

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE NO.: MICT-12-29-A

AUGUSTIN NGIRABATWARE

v.

THE PROSECUTOR
OF THE TRIBUNAL

THURSDAY, 18 DECEMBER 2014
1100H
APPEAL JUDGEMENT

Before the Judges:

Theodor Meron, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge
Judge Burton Hall
Judge Liu Daqun

For the Registry:

Ms. Ana Maria Fernandez de Soto
Ms. Joyce Ngowi

For the Prosecution:

Mr. Richard Karegyesa
Mr. Takeh Sendze
Mr. Disengi Mugeyo
Mr. Leo Nwoye
Mr. Nigel Davidson
Ms. Betty Mbabazi
Ms. Chelsea Fewkes

For the Appellant Augustin Ngirabatware:

Ms. Mylène Dimitri
Dr. Guénaël Mettraux

Court Reporter:

Ms. Deirdre O'Mahony

PROCEEDINGS

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MS. FERNANDEZ DE SOTO:

The Mechanism for International Criminal Tribunals (Arusha branch) is now in session.

MR. PRESIDENT:

Good morning, everybody.

Registrar, could you please call the case.

MS. FERNANDEZ DE SOTO:

Good morning, Your Honour.

This is Case No. MICT-12-29-A in the matter of Augustin Ngirabatware v. the Prosecutor, sitting in open session, today, Thursday, 18 December 2014 for the delivery of the judgement.

MR. PRESIDENT:

Thank you.

Mr. Ngirabatware, can you follow the proceedings in a language you understand?

APPELLANT NGIRABATWARE:

Yes, Mr. President, I am following you very well.

MR. PRESIDENT:

Thank you.

Appearances of the parties, Counsel for Mr. Ngirabatware, please.

MS DIMITRI:

Good morning, Mr. President.

Mylène Dimitri, lead counsel for Mr. Ngirabatware, accompanied this morning by Dr. Mettraux, our co-counsel, and Dr. Sebureze, our legal assistant.

MR. PRESIDENT:

Thank you.

For the Prosecution.

MR KAREGYESA:

Good morning, Mr. President.

To receive judgement, the Prosecutor is represented by myself, and I'm appearing with Takeh Sendze, Disengi Mugeyo, Leo Nwoye, Nigel Davidson, Betty Mbabazi and

1 Chelsea Fewkes.

2

3 Most obliged.

4 MR. PRESIDENT:

5 Thank you.

6

7 In accordance with the scheduling order issued on 3 December 2014 and pursuant to
8 Rule 144(D) of the Mechanism's Rules of Procedure and Evidence, I will pronounce today the
9 judgement on behalf of the Appeals Chamber in the case of Augustin Ngirabatware v. the
10 Prosecutor.

11

12 I will not read out the full text of the judgement, except for the disposition, but instead I will
13 summarise the essential issues on appeal and the central findings of the Appeals Chamber.
14 This oral summary does not constitute any part of the official and authoritative judgement of
15 the Appeals Chamber, which will be distributed in writing to the parties at the close of this
16 hearing.

17

18 During the relevant period in 1994, Ngirabatware served as Minister of Planning in the
19 Rwandan government.

20

21 On 20 December 2012, Trial Chamber II of the International Criminal Tribunal for Rwanda
22 convicted Ngirabatware of direct and public incitement to commit genocide based on his
23 speech at a roadblock in Nyamyumba *commune* on 22 February 1994. It also found him guilty
24 of instigating and aiding and abetting genocide based on his role in distributing weapons and
25 his statements at two roadblocks in Nyamyumba *commune* on 7 April 1994. The
26 Trial Chamber also convicted Ngirabatware, under the extended form of joint criminal
27 enterprise, of rape as a crime against humanity. It sentenced him to 35 years of
28 imprisonment.

29

30 The trial judgement was issued in writing on 21 February 2013, and Ngirabatware filed an
31 appeal before the Mechanism challenging his convictions and sentence. The
32 Appeals Chamber heard the oral submissions of the parties on 30 June 2014.

