest in November 1999 to the present day, Mr. Kamuhanda has denied being present in Gikomero after the death of President Habyarimana on 6 April 1994 or having anything to do with the Gikomero Parish attack.²

4. After a trial before Judges Sekule, Ramoroson, and Maqutu, Mr. Kamuhanda was convicted of genocide and extermination for ordering the attack on Tutsis at Gikomero Protestant Parish and sentenced to life imprisonment.³ Among the witnesses who testified against him was Prosecution Witness GEK, who testified that she had personally heard him incite others to attack the Tutsis and personally observed him deliver weapons prior to the attack.⁴

5. During the appeal proceedings, Mr. Kamuhanda produced statements from Prosecution Witness GAA and Prosecution Witness GEX, who claimed that their testimony and statements that Mr. Kamuhanda had been present at the Gikomero Parish were false and that Witness GEK had encouraged persons to falsely say that they had seen or heard that Mr. Kamuhanda was present there.⁵

¹ *Prosecutor v Kamuhanda*, No. ICTR-99-54-I, *Indictment* (27 September 1999)

² Trial Transcript of 30 January 2003, pp. 43-47, 61; Exhibit D40; Transcript of 20 August 2002, p. 90

³ *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Judgement* (22 January 2004)

⁴ *Id.*, paras. 254-56, 314

⁵ Exhibit ARP1 (Witness GAA) and ARP4 (Witness GEX)

6. The Appeals Chamber held a hearing at which Witnesses GAA and GEX testified that they had falsely accused Mr. Kamuhanda.⁶ The prosecution called Witness GEK to testify in rebuttal.

7. On 19 May 2005, Witness GEK testified that two Tribunal employees had approached her at the United Nations safe house in Arusha while she was testifying in another case and offered to pay her money and give her other substantial assistance if she would recant her trial testimony in the *Kamuhanda* case.⁷ The prosecution argued that this conduct showed how vulnerable prosecution witnesses were to pressure from accused persons and their associates to falsely recant their testimony.⁸

8. After hearing Witness GEK's testimony, the Appeals Chamber expressed its extreme concern that "there may have been attempts to pervert the course of justice with respect to this appeal in the form of the solicitation of false testimony". It stated:

The Chamber wishes to make it very clear to the parties, to the witnesses, who have appeared before us during the past two days, and to future witnesses, as well as to all others connected to these proceedings, that the Tribunal will not tolerate such occurrences. The giving of false testimony before the Court, as well as the interference with the testimony of other witnesses who may appear before the Court, are unacceptable practices, both for the impact that they have on the trial as well as the impact that they have on the Tribunal's mission to seek justice and establish the truth.⁹

9. The Appeals Chamber went on to order the prosecution to investigate (1) allegations to the effect that Tribunal employees may have attempted to interfere with the witness who had given evidence in proceedings before this Tribunal; and (2) the possibility of false testimony given at the Appeals hearing.¹⁰

10. The prosecution retained an American lawyer, Loretta Lynch, to serve as Special Counsel to carry out the investigations ordered by the Appeals Chamber.¹¹

11. On 19 September 2005, the Appeals Chamber, with Judge Weinberg de Roca dissenting, affirmed Mr. Kamuhanda's conviction and life sentence.¹²

⁶ Appeals Transcript of 18 May 2005

⁷ Transcript of 19 May 2005, p. 49 (The actual testimony was given in closed session at pp. 6-9)

⁸ Transcript of 19 May 2005, p. 43

⁹ Transcript of 19 May 2005, p. 50

¹⁰ Transcript of 19 May 2005, p. 51

¹¹ Appointment of Special Counsel by the Prosecutor, ICTR/INFO-9-2-442.EN, 12 July 2005, available at <http://www.unict.org/en/news/appointment-special-counsel-prosecutor>

¹² *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005)

12. On 7 April 2006, the Appeals Chamber dismissed Mr. Kamuhanda's request that it order Ms. Lynch to allow him the opportunity to be heard in the course of her investigation and to provide him with a copy of her report when the investigation was concluded. The Appeals Chamber held that:

In directing the Prosecution to investigate the possibility of false testimony, the Appeals Chamber left it to the Prosecutor's discretion to take the eventual steps and measures which he may deem necessary and appropriate under the circumstances. Moreover, Rule 70(A) provides that reports prepared in connection with the investigation of a case are not subject to disclosure. Consequently, Mr. Kamuhanda's requests related to the investigation lack merit.¹³

13. The prosecution later indicated that the Special Counsel never concluded her investigation and never filed a report.¹⁴

