



Original: English

No: ICC-01/05-01/13
Date: 9 February 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
AND NARCISSE ARIDO***

Public

**Application for Leave to Appeal 'Decision on Relevance and Propriety of Certain
Kilolo Defence Witnesses (ICC-01/05-01/13-1600)'**

Source: Defence for Mr. Aimé Kilolo Musamba

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. This is an application from the defence for Mr. Kilolo (“Defence” or “Kilolo Defence” to Trial Chamber VII (“Chamber”) pursuant to Article 82(1) (d) of the Statute and Rule 155 of the Rules of Procedure and Evidence (“Rules”) requesting leave to appeal “Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses” (the “Decision”) issued on 4 February 2016.¹
2. The Decision rejected the Kilolo Defence request to call D21-001 as a witness and stipulates that the testimony of D21-004, D21-005, D21-006, D21-007 and D21-008 (the “character witnesses”) is to be presented pursuant to Rule 68(2) (b) as opposed to being called *viva voce* before the Chamber.
3. The Kilolo Defence is grateful to the Trial Chamber for the opportunity to present the evidence of the five character witnesses pursuant to Rule 68(2) (b). Notwithstanding this helpful suggestion the Kilolo Defence respectfully seeks leave to appeal the Trial Chamber’s decision to limit the number and scope of Defence witnesses to be called *viva voce* at trial.

II. APPLICABLE LAW

4. Article 82 (1) (d) of the Statute sets out two criteria for granting leave to appeal:
 - (i) “A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,
 - (ii) And for which, (...) an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

¹ ICC-01/05-01/13-1600.

The objective of such a provision is to “pre-empt the repercussion of erroneous decisions on the fairness or outcome of the trial”.²As such, in examining whether leave to appeal should be granted, the Trial Chamber should determine whether the issues presented significantly affects the fairness of the proceedings.³ The Trial Chamber must also “ponder the possible implication of a given issue being wrongly decided on the outcome of the case”.⁴

5. Regarding the first criterion set out in Article 82 (1) (d) Statute, the Kilolo Defence notes that the Appeal Chamber has considered that decisions are appealable only where there exists an issue: “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁵As such, an issue, which may be legal or factual or mixed,⁶ must “significantly affect”, in other words, have consequences on either the fair and expeditious conduct of the proceedings, or the outcome of the trial.⁷
6. As to the second criterion of Article 82 (1) (d), the Defence points out that the Appeals Chamber held that this criteria would be satisfied where a decision on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the right lines”. An immediate decision of the Appeals Chamber would, in such a case, settle the matter and “ensure that the proceedings follow a right course”⁸.
7. Moreover, pursuant to Regulation 65 (2) of the Regulation of the Court (“RoC”), an application for leave to appeal under article 82, paragraph 1 (d), must specify

² ICC-01/04-168, para. 19.

³ ICC-01/09-02/11-253, para. 28.

⁴ ICC-01/04-168, para. 13.

⁵ ICC-01/04-168, para. 9.

⁶ ICC-01/04-168, para. 9.

⁷ ICC-01/04-168, para. 10.

⁸ ICC-01/04-168, paras. 14-15

the reasons justifying immediate resolution by the Appeals Chamber of the matter at issue.

III. IDENTIFIED ISSUE FOR APPEAL

8. The Defence notes that the Chamber has previously stated that an appealable issue under Article 82(1) (d) of the Statute requires the parties to articulate ‘discrete issues’.⁹ The Defence hereby specifies that there is one discrete issue for which it seeks leave to appeal:

The extent to which Articles 64(2) and 69(2) permit a Trial Chamber to interfere with an accused’s right pursuant to Article 67(1) (e) to identify and choose the witnesses he would like to call in his defence at trial.

IV. DEFENCE SUBMISSIONS

9. It is respectfully submitted that (i) the highlighted discrete issue is appealable and arises out of the Decision; (ii) resolution of this issue will significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and (iii) immediate resolution of this issue will materially advance the proceedings.

(i) The discrete issue is appealable and arises out of the Decision

10. Article 67(1) (e) of the Statute guarantees that the accused shall be entitled to “obtain the attendance and examination of witnesses on his (...) behalf”. This right is subject to Article 69(4) of the Statute which provides: “The Court may rule on the relevance or admissibility of any evidence”.

11. In addition Article 64(2) of the Statute provides that it is incumbent upon the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted

⁹ ICC-01/08-01/13-T-10-CONF-ENG ET 29-09-2015 10/74 SZ T.

with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.

12. Even so, a “Chamber will not interfere with a party’s decisions regarding its selection and presentation of evidence unless there is a compelling reason to do so”.¹⁰ There must be a “measure of deference” to “parties to shape their presentation of evidence in a manner that best fits their overall theory of the case”.¹¹ Thus, while a Chamber *may* intervene, “it will do so sparingly”.¹²
13. The same principles have been upheld by other International Tribunals. For instance, the ICTY has held that, in principle, “it is for each party to decide which witnesses to call to prove its case”.¹³
14. The ICTR Appeals Chamber clearly recognized “there are few tasks more relevant to the preparation of the defence case than selecting witnesses”.¹⁴
15. “[T]he choice of which (rather than how many) witness to call should remain with the parties and not with the judges (...). It may therefore be preferable for the Trial Chamber to limit the time available to the parties rather than the number of witnesses; the parties can then use this time as they see fit”.¹⁵
16. Having said that, at paragraphs 8 of the Decision, the Chamber ruled that, regarding D21-0001’s testimony:

¹⁰ *Prosecutor v Bemba* Decision Regarding the Prosecution’s Witness Schedule, 11 November 2011, ICC-01/05-01/08-1904-Red, para. 25 [Emphasis added].

