



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

OR: ENG

Summary of: Friday, 9 July 2004

Niyitegeka

v.

Prosecutor

Case No. ICTR-96-14-T

SUMMARY OF JUDGEMENT BY PRESIDING JUDGE

The Appeals Chamber is here today to deliver its judgement on appeal in the case of Eliézer Niyitegeka v. The Prosecutor. As was stated in the Scheduling Order of 23 June 2004, today's hearing for the delivery of the Judgement is taking place, pursuant to Rule 15bis(A) of the Rules of Procedure and Evidence, in the absence of one of the Judges of the Chamber, Judge Mohamed Shahabuddeen, who is unavailable due to official Tribunal business.

The Appellant, Mr. Niyitegeka, appealed from the judgement issued by Trial Chamber I of this Tribunal on 16 May 2003, following a trial that began here at Arusha on 17 June 2002 and included 33 trial days.

The Trial Chamber found the Appellant guilty on six counts of the indictment, which arose out of alleged crimes committed between April and June 1994 in Kibuye Prefecture. During the relevant period, the Appellant was the Minister of Information in Rwanda's interim government. The indictment charges the Appellant for his individual criminal responsibility relating to selected incidents that occurred in Kibuye prefecture, including the area of Bisesero.

The Trial Chamber convicted the Appellant on six counts of the indictment: genocide (count 1), conspiracy to commit genocide (count 3), direct and public incitement to commit genocide (count 4), and crimes against humanity of murder, extermination, and other inhumane acts (counts 5, 6, and 8 respectively). The Trial Chamber

acquitted the Appellant on four counts: complicity in genocide (count 2), rape as a crime against humanity (count 7), and two counts of serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto (counts 9 and 10). The Trial Chamber sentenced the Appellant to imprisonment for the remainder of his life.

On appeal, the Appellant challenged all the findings and decisions of the Trial Chamber as findings or decisions that could not have been reached by a reasonable Tribunal and submitted that his trial was manifestly unfair in breach of his statutory right to a fair trial.

Following the practice of the Tribunal, I will not read out the entire text of the Appeal Judgement. Instead, I will summarise the issues on appeal and the reasoning and findings of the Appeals Chamber so that the Appellant, Mr. Niyitegeka, together with the public, will know the reasons for the Appeals Chamber's decision. I emphasise, however, that this is only a summary, and that it does not in any way form part of the Judgement of the Appeals Chamber. The only authoritative account of the findings of the Appeals Chamber is in the written Judgement which will be available today at the end of these proceedings.

The Appellant's brief of appeal contained 53 grounds of appeal. For the purposes of the present Judgement, the Appeals Chamber has divided the Appellant's grounds of appeal into eight categories.

First, the Appellant argues that the integrity of the trial process was undermined by the participation in the trial of a staff member of the Office of the Prosecutor, Melinda Pollard, who, at the time, was suspended from practice in her home jurisdiction, the State of New York.

The Tribunal's instruments do not prescribe qualification requirements for members of the staff of the Office of the Prosecutor appearing before it. Pursuant to Rule 37(B) of the Rules, the Prosecutor's powers in respect of individual cases may be exercised by staff members of his office authorized by him or acting under his direction. Consequently, irrespective of Counsel Pollard's standing to practise law in New York, under the Tribunal's regulatory regime she was entitled to exercise such powers of the Prosecutor as have been entrusted to her under Rule 37(B) of the Rules.

In the exercise of such powers, Counsel Pollard was required to adhere to the standards of professional conduct set out in Prosecutor's Regulation No. 2. In addition, as a staff member of the United Nations, she also had a duty to act in accordance with the Charter of the United Nations, its Staff Rules and its Staff Regulations, which include a duty to act with integrity and honesty. Similar standards are imposed upon defence counsel appearing before the Tribunal who have a duty to "act honestly, fairly, skilfully, diligently and courageously". However, the Appeals Chamber stresses that the integrity of the judicial process demands that these ethical standards be applicable to all counsel appearing before the Tribunal. All counsel have a duty to adhere, as a minimum, to these ethical standards. This is independent of formal provisions or counsel's membership of a national bar.