14. On 25 August 2011, the Appeals Chamber denied Mr. Kamuhanda's request for review of his conviction. It also dismissed Mr. Kamuhanda's allegations that the prosecution had misled the Appeals Chamber concerning Witness GAA and had failed in its obligation to have the Special Counsel conclude her investigation related to Witness GAA and submit a final report. The Appeals Chamber held that:

The Appeals Chamber recalls that, in its Oral Decision, it directed the Prosecution to investigate allegations and discrepancies under Rules 77(C)(i) and 91(B) of the Rules, leaving it to the Prosecution's discretion to take the eventual steps and measures deemed necessary and appropriate under the circumstances. These provisions indicate that instructions to investigate possible contempt are made "with a view to the preparation and submission of an indictment". The Appeals Chamber considers that the filing of a concluding report is therefore not necessarily required and that it was within the Prosecution's discretion instead to file indictments against Witness GAA and Nshogoza. Accordingly, Kamuhanda's submission that the Prosecution committed contempt is without merit. The Appeals Chamber declines to consider any alleged violation of the Prosecutor's Regulation No. 2 because a violation of any of its provisions would be a matter for the Prosecutor to consider.¹⁵

15. When Mr. Kamuhanda's new counsel reviewed his file in 2015, it became apparent that the Special Counsel Loretta Lynch had indeed investigated that part of issue

¹³ *Prosecutor v Kamuhanda*, No. ICTR-99-54A-A, *Decision on Jean de dieu Kamuhanda's Request related to Prosecution Disclosure and Special Investigation* (7 April 2006), para. 7

¹⁴ *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Prosecutor's Clarification on Kamuhanda's Request for Special Counsel's Report* (13 August 2009), para. 4

¹⁵ *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 July 2011) at para. 65

(2) of the Appeals Chamber's 2005 directions¹⁶ that pertained to the defence witnesses. Her investigation led to the indictment and guilty plea of Witness GAA for giving false testimony on Mr. Kamuhanda's behalf at the Appeals hearing,¹⁷ and the indictment and acquittal of Mr. Kamuhanda's investigator for instigating and bribing Witness GAA.¹⁸

16. However, it also appeared that nothing ever came of issue (1)--the allegations that Tribunal employees may have attempted to interfere with Witness GEK, or that part of issue (2) that pertained to allegedly false testimony of Witness GEK.

17. When new counsel for Mr. Kamuhanda requested information in the possession of the prosecution concerning the allegation of Witness GEK that Tribunal employees attempted to convince her to recant her testimony against Mr. Kamuhanda and any conclusions or recommendations of the Special Counsel on that issue, he was advised that the prosecution had no exculpatory documents in its possession on those subjects.¹⁹

18. Counsel for Mr. Kamuhanda contacted the two employees of the Tribunal's Victims and Witnesses Support Section who Witness GEK claimed had encouraged her to recant her testimony against Mr. Kamuhanda. Both employees adamantly denied doing so and stated emphatically that Witness GEK's testimony about them was false.²⁰

Procedural History

19. On 3 August 2015, Mr. Kamuhanda filed his *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK* with the Residual Mechanism. He alleged that there were strong grounds to believe that Witness GEK had given false testimony at the Appeals Hearing, and had interfered with the administration of justice. Pursuant to Rules 90(C)(ii) and 108(B)(ii), he requested that the Mechanism appoint an *amicus curiae* prosecutor to investigate Witness GEK.

20. On 10 August 2015, the President referred the motion to Single Judge Vagn Joensen.²¹

¹⁶ See para. 9, above.

¹⁷ *Prosecutor v GAA*, No. ICTR-07-90-R77-I, *Judgement and Sentence* (4 December 2007)

¹⁸ *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009). Mr. Nshogoza was convicted of disclosing confidential information and sentenced to 10 months imprisonment for that offense.

¹⁹ *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK* (3 August 2015), Annexes A & B.

²⁰ *Id.*, at Annexes C-E

²¹ *Order Assigning a Single Judge* (10 August 2015)

21. The prosecution filed a response to the motion on 11 August 2015²² and Mr. Kamuhanda filed a reply on 20 August 2015.²³

22. On 16 September 2015, the Single Judge issued the Impugned Decision.

23. In light of the finding by the Single Judge that he did not have jurisdiction to reconsider or deal with a matter that had been decided by the ICTR Appeals Chamber, on 21 September 2015, Mr. Kamuhanda attempted to file his motion for appointment of an *amicus curiae* prosecutor with the ICTR Appeals Chamber.²⁴

24. On 23 September 2015, Mr. Kamuhanda's counsel received an e-mail from the Registry that it had refused to file the motion as the ICTR no longer had jurisdiction over Mr. Kamuhanda's case.²⁵