¹¹ *Ibid.*

¹² *Ibid* [Emphasis added].

¹³ *Prosecutor v Halilovic*, IT-01-48-T, ‘Decision on Prosecution’s Motion to Vary its Rule 65 ter Witness List, 7 February 2005, p. 6, and cited in a number of subsequent decisions.

¹⁴ *Prosecutor v Bagosora et al.* ICTR-98-41-AR73, ‘Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence’, 25 September 2006 at para. 9.

¹⁵ R. May and M Wierda, *International Criminal Evidence*, (Ardsey, NY: Transnational, 2002) 342.

“The Chamber does not consider that it requires general background on the challenges and practical realities of international defence counsel for purposes of its Article 74 decision. In order to determine whether Mr. Kilolo committed any offences against the administration of justice, it does not matter how defence counsel behave in the abstract (...), and there is no indication that D21-001 has any personal knowledge of any information specific to Mr. Kilolo’

17. Also, at paragraph 14, regarding the character witnesses, the Chamber held that:

“Contrary to what the Kilolo Defence claims, this case is not about Mr. Kilolo’s ‘character, professionalism and ethics’¹⁵ but whether Mr. Kilolo’s acts and conduct were criminal with respect to the relevant witnesses in The Prosecutor v. Jean-Pierre Bemba Gombo case (ICC-01/05-01/08). Evidence that Mr. Kilolo conducted his work ethically with respect to other witnesses in other contexts does little to contribute to this assessment.”

18. In deciding so, it is respectfully submitted the Trial Chamber has failed to abide by the important principles and case law set out above. In short, insufficient “deference” has been given to the defence in selecting its witnesses and proving its case. Accordingly, the Kilolo Defence submits that the issue is appealable.

19. Also, the issue arises out of the Decision because it effectively prevents the Kilolo Defence to present six of its eight witnesses in the context of its defence case. The Trial Chamber’s decision has effectively had a significant impact on the Defence case which was to be presented at trial.

(ii) Resolution of the issue will significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial

20. The Defence argues that resolution of the issue will significantly affect the fairness and expeditiousness of the proceeding as it has a direct impact on the evidence that the Defence for Mr. Kilolo may call at trial.

Character witnesses

21. Article 70 cases at the ICC are distinct from the ICC's core crimes of Genocide, Crimes against humanity and War Crimes in that, by their very nature, they concern allegations of dishonesty. The character and integrity of the accused is therefore at the center of any Article 70 case.

22. Allegations of dishonesty have been leveled at Mr. Kilolo, not just by the Prosecutor, but also by self-confessed perjurers, individuals who the Prosecutor has sought to rely upon in support of the charges and in its attack on Mr Kilolo's character and professional integrity.

23. Pursuant to Article 67(1) (g) Mr. Kilolo has an absolute right to remain silent, a right he has chosen to exercise in this case. He is a lawyer of high standing with almost 20 years unblemished experience at both the bars of Brussels and Kinshasa. It is absolutely right that the Trial Chamber hear directly from those who can attest to that in its assessment of Mr. Kilolo's case.

24. The Trial Chamber indicates that this case is about "whether Mr Kilolo's acts and conduct were criminal with respect to the relevant witnesses in *The Prosecutor v Jean-Pierre Bemba Gombo*." The Trial Chamber states that the fact that Mr Kilolo has 'conducted his work ethically with respect to other witnesses in other contexts does little to contribute to this assessment'.¹⁶ This statement is of concern.

¹⁶ Decision para. 14.

25. While someone's good character does not prove that they have not committed the acts in question, any more than whether someone's bad character may prove that they did, it is unquestionably a *relevant* consideration and evidence to demonstrate it similarly *relevant*.

26. In the United Kingdom, for example, evidence of a person's good character, let alone exemplary good character, is always deemed both relevant and admissible. As set in the Crown Court Benchbook:

"Good character is relevant to credibility as well as to propensity. Credibility is in issue both when the defendant has given evidence and when, although he has not given evidence, he relies upon an account given in interview. Propensity is in issue whether or not the defendant has given evidence or an account in interview".¹⁷

27. Similarly, in France, Article 331 of the "Code de Procédure Pénale" provides that "les témoins déposent uniquement, soit sur les faits reprochés à l'accusé, soit sur la personnalité et sur la moralité".