33

34 I will now turn to Ngirabatware's grounds of appeal.

35

36 A. Rule 98 *bis* Motion

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1 Ngirabatware submits that the Trial Chamber erred in dismissing his motion under Rule 98 *bis*
2 of the ICTR Rules requesting a judgement of acquittal in relation to 45 paragraphs of the
3 indictment. The Appeals Chamber finds that the Trial Chamber did not err in dismissing
4 Ngirabatware's Rule 98 *bis* motion in its entirety. The Appeals Chamber therefore dismisses
5 Ngirabatware's sixth ground of appeal.

6

7 B. Direct and Public Incitement to Commit Genocide

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9 The Trial Chamber convicted Ngirabatware for direct and public incitement to commit
10 genocide based on his speech at a roadblock on the Cyanika-Gisa road in Nyamyumba
11 *commune* on 22 February 1994. Specifically, the Trial Chamber found that, following the
12 murder of Martin Bucyana, the chairman of the CDR political party, Ngirabatware told a crowd
13 of as many as 150 to 250 people assembled at the roadblock to kill Tutsis. Ngirabatware
14 challenges the Trial Chamber's findings in relation to his conviction for direct and public
15 incitement to commit genocide.

16

17 In relation to Ngirabatware's arguments that he lacked notice of the charge, the
18 Appeals Chamber finds that the indictment provided Ngirabatware with sufficient notice as to
19 his criminal conduct, the date of the commission of the crime and the presence of a crowd at
20 the roadblock. In particular, in relation to the location of the roadblock where the crime was
21 allegedly committed, the Appeals Chamber finds that the inconsistencies in the evidence as to
22 the roadblock's precise location were minor and do not, as such, show that Ngirabatware
23 lacked sufficient notice of the location where the crime was allegedly committed or that he
24 suffered any prejudice as a result.

25

26 The Appeals Chamber also finds that Ngirabatware has failed to show that he had insufficient
27 time to prepare for Witness ANAT's cross-examination.

28

29 With respect to Ngirabatware's challenges as to the legal elements of the crime, the
30 Appeals Chamber finds that Ngirabatware has failed to demonstrate that the Trial Chamber
31 erred in finding that the *actus reus* of the crime of direct and public incitement to commit
32 genocide had been fulfilled. In relation to the public element of the crime, the Trial Chamber
33 explicitly considered that the intended audience of Ngirabatware's speech was a group that
34 may have been composed of as many as 150 to 250 people who had gathered at the
35 roadblock, as opposed to only those manning it. Ngirabatware also has failed to demonstrate
36 that the Trial Chamber did not make the necessary findings in relation to his *mens rea* for
37 direct and public incitement to commit genocide.

1 As regards Ngirabatware's challenges to the Trial Chamber's assessment of the evidence, the
2 Appeals Chamber concludes that Ngirabatware has failed to show that the Trial Chamber
3 erred in finding that there was no collusion or tainting between Witness ANAN and ANAT. The
4 Appeals Chamber therefore dismisses Ngirabatware's fifth ground of appeal.

5

6 C. Genocide

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8 The Trial Chamber convicted Ngirabatware for instigating and aiding and abetting genocide
9 based on his role in distributing weapons and his statements at two roadblocks in Nyamyumba
10 *commune* on 7 April 1994. Specifically, the Trial Chamber found that, on 7 April 1994,
11 Ngirabatware delivered weapons to the *Bruxelles* roadblock, where he told Faustin Bagango
12 that he did not want any Tutsis alive in *Bruxelles*.

13

14 The Trial Chamber also concluded that, later the same day Ngirabatware returned to the
15 *Bruxelles* roadblock and delivered more weapons. According to the trial judgement,
16 Ngirabatware reprimanded the *Interahamwe* for only pretending to work and stated that he
17 brought weapons because he did not want to see any Tutsis in the Busheke *cellule*. Following
18 this incident, Ngirabatware delivered weapons to the nearby Gitsimbi/Cotagirwa roadblock
19 where he again told Bagango that he did not want to see any Tutsis in Nyamyumba *commune*
20 and ordered Bagango to work well. The Trial Chamber considered extensive evidence that
21 people were attacked and killed after Ngirabatware delivered the weapons and that the
22 *Interahamwe* who manned the *Bruxelles* and Gitsimbi/Cotagirwa roadblocks were notorious
23 for their role in killing Tutsis and looting their property.