25. On 1 October 2015, Mr. Kamuhanda filed a notice of appeal from the Impugned Decision of the Single Judge.

The Impugned Decision

26. In the Impugned Decision, the Single Judge held that while jurisdiction for contempt and false testimony matters passed from the ICTR to the Residual Mechanism on 1 July 2012, decisions of the ICTR prior to that date "retain their validity before the Mechanism."²⁶

27. He went on to conclude that:

Considering that prior to the transfer date, the Appeals Chamber, seised with the Kamuhanda case, decided pursuant to Rules 77 and 91 of the ICTR Rules which steps should be taken in light of the testimony that was given before it and later determined that the Prosecutor had acted within the directives in the Appeals Chamber Investigation Decision, I find that I do not have jurisdiction to revisit the matter.²⁷

28. The Single Judge, on that basis, dismissed Mr. Kamuhanda's motion.

²² *Prosecution Response to Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK* (11 August 2015)

²³ *Reply Brief: Motion for Appointment of Amicus Curiae Prosecutor* (20 August 2015)

²⁴ A copy of that motion is attached as Annex "A".

²⁵ The e-mail is attached as Annex "B".

²⁶ *Impugned Decision* at para. 10

²⁷ *Impugned Decision* at para. 11

Ground of Appeal

29. Mr. Kamuhanda presents a single ground of appeal:

The Single Judge erred in finding that the Residual Mechanism lacks jurisdiction to appoint an *amicus curiae* prosecutor.

Standard of Review

30. The Impugned Decision dismissed Mr. Kamuhanda's motion as a matter of law and not in the exercise of the Single Judge's discretion. Therefore, the standard of review is whether the Single Judge committed an error of law.²⁸

Jurisdiction for the Appeal

31. Mr. Kamuhanda has filed this direct appeal pursuant to Rules 90(J) and 108(I).

32. Rule 90(J) provides in pertinent part:

Any decision disposing of a contempt case rendered by a Single Judge under this Rule shall be subject to appeal as of right.

33. Rule 108(I) provides in pertinent part:

Decisions disposing of the false testimony case rendered by a Single Judge under this Rule shall be subject to appeal as of right.

34. The ICTR Appeals Chamber has held, when interpreting similar provisions of the ICTR Rules, that a decision declining to appoint an *amicus curiae* prosecutor is appealable as of right.²⁹

35. The ICTY Appeals Chamber has likewise held, when interpreting similar provisions of the ICTY Rules, that a decision declining to initiate contempt proceedings is appealable as of right.

36. In the *Seselj* case, acting upon an appeal of the Prosecution, the Appeals Chamber held that:

²⁸ *Prosecutor v Bagosora*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (18 September 2006) at para. 16

²⁹ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR91, *Decision on Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony...* (22 January 2009) at para. 15. See also *Karemera et al v Prosecutor*, No. ICTR-98-44-AR91.2, *Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision not to Prosecute Witness [] for False Testimony* (16 February 2010)

The Appeals Chamber considers that a decision dismissing a request to initiate contempt proceedings is a decision disposing of the contempt case within the meaning of Rule 77(J) of the Rules. The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber held that sufficient grounds did not exist to initiate contempt proceedings against Vucic, which in effect dismissed the Prosecution Request to initiate contempt proceedings. The Appeals Chamber accordingly finds that an appeal as of right lies from the Impugned Decision under Rule 77(J) of the Rules.³⁰

37. The operative wording of ICTR and ICTY Rules 77(J) and 91(I) differs from MICT Rules 90(J) and 108(I) in that the former provides for an appeal of right for “any decision rendered by a Trial Chamber under this Rule” while the latter provides for an appeal of right for “any decision disposing of a contempt [false testimony] case rendered by a Single Judge under this Rule”.

38. This change in the wording appears to be an incorporation of ICTY jurisprudence that held that only decisions that disposed of a contempt case, as opposed to “any decision” could be appealed as of right.³¹

39. As the ICTY and ICTR Appeals Chambers have recognized, a decision dismissing a request to initiate a false testimony or contempt proceeding, is a decision disposing of the false testimony or contempt case.³²

40. The effect of the Impugned Decision not to initiate an investigation of Witness GEK for false testimony or contempt was to dispose of the false statement and contempt case and therefore is appealable under the language of the MICT Rules.

Argument

41. Article I (a) (a) of the MICT Statute states: “the Mechanism shall have the power to prosecute in accordance with the provisions of the present Statute, any person who knowingly and wilfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt.”