The Appeals Chamber notes that Counsel Pollard was not the only Prosecution counsel on the case and that she operated under the supervision of a Senior Trial Attorney during the trial. Beyond making mere allegations about Counsel Pollard's possible misconduct in the proceedings against him, the Appellant has not shown how Counsel Pollard's past conduct in New York affected his trial or rendered it unfair.

It has therefore not been established that Counsel Pollard's past professional conduct in the State of New York, the status of her licence to practise law there, or her alleged untimely disclosure that her licence to practise law in New York had been suspended, has undermined the integrity of the Appellant's trial or deprived him of the right to a fair trial. This ground of appeal is accordingly dismissed. However, the present finding is strictly limited to the matter considered here. It is not for the Appeals Chamber to comment on Counsel Pollard's past conduct in her home jurisdiction or her employment in the Office of the Prosecutor.

The Appellant also contends that the Trial Chamber erred in relying on representations made by Counsel Pollard with regard to the non-existence of material which may have benefited his defence, as well as the opportunity to seek an independent inquiry into the existence of investigators' first-made records of interviews with witnesses. It is, of course, essential that the Chambers of the Tribunal be able to rely on the integrity of counsel on both sides and that counsel be able to rely on each other's statements. Dereliction in the duty of honesty may, in appropriate cases, be cause for sanctions or for contempt proceedings. Such dereliction by Prosecution counsel may also be contrary to the Charter of the United Nations and a breach of the relevant Staff Regulations and Staff Rules.

The Appeals Chamber, however, finds no concrete evidence of a violation of the duty of honesty in the present case. In the absence of any showing of Counsel Pollard's breach of the prescribed standards, the Trial Chamber was entitled to accept and rely upon her representations and undertakings. With respect to the Prosecutor's duty to disclose to the Defence the existence of exculpatory evidence, the Appellant did not point to any instance where the Trial Chamber relied on Counsel Pollard's representation as to exculpatory evidence. Finally, it has not been shown that Counsel Pollard's representations regarding the non-existence of first-made records were factually incorrect; indeed, the Senior Trial Attorney confirmed them during the appeal hearing. Because it has not been established that the Trial Chamber erred in law when it relied on Counsel Pollard's representations and undertakings, the appeal on this point is dismissed.

The Appellant's second category of arguments on appeal is that the Trial Chamber erred in law when it permitted the Prosecutor to rely upon Rule 70 of the Rules to claim privilege over the first-made records of the questions that Prosecution investigators put to witnesses and of the answers given.

The Prosecutor has the duty under Rule 66(A)(ii) of the Rules to make available to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. Neither International Tribunal has provided a clear definition of the term "statement" as used in Rule 66(A)(ii), and a clear distinction has not been made between "statements" under Rule 66(A)(ii) and "internal documents prepared by a

party which are not subject to disclosure or notification” under Rules 66 and 67 of the Rules.

Records of questions put to witnesses by the Prosecution and of the answers given constitute witness statements pursuant to Rule 66(A)(ii) of the Rules. It is necessary to disclose the questions put to the witness in order to make the statement intelligible. A question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules. If, however, counsel or another staff member of the Prosecution notes down a question prior to the interrogation, without putting this question to the witness, such a question is not subject to disclosure. Similarly, any note made by counsel or another staff member of the Prosecution in relation to the questioning of the witness is not subject to disclosure, unless it has been put to the witness.

The Prosecution has to make available to the Defence the witness statement in the form in which it has been recorded. However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure. In the present case, the Appellant has not sufficiently demonstrated that additional records exist that have not been disclosed to the Defence. Without a showing of the availability of such records it has not been established that the Prosecution did not fulfil its duty to disclose pursuant to Rule 66(A)(ii) of the Rules. On the contrary, as was mentioned previously, the Senior Trial Attorney confirmed that the Prosecution has no such documents in its possession, and the Appellant has shown no reason to doubt this representation. The Trial Chamber also did not err in law when it permitted the Prosecution to call witnesses for whom first-made records were unavailable.

The Appellant also argued that the Trial Chamber erred in law “by deciding that the Prosecutor had not failed in her duty to preserve all the evidence as obliged by virtue of Rule 41.” The Appellant did not identify the instance when the Trial Chamber supposedly made this decision, and it is not obvious that the Chamber in fact considered this matter or that it reached the decision asserted by the Appellant. Consequently, this ground of appeal is dismissed.