24

25 Ngirabatware submits that the Trial Chamber erred in convicting him of instigating and aiding
26 and abetting genocide.

27

28 The Appeals Chamber finds that Ngirabatware has failed to demonstrate that he lacked
29 sufficient notice of the timing of the distribution of the weapons and that he suffered material
30 prejudice as a result of the defect in the pleading of the location of the events in the
31 indictment. The Appeals Chamber considers that Ngirabatware has also failed to demonstrate
32 that he lacked notice that he distributed weapons on three occasions at two separate locations
33 and that he lacked notice of the underlying crimes, the perpetrators or the victims.

34

35 The Appeals Chamber also dismisses Ngirabatware's arguments that the Trial Chamber erred
36 in relation to the *actus reus* and *mens rea* elements of instigating and aiding and abetting.

37

1 As regards the Trial Chamber's assessment of the evidence, the Appeals Chamber finds that
2 a reasonable trier of fact could have found that the only reasonable inference from the
3 evidence was that the *Interahamwe* used at least some of the weapons, distributed by
4 Ngirabatware on 7 April 1994, during the subsequent attacks and killings of Tutsis. The
5 Appeals Chamber therefore dismisses Ngirabatware's first ground of appeal.

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7 D. Alibi

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9 At trial, Ngirabatware advanced an alibi placing him in Kigali from 6 to 12 April 1994. The
10 Trial Chamber found that Ngirabatware failed to give proper notice of his alibi and,
11 accordingly, took this into account in evaluating the alibi evidence. In this regard, the
12 Trial Chamber considered that the manner and context in which Ngirabatware provided notice
13 of his alibi indicated that there was a high probability that the alibi was tailored and fabricated
14 to fit the Prosecution case. The Trial Chamber also noted the nature and proximity of the
15 relationship between Ngirabatware and the Defence witnesses and considered that these
16 witnesses might have had a motive to protect Ngirabatware. The Trial Chamber concluded
17 that the alibi evidence was not credible and was insufficient to raise a reasonable doubt in the
18 Prosecution's case with regard to Ngirabatware's presence in Nyamyumba *commune* on
19 7 April 1994.

20
21 The Appeals Chamber finds that Ngirabatware has not demonstrated that the Trial Chamber
22 erred in assessing the notice he provided for his alibi or in drawing negative inferences from it.
23 The Appeals Chamber, Judge Moloto dissenting, also finds that Ngirabatware has not
24 demonstrated that the Trial Chamber failed to assess the evidence as a whole, shifted the
25 burden of proof, or erred in its evaluation of the feasibility of travel between Kigali and Gisenyi
26 *préfecture*. The Appeals Chamber, Judge Moloto dissenting, further finds that Ngirabatware
27 has failed to demonstrate an error in the Trial Chamber's assessment of the alibi evidence.

28
29 Accordingly, the Appeals Chamber, Judge Moloto dissenting, dismisses Ngirabatware's
30 second ground of appeal.

31
32 E. Joint Criminal Enterprise

33
34 The Trial Chamber convicted Ngirabatware under Count 6 of the indictment of rape as a crime
35 against humanity, pursuant to the extended form of joint criminal enterprise, in relation to the
36 repeated rape of Chantal Murazemariya in April 1994 by two members of the joint criminal
37 enterprise.

1 Ngirabatware submits that the Trial Chamber erred in holding him responsible for the crime of
2 rape on the basis of his participation in a joint criminal enterprise, because his contribution to
3 the joint criminal enterprise was not pleaded in the indictment. He further argues that he
4 cannot be held responsible under Count 6 of the indictment because the alleged common
5 criminal purpose of the joint criminal enterprise under Count 6 was the extermination of the
6 Tutsi civilian population and he was acquitted by the Trial Chamber of the crime of
7 extermination charged under Count 5.