42. As evidenced by its refusal to even file Mr. Kamuhanda’s motion, the ICTR

³⁰ *Prosecutor v Seselj*, No. IT-03-67-AR77.2, *Decision on the Prosecution’s Appeal Against the Trial Chamber Decision of 10 June 2008* (25 July 2008) at para. 12

³¹ *Prosecutor v Seselj*, No. IT-03-67-AR77.1, *Decision on Vojislav Seselj’s Appeal Against the Trial Chamber’s Decision of 19 July 2007* (14 December 2007) at p. 2, last paragraph

³² *Prosecutor v Seselj*, No. IT-03-67-AR77.2, *Decision on the Prosecution’s Appeal Against the Trial Chamber Decision of 10 June 2008* (25 July 2008) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR91, *Decision on Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony...* (22 January 2009) at para. 15

no longer has the power to appoint an *amicus curiae* prosecutor to investigate persons for false testimony and contempt.

43. By holding that he had no jurisdiction to appoint an *amicus curiae* prosecutor, the Single Judge misconstrued Mr. Kamuhanda's motion and misapplied the jurisprudence concerning the effect of ICTR decisions on the Mechanism.

44. The Single Judge misconstrued Mr. Kamuhanda's motion as raising the same issues that had been raised before the ICTR Appeals Chamber. That was not the case. The issue that led to the Appeals Chamber's 2006 decision was whether Mr. Kamuhanda was entitled to be heard by the Special Counsel and to receive a copy of her report.³³ The issue that was decided in 2011 was whether the Special Counsel was required to file a final report.³⁴ At the time that these decisions were rendered, the facts that are the subject of Mr. Kamuhanda's 2015 motion were not even known.

45. It was only in 2015, after Mr. Kamuhanda's new counsel contacted the VWSS employees accused by Witness GEK, that it was discovered that evidence existed which established false testimony and contempt by Witness GEK.

46. Therefore, the Single Judge erred in concluding that the same issue presented by Mr. Kamuhanda's motion had already been decided by the ICTR Appeals Chamber.

47. The Single Judge also erred in applying the jurisprudence on the effect of ICTR decisions on the Mechanism.

48. The Appeals Chamber has explained the relationship as follows:

The Mechanism was established pursuant to United Nations Security Council Resolution 1966 (2010) and continues the material, territorial, temporal, and personal jurisdiction of the ICTR. The Statute and the Rules of the Mechanism reflect normative continuity with the Statutes and Rules of the ICTR and ICTY. The Appeals Chamber considers that it is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTR and ICTY. Likewise, where the respective Rules or Statutes of the ICTR or ICTY are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them.³⁵

³³ *Prosecutor v Kamuhanda*, No. ICTR-99-54A-A, *Decision on Jean de dieu Kamuhanda's Request related to Prosecution Disclosure and Special Investigation* (7 April 2006), para. 6, and *Conclusions en Replique a la Requete du Procureur sur le Fondement de l'Article 75(F)* (13 March 2006), pp. 2-3

³⁴ *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 July 2011) at para. 62

³⁵ *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014), para. 6; *Munyarugarama v Prosecutor*, No. MICT-12-09-AR14, *Decision on Appeal against the Referral Phineas Munyarugarama's Case to Rwanda...* (5 October 2012), para. 6

49. The Single Judge's statement that "decisions of the ICTR prior to [1 July 2012] retain their validity before the Mechanism"³⁶ is undeniably correct. But that does not divest the Mechanism from jurisdiction to act when new information arises.

50. For example, a core function of the Mechanism is to decide requests for disclosure of ICTR evidence to national jurisdictions that are seeking to prosecute or extradite persons for crimes committed during the 1994 Rwandan genocide. Disclosure of closed session testimony or exhibits received under seal often requires reconsideration and variation of decisions of the ICTR concerning protective measures.

51. Applying the logic of the Single Judge, the Mechanism would be without jurisdiction to reconsider or vary such protective measures because to do so, the ICTR decisions granting protective measures, or refusing to modify them, would no longer retain their validity.

52. Similarly, if an ICTR Chamber had found a witness credible in a judgement, it would be impossible to obtain a review of that judgement even where the witness herself came before the Mechanism and confessed to having lied, since to do so would not retain the validity of the ICTR judgement.

53. As these examples show, the Single Judge mistook the Appeals Chamber's explanation of the precedential value of ICTR decisions as a prohibition by the Mechanism on reconsideration or modification of those decisions in the face of new information.

54. While the Single Judge was entitled to consider, in the exercise of his discretion, whether the ICTR Appeals Chamber decisions militated against appointment of an *amicus curiae* prosecutor, he was mistaken in foreclosing the exercise of that discretion by finding that he had no jurisdiction. This was a legal error that invalidates the Impugned Decision.