28. As the Trial Chamber fairly recognizes "there does not seem to be a consistent pattern in other international criminal cases as to whether good character evidence is generally admissible when considering the guilt or innocence of the accused".¹⁸

29. It is of note that of the two cases cited by the Trial Chamber to demonstrate this divergent practice: (i) *Prosecutor v Tadic* "Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin", and (ii) *Prosecutor v Zoran Kupreskic et al* "Decision on Evidence of the Good Character of the Accused and the Defence of

¹⁷https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf, page. 161, para 2.

¹⁸ See Decision footnote 16.

Tu Quoque". The case in which the Defendant was permitted to present character evidence was that of Milan Vujin.

30. Vujin, like this case, concerned allegations against counsel in which, evidence of "whether it is likely that a person of good character would have acted in the way alleged" was at the heart of the case.

31. Moreover, it is of note that *Vujin* was a decision of the ICTY Appeals Chamber while *Kupreskic* a Trial Chamber decision. To the extent that there is any divergence it is respectfully submitted that it is the decision of the Appeals Chamber that should prevail.

Witness D21-001

32. As with the character witnesses, in refusing the Defence an opportunity to call D21-001, it is respectfully submitted that the Trial Chamber has failed to afford the Defence sufficient deference in deciding which witnesses to call to prove its case.

33. D21-001 is categorically not an expert witness and will not provide "improper expert testimony".¹⁹ He will not give opinion evidence on the final issue, i.e. whether or not Mr Kilolo has committed a criminal offence. It is accepted that such issue is a matter entirely within the domain of the Trial Chamber.

34. Again, having chosen to exercise his right not to give evidence, Mr Kilolo hoped that D21-001 could present evidence about the challenges and practical reality of conducting defence investigations. It is not intended that D21-011 will usurp to role of the Trial Chamber, and, as such, he was selected precisely because he will not give evidence about "Mr Kilolo's own acts and conduct".²⁰

¹⁹ Decision, para. 10.

²⁰ Decision, para. 9.

35. The Trial Chamber states that D21-001 does not appear to have any “specialised knowledge about the context of this particular case, such as the cultural factors or different professional obligations in the relevant African countries”.²¹ D21-001 can assist the Trial Chamber by explaining the different professional obligations and experiences of lawyers from different jurisdictions and from different backgrounds. He has over 20 years’ experience in international criminal proceedings and now sits on the ICC Disciplinary Appeals Board. He is also Chair of the Committee tasked with drafting a Constitution for a bar association for all ICC. As such he has first-hand experience of the sort of challenges and sensitivities that need to be taken into consideration when assessing the professional standards of lawyers from a different jurisdiction to one’s own.

36. Even if not persuaded of the relevance of D21-001’s testimony at this stage, it is respectfully submitted that the preferable course would have been to defer to the Defence, allow the evidence of D21-001 to be heard *de bene esse*, and for its relevance and admissibility to be determined thereafter. It is noted that such a course has previously been adopted by the Trial Chamber with regards evidence presented by the Prosecution pursuant to its various Bar Table Motions.²² In that Decision the Trial Chamber opted to defer any decision on the relevance and admissibility of the material until the end of the trial.²³ A not dissimilar approach was adopted in relation to the testimony of Prosecution witness P-0433 when the Trial Chamber opted to hear his testimony and rule on specific questions and issues during the course of his testimony.²⁴

²¹ Decision, para. 9.

²² ‘Decision on Prosecution Requests for Admission of Documentary Evidence’ 24 September 2015. (ICC-01/05-01/13-1285).

²³ (ICC-01/05-01/13-1285), para. 16.

²⁴ See Oral Decision rendered on 30 September 2015 – Transcripts p. 6 lines 15 to 18.

37. Accordingly, on the face of it, in ordering the Defence to strike D21-0001 of its list of witnesses and in directing it to present the character witnesses evidence through Rule 68 (2) ((d), the Trial Chamber has decided upon the potential impact of possible defence evidence without even having seen or heard it. This runs the danger of signifying to the accused that evidence he seeks to rely upon is not as important as that of the Prosecution.

38. In light of the above, the Defence submits that resolution of this discrete issue by the Appeals Chamber will affect the fairness of the proceedings and the outcome of the trial.

(iii) Immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings.

39. The Defence notes that the Appeals Chamber held as follows:

“A wrong decision on an issue in the context of Article 82(1) (d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back.”²⁵

40. In the present case, an immediate resolution of the issue is required to ensure that the accused’s right to present evidence under article 67 (1) of the Statute as stated above are implemented and safeguarded in an efficient manner.

41. The intervention of the Appeals Chamber will also delineate the scope of evidence that may be called by the Defence and thus provide great clarity.

²⁵ ICC-01/04-168, para. 16.

42. Immediate resolution of the issue is all the more required as it cannot be deferred to the final judgment or appeal as the Defence would have had already been deprived of the opportunity to present the relevant evidence at trial.

43. Accordingly, the Defence submits that immediate resolution will materially advance the proceedings.

V. RELIEF SOUGHT

44. The Defence for Mr. Kilolo respectfully asks the Trial Chamber to grant leave pursuant to Article 82(1) (d) for the Kilolo Defence to appeal the “Decision on Relevance and Propriety of Certain Defence Witnesses”.

Respectfully submitted,



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Dated this 9 February 2016,
At The Hague, The Netherlands.