8
9 The Appeals Chamber observes that the nature of the common purpose under Count 5
10 (extermination) is identical to the common purpose pleaded under Count 6 (rape). A plain
11 reading of the indictment thus indicates that the common purpose of exterminating the Tutsi
12 civilian population pleaded under Count 6 (rape) was linked to the charge of extermination
13 contained in Count 5. The Appeals Chamber considers that Count 6 (rape) is narrowly
14 tailored and alleges Ngirabatware's contribution to the common purpose to exterminate the
15 Tutsis on the basis of his conduct pleaded under Count 5 (extermination). In relying on
16 findings made in relation to Count 2 (genocide) to establish Ngirabatware's contribution to the
17 joint criminal enterprise, the Trial Chamber impermissibly expanded the charge of rape as a
18 crime against humanity.

19
20 The Appeals Chamber observes that Ngirabatware's contribution to the common purpose to
21 exterminate the Tutsi civilian population was essential for establishing his responsibility for
22 crimes committed beyond the common purpose, but which are nevertheless a natural and
23 foreseeable consequence thereof. Since the Prosecution failed to prove Ngirabatware's
24 contribution to the common purpose of exterminating the Tutsi civilian population pleaded
25 under Count 5, Ngirabatware's conviction for rape pursuant to the extended form of joint
26 criminal enterprise under Count 6 cannot be sustained. In the absence of an appeal by the
27 Prosecution, the Appeals Chamber will not comment on Ngirabatware's acquittal under
28 Count 5 of the indictment.

29
30 The Appeals Chamber therefore grants, in part, Ngirabatware's third ground of appeal,
31 reverses his conviction for the rape of Chantal Murazemariya, and enters a verdict of acquittal
32 under Count 6 of the indictment.

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34 As a consequence, Ngirabatware's fourth ground of appeal challenging other aspects related
35 to his conviction for the rape of Chantal Murazemariya is dismissed as moot.

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1 F. Sentencing

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3 The Appeals Chamber finds that Ngirabatware has not demonstrated any error in the
4 Trial Chamber's assessment of his sentence.

5

6 As previously mentioned, the Appeals Chamber has reversed Ngirabatware's conviction for
7 rape as a crime against humanity. Nonetheless, he remains convicted of very serious crimes,
8 including direct and public incitement to commit genocide and genocide. The impact, if any,
9 will be mentioned during the reading of the disposition.

10

11 I would like now to ask Mr. Ngirabatware to stand while I read the full text of the disposition of
12 the Appeals Chamber in this case.

13

14 For the foregoing reasons, the Appeals Chamber, pursuant to Article 23 of the Statute and
15 Rule 144 of the Rules; noting the written submissions of the parties and their oral arguments
16 presented at the appeal hearing on 30 June 2014; sitting in open session;

17

18 Grants Ngirabatware's third ground of appeal and reverses Ngirabatware's conviction for rape
19 as a crime against humanity pursuant to the extended form of joint criminal enterprise;

20

21 Dismisses, Judge Moloto dissenting in part, Ngirabatware's appeal in all other respects;

22

23 Affirms Ngirabatware's convictions for committing direct and public incitement to commit
24 genocide, and, Judge Moloto dissenting, instigating and aiding and abetting genocide;

25

26 Sets aside the sentence of 35 years of imprisonment and imposes a sentence of 30 years of
27 imprisonment, subject to credit being given under Rules 125(C) and 131 of the Rules for the
28 period Ngirabatware has already spent in detention since his arrest on 17 September 2007;

29

30 Rules that this judgement shall be enforced immediately pursuant to Rule 145(A) of the Rules;

31

32 Orders that, in accordance with Rules 127(C) and 131 of the Rules, Ngirabatware is to remain
33 in the custody of the Mechanism pending the finalisation of arrangements for his transfer to
34 the state where his sentence will be served.

35

36 Judge Bakone Justice Moloto appends a dissenting opinion.

37

1 Mr. Ngirabatware, you may be seated.

2

3 Registrar, will you please distribute copies of the written judgement to the parties.

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5 This concludes the appellate proceedings in this case.

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7 *(Court adjourned at 1126H)*

8 *(Pages 1 to 8 by Deirdre O'Mahony)*

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C E R T I F I C A T E

I, Deirdre O'Mahony, Official Court Reporter for the status conference of the Mechanism for International Criminal Tribunals, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*stenotype*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in nowise interested in the result of said cause.

_____ Deirdre O'Mahony