Conclusion

55. For the foregoing reasons, the decision of the Single Judge that he had no jurisdiction to decide on Mr. Kamuhanda's request that an *amicus curiae* prosecutor be appointed to investigate possible false testimony and contempt of Witness GEK must be

³⁶ *Impugned Decision* at para. 10

reversed.

56. The Appeals Chamber should remand the matter to the Single Judge to decide the motion on its merits.

Word count: 3515

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is written in a cursive, flowing style with large, rounded letters.

PETER ROBINSON
Counsel for Jean de dieu Kamuhanda

ANNEX "A"

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE No. ICTR-99-54A-A

IN THE APPEALS CHAMBER

Before: A bench of the Appeals Chamber

Registrar: Mr. Bongani Majola

Date Filed: 21 September 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

Public w/Public Annexes A-D and Confidential Annex E

MOTION FOR APPOINTMENT OF AMICUS CURIAE
PROSECUTOR TO INVESTIGATE PROSECUTION WITNESS GEK

Office of the Prosecutor:
Mr. Hassan Jallow

Jean de dieu Kamuhanda:
Mr. Peter Robinson, Counsel

1. In the wake of the Residual Mechanism Single Judge's ruling that he lacked jurisdiction,³⁷ Jean de dieu Kamuhanda respectfully returns to the Appeals Chamber with this motion for an order appointing an *amicus curiae* prosecutor to conduct an investigation into false testimony and interference with the administration of justice in his case by Prosecution Witness GEK.

Background

2. Jean de dieu Kamuhanda is an innocent man serving a sentence for a crime he never committed.

3. Mr. Kamuhanda was charged with leading an attack on the Protestant Parish in his native commune of Gikomero on 12 April 1994 in which many Tutsis were killed.³⁸ From the day of his arrest in November 1999 to the present day, Mr. Kamuhanda has denied being present in Gikomero after the death of President Habyarimana on 6 April 1994 or having anything to do with the Gikomero Parish attack.³⁹

4. However, Mr. Kamuhanda was convicted of genocide and extermination for ordering the attack on Tutsis at Gikomero Protestant Parish and sentenced to life imprisonment.⁴⁰ Among the witnesses who testified against him was Prosecution Witness GEK, who testified that she had personally heard him incite others to attack the Tutsis and personally observed him deliver weapons prior to the attack.⁴¹

5. During the appeal proceedings, Mr. Kamuhanda produced statements from Prosecution Witness GAA and Prosecution Witness GEX, who claimed that their testimony and statements that Mr. Kamuhanda had been present at the Gikomero Parish were false, and that Witness GEK had encouraged persons to falsely say that they had seen or heard that Mr. Kamuhanda was present there.⁴²

6. The Appeals Chamber held a hearing at which Witnesses GAA and GEX testified that they had falsely accused Mr. Kamuhanda.⁴³ The prosecution called Witness GEK to testify in rebuttal.

³⁷ *Prosecutor v Kamuhanda*, No. MICT-13-35, *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (16 September 2015) paras. 10-11

³⁸ *Indictment* (27 September 1999)

³⁹ Trial Transcript of 30 January 2003, pp. 43-47, 61; Exhibit D40; Transcript of 20 August 2002, p. 90

⁴⁰ *Judgement* (22 January 2004)

⁴¹ *Id.*, paras. 254-56, 314

⁴² Exhibit ARP1 (Witness GAA) and ARP4 (Witness GEX)

⁴³ Appeals Transcript of 18 May 2005

7. On 19 May 2005, Witness GEK testified that her trial testimony was the truth and that she never encouraged anyone to falsely state that they had seen Mr. Kamuhanda at the Gikomero Parish.⁴⁴ She then made the explosive allegation that two Tribunal employees had approached her at the United Nations safe house in Arusha while she was testifying in another case and offered to pay her money and give her other substantial assistance if she would recant her trial testimony in the *Kamuhanda* case.⁴⁵ The prosecution argued that this conduct showed how vulnerable prosecution witnesses were to pressure from accused persons and their associates to falsely recant their testimony.⁴⁶

8. After hearing Witness GEK's testimony, the Appeals Chamber expressed its strong concern that "there may have been attempts to pervert the course of justice with respect to this appeal in the form of the solicitation of false testimony". It stated:

The Chamber wishes to make it very clear to the parties, to the witnesses, who have appeared before us during the past two days, and to future witnesses, as well as to all others connected to these proceedings, that the Tribunal will not tolerate such occurrences. The giving of false testimony before the Court, as well as the interference with the testimony of other witnesses who may appear before the Court, are unacceptable practices, both for the impact that they have on the trial as well as the impact that they have on the Tribunal's mission to seek justice and establish the truth.⁴⁷

