



Mechanism for International Criminal Tribunals

Case No: MICT-13-33-AR90/108.1
Date: 23 October 2015
Original: English

APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Joseph E. Chiondo Masanche
Judge Ben Emmerson

Registrar: John Hocking

PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

PUBLIC REDACTED VERSION

PROSECUTION RESPONSE TO KAMUHANDA'S APPEAL

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A handwritten signature in black ink, appearing to read 'McCallum Carter', written over a horizontal line within a rectangular box.

1. The Appeals Chamber should reject Kamuhanda's appeal.¹ The Single Judge correctly found that the matter was already disposed of by the ICTR Appeals Chamber's 19 May 2005 decision,² which Kamuhanda now seeks to re-litigate for the third time.

A. Statement of facts

2. On 19 May 2005, the ICTR Appeals Chamber ordered an investigation, under ICTR Rules 77(C) and 91(B), as to whether certain persons, including witnesses GAA and GEK, should be charged with contempt or having given false testimony (Investigation Decision).³ Under the Rules, the ICTR Appeals Chamber had two options as to who should conduct the investigations: the Prosecutor or an *amicus curiae*. The ICTR Appeals Chamber chose the Prosecutor—emphasizing that he had “discretion to take the eventual steps and measures which he deems necessary and appropriate under the circumstances.”⁴

3. The Investigation Decision was rendered during the *Kamuhanda* appeal proceedings after the ICTR Appeals Chamber had heard additional evidence from the defence and rebuttal evidence from the prosecution. One of the defence witnesses was GAA. This witness lied⁵ to the ICTR Appeals Chamber by falsely recanting his trial evidence and claiming that he had conspired with witness GEK to fabricate evidence against Kamuhanda.⁶

¹ Kamuhanda's Appeal of Decision on Jurisdiction to Investigate Prosecution Witness GEK, 15 October 2015 (Appeal).

² Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK, 16 September 2015 (Impugned Decision).

³ T. 19 May 2005, pp. 50-51.

⁴ T. 19 May 2005, p. 51.

⁵ The ICTR Appeals Chamber rejected GAA's recantation as contradictory, implausible, and ultimately not credible and upheld his trial evidence, *Kamuhanda* Appeal Judgement, paras. 216 *et seq.* Moreover, GAA later admitted that his recantation was false, *Prosecutor v. GAA*, Case No. ICTR-07-90-R77-I, Judgement and Sentence, 4 December 2007, para. 5.

⁶ *Kamuhanda* Appeal Judgement, paras. 212 *et seq.*

The prosecution rebutted GAA's attempted recantation through witness GEK's testimony who, in addition to rejecting GAA's claims, testified that [REDACTED] had asked her to falsely recant her trial testimony.⁷

4. Following GEK's testimony, the *Kamuhanda* defence asked the ICTR Appeals Chamber to call [REACTED]. The ICTR Appeals Chamber, however, denied the request because it was not convinced that their testimony would be helpful.⁸

5. The ICTR Appeals Chamber then rendered the above mentioned Investigation Decision, requesting the Prosecutor to take the steps he deemed necessary and appropriate to investigate the issues that arose during the additional evidence hearing.⁹

6. Since the Appeals Chamber rendered its Investigation Decision, Kamuhanda has already twice attempted to re-litigate it. He requested that the prosecutor be taken off the investigation¹⁰ or forced to take specific measures which Kamuhanda hoped would assist his case.¹¹ On both occasions, the ICTR Appeals Chamber rejected Kamuhanda's requests and

⁷ T. 19 May 2005, pp. 2 *et seq.* (closed and open session) (The present response is filed confidentially, because the details about the persons who approached GEK are only revealed in GEK's closed session testimony).

⁸ T. 19 May 2005, p. 50; *see also* the established jurisprudence that if a witness's testimony on one matter is shown to be untrue, the witness can still be relied on for the remainder of his or her testimony, *see e.g., Prosecutor v. Elizaphan Ntakirutimana et al.*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, paras. 132, 182, 254; *Juvénal Kajelijeli v. the Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 167.

