

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/05-01/13
Date: 17 February 2016

TRIAL CHAMBER VII

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

Decision on the ‘Application for Leave to Appeal “Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses (ICC-01/05-01/13-1600)”’

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 82(1)(d) of the Rome Statute ('Statute') and Rule 155 of the Rules of Procedure and Evidence ('Rules'), issues the following Decision on the 'Application for Leave to Appeal "Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses (ICC-01/05-01/13-1600)''.

I. Procedural History

1. On 21 January 2016, the defence for Mr Kilolo ('Defence') filed its final list of witnesses and anticipated testimony summaries.¹
2. On 26 January 2016, the Single Judge directed the Defence to file submissions justifying the relevance and propriety of calling: (i) witness D21-001 to testify on the challenges and practical realities of international defence counsel; and (ii) witnesses to testify as to Mr Kilolo's character, professionalism and/or ethics (witnesses D21-004, D21-005, D21-006, D21-007, D21-008 – collectively 'Character Witnesses').²
3. On 29 January 2016, the Defence submitted that D21-001 and the Character Witnesses were both relevant and of vital importance to its case and should thus be permitted to testify.³ The Office of the Prosecutor ('Prosecution') responded to those submissions on 2 February 2016.⁴
4. On 4 February 2016, the Chamber rejected the Defence request to call D21-001 as a witness and invited it to present the testimony of the Character Witnesses in writing, pursuant to Rule 68(2)(b) of the Rules ('Impugned Decision').⁵

¹ Soumissions de la défense de monsieur Aimé Kilolo concernant sa liste de témoins et sa liste de preuves, ICC-01/05-01/13-1562.

² Directions Relating to Certain Witnesses and Appearance Order, ICC-01/05-01/13-1578, para. 4.

³ Kilolo Defence's submissions on relevance and propriety of certain defence witnesses, ICC-01/05-01/13-1585-Conf.

⁴ Prosecution's Response to the Kilolo Defence's Submissions on Relevance and Propriety of Certain Defence Witnesses, ICC-01/05-01/13-1591-Conf.

⁵ Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, ICC-01/15-01/13-1600.

5. On 9 February 2016, the Defence sought leave to appeal, pursuant to Article 82(1)(d) of the Statute ('Application'),⁶ and the Prosecution filed a response thereto on 12 February 2016 ('Response').⁷

II. Submissions

6. The issue raised by the Defence for adjudication on appeal is: '[t]he 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) to identify and choose the witnesses he would like to call in his defence at trial' ('Issue').⁸ The Defence asserts that resolution of the Issue will significantly affect the fairness and expeditiousness of the proceedings as it impacts upon the accused's right to present evidence in his defence and thus cannot be deferred to the final judgment or appeal.⁹
7. It is argued that in the Impugned Decision, the Chamber afforded the Defence insufficient deference in deciding which witness to call to prove its case.¹⁰ The Defence relies upon jurisprudence of this Court and the international criminal tribunals for the former Yugoslavia and Rwanda indicating that the defence should be given some liberty in its selection of witnesses in order to be able to shape the presentation of evidence in a manner that best fits its overall case theory, and that a chamber should only intervene where there are compelling reasons to do so.¹¹ The Defence maintains that whereas the Chamber could have decided to hear all its witnesses and defer admissibility and relevance assessments to the end of the proceedings,¹² it instead prevented the Defence from calling six out of its eight witnesses, thereby significantly impacting its

⁶ Application for Leave to Appeal 'Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses (ICC-01/05-01/13-1600)', 9 February 2016, ICC-01/05-01/13-1614.

⁷ Prosecution's response to application for leave to appeal the 'Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses', ICC-01/05-01/13-1623.

⁸ Application, ICC-01/05-01/13-1614, para. 8.

⁹ Application, ICC-01/05-01/13-1614, paras 20 and 40-41.

¹⁰ Application, ICC-01/05-01/13-1614, paras 8, 18 and 32.

¹¹ Application, ICC-01/05-01/13-1614, paras 11-15.