9. The Appeals Chamber went on to order the prosecution to investigate (1) allegations to the effect that Tribunal employees may have attempted to interfere with the witness who had given evidence in proceedings before this Tribunal; and (2) the possibility of false testimony given at the Appeals hearing.⁴⁸

10. The prosecution retained an American lawyer, Loretta Lynch, to serve as Special Counsel to carry out the investigations ordered by the Appeals Chamber.⁴⁹

11. On 19 September 2005, the Appeals Chamber affirmed Mr. Kamuhanda's conviction and life sentence.⁵⁰

12. On 7 April 2006, the Appeals Chamber dismissed Mr. Kamuhanda's request that it order Ms. Lynch to allow him the opportunity to be heard in the course of her

⁴⁴ Transcript of 19 May 2005, pp. 4-5

⁴⁵ Transcript of 19 May 2005, p. 49 (The actual testimony was given in closed session at pp. 6-9)

⁴⁶ Transcript of 19 May 2005, p. 43

⁴⁷ Transcript of 19 May 2005, p. 50

⁴⁸ Transcript of 19 May 2005, p. 51

⁴⁹ Appointment of Special Counsel by the Prosecutor, ICTR/INFO-9-2-442.EN, (12 July 2005)

⁵⁰ *Judgement* (19 September 2005)

investigation and to provide him with a copy of her report when the investigation was concluded.⁵¹

13. The prosecution later indicated that the Special Counsel never concluded her investigation and never filed a report.⁵²

14. On 25 August 2011, the Appeals Chamber denied Mr. Kamuhanda's request for review of his conviction. It also dismissed Mr. Kamuhanda's allegations that the prosecution had misled the Appeals Chamber concerning Witness GAA and had failed in its obligation to have the Special Counsel conclude her investigation related to Witness GAA and submit a final report. The Appeals Chamber held that:

The Appeals Chamber recalls that, in its Oral Decision, it directed the Prosecution to investigate allegations and discrepancies under Rules 77(C)(i) and 91(B) of the Rules, leaving it to the Prosecution's discretion to take the eventual steps and measures deemed necessary and appropriate under the circumstances. These provisions indicate that instructions to investigate possible contempt are made "with a view to the preparation and submission of an indictment". The Appeals Chamber considers that the filing of a concluding report is therefore not necessarily required and that it was within the Prosecution's discretion instead to file indictments against Witness GAA and Nshogoza. Accordingly, Kamuhanda's submission that the Prosecution committed contempt is without merit.⁵³

15. When Mr. Kamuhanda's new counsel reviewed his file in 2015, it became apparent that the Special Counsel Loretta Lynch had indeed investigated that part of issue (2) of the Appeals Chamber's 2005 directions⁵⁴ that pertained to the defence witnesses. Her investigation led to the indictment and guilty plea of Witness GAA for giving false testimony on Mr. Kamuhanda's behalf at the Appeals hearing,⁵⁵ and the indictment and acquittal of Mr. Kamuhanda's investigator for instigating and bribing Witness GAA.⁵⁶

16. However, it also appeared that nothing ever came of issue (1)--the allegations that Tribunal employees may have attempted to interfere with Witness GEK, or that part of issue (2) that pertained to allegedly false testimony of Witness GEK.

⁵¹ *Decision on Jean de dieu Kamuhanda's Request related to Prosecution Disclosure and Special Investigation* (7 April 2006), para. 7

⁵² *Prosecutor's Clarification on Kamuhanda's Request for Special Counsel's Report* (13 August 2009), para. 4

⁵³ *Decision on Request for Review* (25 July 2011) para. 65

⁵⁴ See para. 9 above.

⁵⁵ *Prosecutor v GAA*, No. ICTR-07-90-R77-I, *Judgement and Sentence* (4 December 2007)

⁵⁶ *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009). Mr. Nshogoza was convicted of disclosing confidential information and sentenced to 10 months imprisonment for that offense.

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20. On 10 August 2015, the MICT President referred the motion to Single Judge Vagn Joensen.⁶⁰

21. The prosecution filed a response to the motion on 11 August 2015⁶¹ and Mr. Kamuhanda filed a reply on 20 August 2015.⁶²

22. On 16 September 2015, the Single Judge held that while jurisdiction for contempt and false testimony matters passed from the ICTR to the Residual Mechanism on 1 July 2012, decisions of the ICTR prior to that date "retain their validity before the Mechanism."⁶³

23. He went on to conclude that:

⁵⁷ This correspondence is Annexes A & B.