The Appellant’s third category of appeal asserts that the Trial Chamber erred in law when it decided not to recuse itself after Counsel Pollard made a reference to a matter that the Appellant contends is highly prejudicial and impossible to expunge from the minds of the Judges. The Appeals Chamber has repeatedly held that “there is a presumption of impartiality that attaches to a Judge or a Tribunal and, consequently, partiality must be established on the basis of adequate and reliable evidence.” The Appellant has not shown evidence of bias on the part of the trial Judges. Consequently, this ground of appeal is dismissed.

Fourth, the Appellant argues that the Trial Chamber erred in its interpretation of the specific intent requirement for the crime of genocide. Article 2(2) of the Statute of the Tribunal states in part: “Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such....” This provision mirrors Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. In the Appellant’s view, the words “as such” should be interpreted as referring to a situation “where the

specific intent was to commit the specified acts against the group solely because they were members of such a group.”

This proposal, if adopted, would introduce into the calculus of the crime of genocide the determination whether the perpetrator’s acts were motivated solely by the intent to destroy the protected group, in whole or in part, or whether the perpetrator was motivated by that intent as well as other factors. In *Kayishema and Ruzindana*, the Appeals Chamber cautioned that “criminal intent (*mens rea*) must not be confused with motive” and stated that “in respect of genocide, personal motive does not exclude criminal responsibility” provided that the genocidal acts were committed with the requisite intent. This position was reinforced in *Prosecutor v. Jelusic*, where the ICTY Appeals Chamber observed that “the existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.” The term “as such” draws a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. It does not create any obstacle for a conviction for genocide in a case in which the perpetrator was also driven by other motivations. The Trial Chamber was correct in interpreting “as such” to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership. This ground of appeal is dismissed.

Fifth, the Appellant takes issue with the Trial Chamber’s treatment of his alibi evidence. The Appellant contends that the Trial Chamber erred in law by requiring the Appellant to prove his alibi beyond reasonable doubt. In the view of this Chamber, the Trial Chamber correctly stated that the Prosecution bears the burden of proof and that an alibi defence does not bear a separate burden. The Trial Chamber affirmed that, even where the alibi is rejected, it remains the task of the Prosecution to establish the offences charged beyond reasonable doubt. The approach articulated by the Trial Chamber conforms to that previously set forth by the Appeals Chamber.

The Appellant also contends that the Trial Chamber failed to apply the same standards in assessing Defence and Prosecution evidence. The Appellant sets forth several instances in which he believes the Trial Chamber rejected the evidence of Defence witnesses on the grounds that they were unable to provide “details” about the Appellant’s activities during the relevant period, whereas the Trial Chamber excused Prosecution witnesses’ forgetfulness due to lapse of time, allowed inconsistent evidence of Prosecution witnesses, and convicted him on the basis of vague and unspecified Prosecution evidence. The Appeals Chamber has reviewed all of these instances and, for the reasons stated in the written Judgement, finds that the Appellant has not shown that the Trial Chamber failed to apply the same standards in assessing Defence and Prosecution evidence.

The Appellant also argues that the Trial Chamber erred in concluding that his alibi evidence did not raise reasonable doubt as to whether he was in Kibuye area on 28 June 1994 giving orders to commit offences, as testified to by Prosecution Witness KJ. As set out in greater detail in the written Judgement, the Appellant has not shown that the Trial Chamber’s finding of fact on this issue was one that no reasonable trier of fact could have reached. The Appeals Chamber therefore dismisses the appeal related to the alibi.

The Appellant's sixth category of arguments concerns the Trial Chamber's assessment of the credibility of Prosecution witnesses and the reliability of their evidence. The Appellant raises numerous issues under multiple grounds of appeal concerning the Trial Chamber's assessment of the credibility of Prosecution witnesses and the reliability of their evidence. The Appellant asserts legal error with regard to the Trial Chamber's approach to assessing uncorroborated evidence, inconsistencies in evidence, and accomplice and identification evidence.

The Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness's testimony for the proof of a material fact. Having reviewed the Appellant's legal arguments, the Appeals Chamber concludes that the Appellant has not shown that the Trial Chamber committed any error of law in its treatment of uncorroborated testimony, discrepancies between prior statements and testimony, accomplice testimony, or identification and recognition evidence.