¹² Application, ICC-01/05-01/13-1614, para. 35.

case.¹³ The Defence argues that as this is a case where the integrity of Mr Kilolo has been called into question, the Character Witnesses are essential, in line with jurisprudence from national and international courts.¹⁴ The Defence furthermore argues that witness D21-001 was relevant to the case, having ‘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’.¹⁵

8. The Prosecution opposes the Application. It argues that the Issue does not arise from the Decision and amounts to a mere disagreement with the Chamber’s findings.¹⁶ Additionally, the Prosecution argues that the Issue does not affect the fair and expeditious conduct of the proceedings or trial outcome.¹⁷ With regards to witness D21-001, the Prosecution maintains that ‘Article 67(1)(e) does not give an accused an unbridled right to submit irrelevant evidence’.¹⁸ With regards to the Character Witnesses, the Prosecution notes that the Impugned Decision allowed the Defence to submit their evidence pursuant to Rule 68(2)(b) of the Rules and thus did not negatively affect its right to present the evidence of those witnesses.¹⁹

III. Analysis

9. Recalling the applicable law relating to appeals brought pursuant to Article 82(1)(d) of the Statute as set out in its previous decisions,²⁰ the Chamber does not find that the Issue raised by the Defence is sufficiently discrete or significantly affects the fair and expeditious conduct of the proceedings.

¹³ Application, ICC-01/05-01/13-1614, para. 18.

¹⁴ Application, ICC-01/05-01/13-1614, paras 21 and 24.

¹⁵ Application, ICC-01/05-01/13-1614, para. 35.

¹⁶ Response, ICC-01/05-01/13-1623, para. 3

¹⁷ Response, ICC-01/05-01/13-1623, paras 8-11.

¹⁸ Response, ICC-01/05-01/13-1623, para. 4

¹⁹ Response, ICC-01/05-01/13-1623, para. 5

²⁰ Decision on Babala Defence Request for Leave to Appeal the Decision Related to the Timing of Opening Statements, 16 September 2015, ICC-01/05-01/13-1258, para. 8 and the decision cited in footnote 14; Decision on the Request for Leave to Appeal the Decision ICC-01/05-01/13-893-Red, 28 May 2015, ICC-01/05-01/13-966, paras 12-13.

10. The rights of the defence, pursuant to Article 67(1)(e) of the Statute, to obtain the attendance and examination of witnesses is not unlimited. It is subject to judicial oversight to ensure that the trial is fair and expeditious and is conducted with full regard for the rights of the accused in accordance with Articles 64(2), 64(9), 67(1)(c) and 69(4) of the Statute.²¹ The Chamber has in previous instances decided to defer the assessment of evidence to the end of the proceedings, but this decision too is not without exception. The Chamber in this particular instance found that the specialised testimony of D21-001 would be irrelevant and comparable to improper expert testimony and for this reason ordered the Defence to strike D21-001 from its list of witnesses.²² The Chamber has the discretion to make determinations on the admissibility of evidence pursuant to Articles 64(9) and 69(4) of the Statute and the Defence's right to obtain the attendance and examination of witnesses is subject to the Chamber's obligation to refuse irrelevant evidence. The Defence in its Application does not point to any specific error in the exercise of the Chamber's discretion in its assessment of the relevance and appropriateness of the testimony of D21-001, and as such fails to articulate a discrete issue for resolution by the Appeals Chamber.
11. Furthermore, contrary to the submissions of the Defence, the Chamber has not reduced the number of Defence witnesses from eight to two. The Chamber has allowed the Defence to present the evidence of the Character Witnesses as part of their evidence in writing, pursuant to Rule 68(2)(b) of the Rules. Thus, the Defence has not been curtailed from presenting the evidence of good character to the Chamber, which will in turn examine the evidence before it and make an assessment as to its relevance and probative value at the relevant time. The Issue does not therefore affect the fair and expeditious conduct of the proceedings.

²¹ See also Impugned Decision, ICC-01/05-01/13-1600, para. 6; *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, 15 November 2011, ICC-01/05-01/08-1904-Red, paras 24-25.

²² Impugned Decision, ICC-01/15-01/13-1600, paras 10-11.

12. For the foregoing reasons, the Chamber does not consider that the Application satisfies the criteria of Article 82(1)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Application.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 17 February 2016

At The Hague, The Netherlands