⁵⁸ This is documented in Annexes C-E

⁵⁹ *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK* (3 August 2015)

⁶⁰ *Order Assigning a Single Judge* (10 August 2015)

⁶¹ *Prosecution Response to Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK* (11 August 2015)

⁶² *Reply Brief: Motion for Appointment of Amicus Curiae Prosecutor* (20 August 2015)

⁶³ *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (16 September 2015) at para. 10

Considering that prior to the transfer date, the Appeals Chamber, seised with the Kamuhanda case, decided pursuant to Rules 77 and 91 of the ICTR Rules which steps should be taken in light of the testimony that was given before it and later determined that the Prosecutor had acted within the directives in the Appeals Chamber Investigation Decision, I find that I do not have jurisdiction to revisit the matter.⁶⁴

24. The Single Judge, on that basis, dismissed Mr. Kamuhanda's motion.

Therefore, Mr. Kamuhanda now returns back to the ICTR Appeals Chamber seised of his case.

Jurisdiction

25. It appears that the Mechanism's Single Judge has interpreted the Transitional Arrangements between the ICTR and MICT as allowing ICTR Chambers to make decisions on investigation of contempt matters after July 2012, but leaving it to the MICT to decide whether to initiate prosecution.⁶⁵

26. Mr. Kamuhanda therefore requests that the Appeals Chamber grant his motion and order an investigation by an *amicus curiae* prosecutor. Presumably, the decision whether to prosecute Witness GEK would be made by the Mechanism after the conclusion of that investigation.

False Testimony

27. Rule 91 provides in pertinent part that:

If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

- (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or
- (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

28. There are strong grounds to believe that Witness GEK gave false testimony when she claimed that two Tribunal employees urged her to recant her testimony against

⁶⁴ *Id.*, para. 11

⁶⁵ *In Re Sebureze & Turinabo*, No. MICT-13-40&41-R90, *Decision on Deogratias Sebureze and Maximilien Turinabo's Motions on the Legal Effect of the Contempt Decision and Order Issued by the ICTR Trial Chamber* (20 March 2013), para. 12; *Decision on Prosecutor's Motion for Reconsideration of 20 March 2013 Decision* (17 July 2013), para. 49

Mr. Kamuhanda. Those strong grounds arise from the clear and unequivocal statements of the two employees that this never took place.

29. There are also strong grounds to believe that Witness GEK gave false testimony at the Appeals Hearing when she testified that she never encouraged anyone to falsely state that they had seen Mr. Kamuhanda at the Gikomero Parish.⁶⁶

30. In 2009, Straton Nyarwaya, a person who had a close relationship with Witness GEK, testified in the *Nshogoza* trial that Witness GEK had recruited people to testify against Mr. Kamuhanda at the ICTR and falsely accuse Mr. Kamuhanda of participating in the killings that took place at Gikomero Parish.⁶⁷ This included showing the witnesses a photograph of Mr. Kamuhanda so they could falsely identify him.⁶⁸ Some of the meetings with prosecution witnesses took place in Mr. Nyarwaya's house,⁶⁹ and he observed other meetings at Witness GEK's house.⁷⁰

31. Another witness testified in 2009 in the *Nshogoza* trial that Witness GEK had organized meetings to solicit false testimony about Mr. Kamuhanda.⁷¹

32. Moreover, in 2006, Witness GEK was explicitly found not to have been a credible witness by the Trial Chamber in the *Rwamakuba* trial, in which she also testified as a prosecution witness.⁷² Throughout its judgement, the Trial Chamber found numerous inconsistencies in her testimony.⁷³

33. Therefore, apart from the fact that the Appeals Chamber has already ordered an investigation into false testimony given at the Appeals Hearing, subsequent events re-enforce the Appeals Chamber's finding that there were strong grounds to believe that witnesses gave false testimony at that hearing.

Interference with the Administration of Justice

34. Rule 77 mirrors Rule 91, but applies when a Chamber has reason to believe that a person may be in contempt of the Tribunal.

⁶⁶ Transcript of 19 May 2005, pp. 4-5

⁶⁷ *Prosecutor v Nshogoza*, No. ICTR-07-91-T, Transcript of 20 March 2009, pp. 10-11

⁶⁸ *Prosecutor v Nshogoza*, No. ICTR-07-91-T, Transcript of 20 March 2009, p. 11

⁶⁹ *Prosecutor v Nshogoza*, No. ICTR-07-91-T, Transcript of 20 March 2009, p. 11

⁷⁰ *Prosecutor v Nshogoza*, No. ICTR-07-91-T, Transcript of 20 March 2009, p. 16

⁷¹ His testimony is referred to in Confidential Annex "E" as it identifies Witness GEK by name.

