

THE PROSECUTOR v. JEAN DE DIEU KAMUHANDA, MOTION FOR APPOINTMENT OF AMICUS CURIAE PROSECUTOR TO INVESTIGATE PROSECUTION WITNESS GEK, CASE No. ICTR-99-54A-A, (21 September 2015)

I Background:

Mr. Kamuhanda on 3 August 2015, pursuant to Rules 90(C)(ii) and 108(B)(ii) filed a Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK with the Residual Mechanism of the International Criminal Tribunal (RMICT).¹ In response, the President of RMICT on 10 August 2015 appointed a Single Judge Vagn Joensen, who on the 16th of September 2015, contend that while the 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 is valid before the Mechanism.² The Single Judge dismissed the motion and concluded 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.³

The accused Jean de dieu Kamuhanda an innocent man serving a sentence for a crime he never committed pray the Court to appoint an amicus curiae prosecutor to investigate an order executed by the ICTR Appeals Chambers in 2005 that was never completed by the ICTR Office of the Prosecution.⁴ He was convicted of genocide and extermination for ordering attacks on Tutsis at Gikomero Protestant Parish and sentenced to life imprisonment.⁵ Among those who testified against the accused were witness GEK, she had allegedly testify that she personally heard the accused inciting attacks against Tutsis and even saw him

¹ *Prosecutor v Kamuhunda*, No. MICT-13-3S, *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (16 September 2015) para. 19.

² *Ibid*, para. 20 and 21.

³ *Ibid*, para. 23.

⁴ *Prosecutor v Kamuhunda*, No. MICT-13-3S, *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (16 September 2015) para. 1 - 2.

⁵ *Prosecutor v Kamuhunda*, No. MICT-13-3S, *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (16 September 2015) para. 4.

distributing weapons.⁶ On appeal, the Appeals Chamber, consisting of Judges Meron, Shababuddeen, Mumba, Schomburg, and Weinberg, held a hearing at which Witnesses GAA and GEX testified that they had falsely accused Mr. Kamuhanda.⁷ Witness GEX further allegedly admit that two Tribunal employees approach her with a promised to received monetary compensation if she would recant her false trial testimony⁸ in the *Kamuhanda* case.⁹ After hearing witness GEK's testimony, the Appeals Chamber in strong language said:

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 practices¹⁰, 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.¹¹

The Appeals Chamber took further steps to ensure that the prosecution investigate the issue but the accused Special Counsel Ms. Loretta Lynch allegedly did not carry out any

⁶ *Prosecutor v Kamuhunda*, No. ICTR-99-54A-Trial Judgement (22 January 2004) ("Trial Judgement"), para. 254-256, 314; *Prosecutor v Kamuhunda*, No. MICT-13-33AR90/108, *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (21 September 2015), para. 5 – 6.

⁷ *Prosecutor v Kamuhunda*, No. MICT-13-3S, *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (16 September 2015) para. 6; *Prosecutor v GAA*, No. ICTR-07.90-R77.I. Judgement and Sentence (4 December 2007), para. 5. Available at: <http://www.unict.org/sites/unict.org/files/case-documents/ict-07-90-r77/trial-judgements/en/071204.pdf>, [29 October 2015].

⁸ Rule 91 in pertinent part instruct 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. See *Prosecutor v Kamuhunda*, No. MICT-13-3S, *Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (16 September 2015), para. 27.

⁹ Witness GEX alleged that Léonidas Nshogoza, gave him money and paid for his meals and drinks on several occasions and offered him the reward of 1,000,000 Rwandan Francs for giving false testimony. See *Prosecutor v GAA*, No. ICTR-07.90-R77.I. Judgement and Sentence (4 December 2007), para. 5; *Prosecutor v Kamuhunda*, No. MICT-13-33AR90/108, *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK* (21 September 2015), para. 7.

¹⁰ Witness GEK was explicitly found not to have been a credible witness by the Trial Chamber in the Rwamakuba trial in 2006. See *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, Judgement. (20 September 2006), para. 125, 127, 135

¹¹ *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK*, para. 8

investigation nor did she submit any report.¹² However, in 2015 the accused new counsel found that the Special Counsel Ms Loretta Lynch had in fact investigated Appeals Chamber's 2005 directions, her investigation led to the indictment and guilty plea of Witness GAA for giving false testimony and the eventual acquittal of Mr. Kamuhanda's investigator for allegedly instigating and bribing witness GAA.¹³

Mr. Kamuhanda's alleged that the prosecution had misled the Appeals Chamber concerning Witness GAA and had failed in its obligation to ensure that the Special Counsel conclude her investigation with regards to Witness GAA and submit a final report.¹⁴ In this regard:

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 merit¹⁵

II Grounds for Requesting 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.¹⁶

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. Limiting investigations and prosecutions to those who have recanted in favour of the

¹² *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK*, para. 9 – 13.

¹³ *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK*, para. 15.

¹⁴ *Motion for Appointment of Amicus Curiae Prosecutor to Investigate Witness GEK*, para. 14.

¹⁵ See note 8, *supra*.

¹⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, "Prosecution Urgent Motion for Clarification of Paragraph 23 of the "Directions on the conduct of the proceedings", ICC-01/05-01/13-1217, (7 September 2015), para. 2. ("The giving of false testimony cannot reasonably be able to veto the proof of such crime"). See also "Decision on Prosecution Motion for Clarification of Rule 68(3) Direction in Conduct of Proceedings Decision", ICC-01/05-01/13-1249, (15 September 2015), para. 2.

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 has emphasised that it left the matter of the investigation to the discretion of the Prosecutor. 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.¹⁷ 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 tum can ultimately reveal the truth.

¹⁷ Article 62(2) of the Statute provides that the testimony of a witness at trial shall be given in person, and that the admission of witness material must not be prejudicial to or inconsistent with the rights of the Accused. See Narcisse Arido's Response to Prosecution's Urgent Motion for Clarification of Paragraph 23 of the "Direction on the Conduct of the Proceedings" (ICC-01/05-01/13-1217), ICC-01/05-01/13-1226, (9 September 2015), para. 12.