The Appellant also raised several challenges to the credibility and reliability of Prosecution witnesses upon whose testimony the Trial Chamber relied in making its findings of fact. The Appeals Chamber is only entitled to substitute its assessment for that of the Trial Chamber if no reasonable trier of fact could have arrived at the Trial Chamber's conclusion and only if the error has occasioned a miscarriage of justice.

The Appeals Chamber's written Judgement analyzes the Appellants' challenges to credibility and reliability of Prosecution witnesses in detail. In the view of the Appeals Chamber, the Appellant has not shown that the Trial Chamber erred in any of its findings relating to credibility or that the Trial Chamber failed to exercise due caution when required in evaluating the testimony of Prosecution witnesses. The Appeals Chamber holds that the Appellant's factual challenges to the Trial Chamber's Judgement do not establish that the Trial Chamber reached conclusions that no reasonable trier of fact could have reached or that a miscarriage of justice occurred. The appeal on these grounds is therefore dismissed.

Seventh, the Appellant contends that the Trial Chamber erred in law by finding that he committed acts that were not pleaded in the indictment and by relying on those findings to convict him. The law governing challenges to the failure of an indictment to provide notice of material facts is set out in detail in the ICTY Appeals Chamber's Judgement in Kupreškic. The Kupreškic Judgement stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21(2), 4(a) and 4(b), "translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven." If the Prosecution charges personal physical commission of criminal acts, the indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed." Failure to set forth the specific material facts of a crime constitutes a "material defect" in the indictment.

Such a defect does not mean, however, that trial on that indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although Kupreškic stated that a defective indictment "may, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic. Kupreškic left open the possibility that the

Appeals Chamber could deem a defective indictment to have been cured “if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.”

Whether the Prosecution cured a defect in the indictment depends, of course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensates for the indictment’s failure to give notice of the charges asserted against the accused. The timing of such communications, the importance of the information to the ability of the accused to prepare his defence, and the impact of the newly-disclosed material facts on the Prosecution’s case are relevant in determining whether subsequent communications make up for the defect in the indictment.

In considering whether a defect in the indictment has been cured by subsequent disclosure, the question arises which party has the burden of proof on the matter. Although the Judgement in Kupreškic did not address this issue expressly, the Appeals Chamber’s discussion indicates that the burden in that case rested with the Prosecution. It is noteworthy, however, that Kupreškic specifically mentioned the fact that the accused in that case had made a timely objection before the Trial Chamber to the admission of evidence of the material fact in question. Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.

The importance of the accused’s right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that accused’s ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.

I will now summarize the Appeals Chamber’s conclusions with regard to the Appellant’s specific claims of lack of notice of material facts.

The Appellant first challenges the Trial Chamber’s finding that “on 10 April 1994, the Accused was transporting guns in Gisovu with three soldiers aboard a white Hilux.” It is not clear whether the allegation of transportation of weapons is indeed a material fact that should have been pleaded in the indictment. However, even if the Appeals Chamber were to consider that the transportation of guns amounts to a “material fact,” the objection was not raised before the Trial Chamber.

Because the Appellant waived this objection in the Trial Chamber, it falls to him to prove that the failure to plead in the indictment the allegation that the Appellant transported weapons on 10 April 1994 materially impaired his defence. The Appellant's Brief does not point out how he suffered any prejudice at all from the leading of evidence on the transportation of weapons on 10 April 1994. On the contrary, his counsel was able to cross-examine Witness GGH on the point and at no time suggested that the Defence was surprised to its detriment by the witness's testimony. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in relying on this fact to convict the Appellant.

The Appellant next challenges the Trial Chamber's finding, based on the testimony of Witness KJ, that "approximately ten days after 6 April 1994" the Appellant "procured gendarmes ... for an attack on Mubuga Church against Tutsi. Again, it is not clear whether the procurement of gendarmes constitutes a "material fact" in the circumstances of this case, but there is no need to decide this question. Even if the Appeals Chamber were to consider that the procurement of gendarmes amounts to a "material fact," the objection was not raised before the Trial Chamber. The Trial Chamber's Judgement does not address such a complaint, nor does the discussion of Witness KJ's testimony in the Defence Final Trial Brief mention it. The Appellant makes no effort to specify how Witness KJ's testimony regarding the procurement of gendarmes materially impaired his defence. This ground of appeal is therefore dismissed.