⁹ T. 19 May 2005, pp. 50-51.

¹⁰ Conclusions en réplique à la requête du procureur sur le fondement de l'article 75 F (Conclusions), p. 4 ; Decision on Jean de Dieu Kamuhanda's Request Related to Prosecution Disclosure and Special Investigation, 7 April 2006 (7 April 2006 Decision), para. 6.

¹¹ 7 April 2006 Decision, para. 6; Decision on Request for Review, 25 August 2011 (Review Decision), para. 64.

affirmed that the Prosecutor was in charge of the investigation and had discretion as to which measures he took.¹²

7. The matter currently before the Appeals Chamber represents Kamuhanda's third attempt to re-litigate the Investigation Decision and to remove the prosecutor from the investigation.

B. Standard of review

8. The Appeals Chamber will only overturn a decision on jurisdiction if the decision contains "a specific error of law or fact invalidating the decision or weighed relevant considerations or irrelevant considerations in an unreasonable manner."¹³ Kamuhanda has failed to show any such error in the Impugned Decision.

C. Argument

9. Kamuhanda correctly accepts that the ICTR Appeals Chamber's decisions retain their validity before the MICT.¹⁴ Indeed, the jurisprudence is clear that parties are not allowed to re-litigate a matter that has already been decided.¹⁵ The only exception is a request for reconsideration.¹⁶ Such a request only succeeds where "new material circumstances have arisen

¹² 7 April 2006 Decision, para. 7; Review Decision, para. 65.

¹³ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 7 (setting out the standard of review for decisions on jurisdiction).

¹⁴ Appeal, para. 49; *see also* Impugned Decision, para. 10, fn. 12.

¹⁵ *See for example, Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 32 May 2005, para. 202; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR -97-21-T, Joint Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motions for Separate Proceedings, a New Trial, and Stay of Proceedings, 7 April 2006, paras. 81-84; *Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-PT, Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment, 11 May 2005, para. 3.

¹⁶ Kamuhanda appears to acknowledge this at para. 53 of his Appeal.

that did not exist at the time of the original decision or where the decision was erroneous and has caused prejudice or injustice to a party.”¹⁷

10. But Kamuhanda neither filed a motion for reconsideration nor did he ever show that new material circumstances exist or that the Investigation Decision was erroneous and caused him prejudice.

11. In particular, it is neither a new nor a material (relevant) circumstance that [REDACTED] have information about their relationship with GEK.¹⁸ First, the circumstance was not relevant for the Investigation Decision. In that decision the ICTR Appeals Chamber ruled who should run the investigation. Kamuhanda provides no explanation as to why the Appeals Chamber’s decision to select the Prosecution for that task would have hinged on the existence of a particular piece of evidence—the information available from [REDACTED].

12. Second, the availability of [REACTED] evidence is not new but was squarely before the ICTR Appeals Chamber when it made its decision. Indeed, it even made a ruling on [REDACTED] potential denial of GEK’s allegations, finding that it would not “be at all helpful in assessing the credibility of the Prosecution’s rebuttal witnesses”.¹⁹ That Kamuhanda has now, ten years after the fact, reconfirmed that [REDACTED] indeed deny having sought to influence GEK is not a new circumstance.

D. Conclusion

13. In conclusion, Kamuhanda’s third request aimed at circumventing and re-litigating the Investigation Decision—as well as two previous ICTR

¹⁷ *Callixte Nzabonimana v. Prosecution*, Case No. ICTR-98-44D-AR7bis, Decision on Callixte Nzabonimana’s Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and on the Motion for Leave to Appeal the President’s Decision Dated 5 May 2010, 20 September 2010, para. 13.


¹⁸ *Contra Appeal*, paras. 44-46.

¹⁹ T. 19 May 2005, p. 50.

Appeals Chamber decisions²⁰—has no legal basis. The Single Judge committed no error when finding that the ICTR Appeals Chamber's Investigation Decision had already disposed of the matter. Kamuhanda's appeal should be denied.

Word count: 1283

Dated at Arusha this 23rd day of October 2015


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²⁰ See above para. 6.