⁷² *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement*, (20 September 2006), para. 135

⁷³ *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement*, (20 September 2006), paras. 125, 127-35, 145

35. The Appeals Chamber has already found that allegations that Tribunal employees may have attempted to interfere with the witness who had given evidence in proceedings before this Tribunal warranted an investigation for contempt. The false testimony of Witness GEK at the Appeals Hearing when combined with the subsequent evidence of Witness GEK's involvement in persuading prosecution witnesses to give false evidence at Mr. Kamuhanda's trial, re-enforces the Appeals Chamber's finding that there was reason to believe that the administration of justice at the ICTR had been interfered with.

Need for *Amicus Curiae* Prosecutor

36. In carrying out the investigations ordered by the Appeals Chamber, it appears that the prosecution investigated and prosecuted only those allegations that advanced its own interests and failed to investigate or prosecute when its own witness was shown to have lied.

37. It is important that investigations and prosecutions for false testimony at the ICTR not be limited to persons who give evidence on behalf of the defence. So far, all known indictments for false testimony have taken place after a prosecution witness recanted and gave evidence on behalf of the defence.⁷⁴ Limiting investigations and prosecutions to those who have recanted in favor of the defence allows prosecution witnesses like Witness GEK, who have lied, to do so with impunity, and results in wrongful convictions like that of Mr. Kamuhanda.

38. Given that the Prosecutor did not conduct or complete the investigation into the allegation of interference with Witness GEK by employees of the Tribunal, as ordered by the Appeals Chamber, the Appeals Chamber should now order that the investigation be completed by an *amicus curiae* prosecutor rather than the Office of the Prosecutor. Apart from its failure to conduct or complete the investigation, the Office of the Prosecutor has an obvious conflict of interest in deciding whether to prosecute its own witness.

39. In its previous decisions in this case denying Mr. Kamuhanda's motions to be heard by the Special Counsel and to receive a copy of her report, the Appeals Chamber

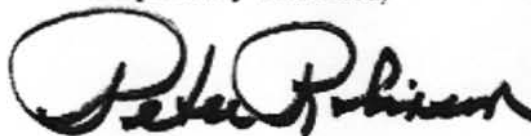
⁷⁴ Witness GAA in this case and Witness BTH in *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Remand following Appeals Chamber Decision of 16 February 2010* (18 May 2010)

has emphasised that it left the matter of the investigation to the discretion of the Prosecutor.⁷⁵ However, the Appeals Chamber is now seised of new information that the Prosecutor never conducted or completed the part of the investigation ordered by the Appeals Chamber into the allegations that Tribunal employees interfered with Prosecution Witness GEK. The Appeals Chamber is also seised of new information that establishes that the testimony of Witness GEK at the hearing was false. Therefore, its previous decisions are not dispositive of this motion.

40. Mr. Kamuhanda clearly has a selfish motive in requesting this investigation. He hopes that an investigation by an *amicus curiae* prosecutor and prosecution of Witness GEK will expose the false testimony that led to his wrongful conviction. As an innocent person serving a life sentence for a crime he had nothing to do with, Mr. Kamuhanda prays that the wheels of justice, as slowly as they may turn, can ultimately reveal the truth.

Word count: 2961

Respectfully submitted,



PETER ROBINSON
Counsel for Jean de dieu Kamuhanda

⁷⁵ *Decision on Jean de dieu Kamuhanda's Request related to Prosecution Disclosure and Special Investigation* (7 April 2006), para. 7; *Decision on Request for Review* (25 July 2011), para. 65

ANNEX “B”

23 September 2015

Dear Mr. Robinson,

I trust this email finds you well.

To answer your question, your motion has not been filed with the ICTR Appeals Chamber and was returned to the MICT on 22 September 2015.

In accordance with the Transitional Measures annexed to Security Council 1966 (2010), this is a matter that was not pending before the ICTR on the commencement date of the MICT (Arusha branch). Accordingly, the ICTR is not in a position to accept a filing on the issues raised by Mr Kamuhanda. We would therefore suggest that you contact our colleagues at the MICT (Arusha branch) with respect to filings that you may wish to make on this issue.

Please do not hesitate to contact us if we can assist you any further.

Many thanks,

[redacted]

**Chief, Judicial and Legal Affairs Section
Legal Officer**

27 September 2015

Dear [MICT Legal Officers],

Do you have any information you can provide me on this?

Yours truly,

Peter

[No response was received to this e-mail]