The Appellant next challenges the Trial Chamber's findings of fact that the Appellant was among the leaders of a large-scale attack at a place called Kivumu, "sometime between the end of April and beginning of May 1994" and that he "was armed with a gun and personally shot at Tutsi refugees." These findings relied on the testimony of Witness GGY. Although the Trial Chamber stated in the Judgement that "the Defence does not complain of lack of notice with respect to the attack at Kivumu," it is clear from the record that the Appellant did object at trial to the introduction of this evidence and received an unfavourable ruling. This suffices to preserve the point on appeal. The Appeals Chamber therefore addresses the merits of the challenge.

The indictment does not allege that a specific attack occurred at the end of April or the beginning of May, let alone that it occurred at Kivumu, that the Appellant was armed, or that the Appellant shot at Tutsi refugees. The closest the indictment comes to pleading these material facts, is a general allegation that the Appellant led others in several attacks in Bisesero, which is a "large area," at "various locations and times throughout April, May and June 1994" does not adequately inform the Defence that the Prosecution intends to charge participation in a specific attack at Kivumu at the end of April or beginning of May during which the Appellant personally shot at refugees. The indictment must "delve into particulars" where possible; generalized allegations of attacks in Bisesero do not suffice.

The Prosecution is expected to know its case before it goes to trial. Given that the Prosecution has not argued on appeal that it was not in a position to plead the material facts of the Kivumu attack with particularity, such as the timeframe of its occurrence,

its location, and the manner in which the Appellant allegedly participated, the only reasonable conclusion is that the Prosecution could have included specific particulars regarding the Kivumu attack in the indictment but failed to do so. This failure to plead material facts rendered this part of the indictment defective.

The next question is whether the Prosecution has shown that the defect was cured by other “timely, clear and consistent information detailing the factual basis underpinning the charges” against the Appellant. In this regard, the Trial Chamber stated that the sufficient notice of the Kivumu attack was given through Witness GGY’s statement taken on 25 October 1999. However, the Trial Chamber’s conclusion that the witness statement gave notice of the Kivumu attack conflicts with the Prosecution’s submission at trial, which was that the statement referred not to the Kivumu attack, but rather to a later attack on 13 May 1994 at Muyira Hill. Furthermore, no attack at Kivumu at the end of April or beginning of May is included in the summary of Witness GGY’s evidence in the Prosecution’s Pre-Trial Brief. Regardless of whether the witness statement referred to the Kivumu attack or not, the Appellant could well have concluded from the failure to mention Kivumu in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe. The Prosecution has not pointed to any other communication that it believes informed the Appellant in a “timely, clear and consistent” way that the Prosecution would include the Kivumu attack in its case.

The Appeals Chamber concludes that the Prosecution has not shown that the failure to plead the Kivumu attack in the indictment was cured by subsequent communication of information. The Trial Chamber therefore committed an error of law by convicting the Appellant in reliance on evidence of his participation in an attack at Kivumu at the end of April or the beginning of May 1994.

The Appellant’s next notice challenge concerns the Trial Chamber’s finding that the Appellant was one of the leaders of an attack at Muyira Hill on 13 April, during which he was armed and shot at Tutsi refugees. Although the Muyira Hill attack of 13 May 1994 was not specifically alleged in the indictment, it was clear from the Prosecution’s Pre-Trial Brief that the Prosecution intended to charge the Appellant with participation in an attack on that date and at that location and that testimony would be adduced stating that the Appellant was armed and shot at Tutsi refugees. Thus, any defect in the indictment in this regard was cured. The Appellant’s argument seems to have less to do with defects in the indictment than with the Appellant’s suspicion that the Prosecution withheld exculpatory witness statements of Witness GGY. The Appellant offers no support for his theory of undisclosed witness statements, which rests on nothing more than speculation.

The Appellant also argues that he lacked notice of information concerning how Witness GGR was able to recognize him as a participant in the attack. The circumstances that led the Trial Chamber to conclude that Witness GGR could reliably identify the Appellant are not facts material to the charges in the indictment, but simply factors bearing on the credibility of the witness’s testimony that the

Appellant committed criminal acts on 13 May 1994. Factors relating to witness credibility need not be pleaded in the indictment. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in finding that the Appellant had sufficient notice of the material facts of the attack at Muyira Hill on 13 May 1994.

The Appellant raises a similar challenge with regard to an attack at Muyira Hill on the following day, 14 May 1994. The Trial Chamber noted that the 14 May attack was not alleged in the indictment and was not mentioned in the Prosecution's Pre-Trial Brief or in any witness statement. The Trial Chamber concluded, however, that the defect in the indictment was cured by the fact that Witness GGY had asserted in a prior statement "that attackers used to come every day to the Bisesero hills" and by the fact that "Prosecution witnesses have testified to large-scale attacks almost daily in various areas in the Bisesero Hills." As was discussed in relation to the Kivumu attack, a general allegation of attacks in the Bisesero region does not cure the indictment's failure to plead the specific date and location of the Muyira Hill attack on 14 May 1994 or the manner of the Appellant's participation in it. The Prosecution has not argued that it was not in a position to plead this information in the indictment.

The Trial Chamber also stated that the Appellant's notice objection was addressed by the fact that the 14 May attack was a "continuation of the 13 May attack, of which the Defence had notice, through the Prosecutor's Pre-trial Brief." Even accepting the Trial Chamber's statement that the 14 May attack was a "continuation" of the 13 May attack, a characterization that is not without doubt, this finding does not answer the question whether the Appellant was given adequate notice that he would be charged with committing criminal acts on 14 May 1994 at Muyira Hill. The notice requirements of Kupreškic apply to the material facts of all criminal acts, including criminal activity that arises as a consequence of earlier criminal activity. As the Trial Chamber acknowledged, the Prosecution did not communicate any information suggesting that the Appellant would be charged with an attack on 14 May 1994 until Witness GGY testified at trial. The Prosecution has not rebutted the presumption of material impairment of the defence that arises from this omission, nor has it suggested that it was not in possession of the information prior to trial. The failure to plead the 14 May 1994 attack in the indictment was therefore not cured. The Appeals Chamber accordingly finds that the Trial Chamber erred in relying on evidence of the Appellant's participation in an attack at Muyira Hill on 14 May 1994.

The Appellant next challenges the finding that the Appellant killed an old man and a young boy at Kiziba on 18 June 1994. Review of the trial transcript reveals that the Appellant did not object to this evidence when it was introduced. Moreover, the Prosecution's Pre-Trial Brief gave notice that Witness GGV would testify that, after two Tutsi refugees were found hiding in the bush, the Appellant "shot and killed the two Tutsi." The Appellant cannot show, and does not attempt to show, that his defence was materially impaired by the failure to plead the two killings in the indictment. The Trial Chamber therefore committed no error in relying on this evidence.

The Appellant next notes that certain Prosecution Witnesses testified that they knew, recognized, or were otherwise familiar with the Appellant due to prior encounters or sightings. The Appellant contends that the details of these previous sightings should have been pleaded in the indictment or subject to clear notice before the witnesses testified at trial. As was stated previously, the details of a witness's sighting of the Appellant are not material facts, but rather go to the credibility of the witness's testimony that the Appellant was in fact seen committing a criminal act. These grounds of appeal therefore fail. Next, the Appellant challenges the finding that the Appellant shot and killed "a girl of 13-15 years of age." The Appellant does not contend that he lacked notice that he would be charged with this murder; rather, he contends that the Prosecution should have pleaded the victim's "identity" in the indictment or else disclosed it. The Appellant is correct that "the identity of the victim," if known to the Prosecution, should be pleaded in the indictment. However, this appears to be a case where the identity of the victim is not known to the Prosecution. The only witness to testify to the murder stated that he did not know the victim. The Prosecution is not obliged to forgo a charge relating to a murder simply because the victim cannot be identified. Rather, in the instant case, the victim's identity could not and need not have been pleaded in the indictment. This argument accordingly fails.

The Appellant also asserts that he had insufficient notice of a particular witness statement. This does not appear to be an argument regarding a defect in the indictment, but rather an argument that the Trial Chamber erred in dismissing his motion to exclude the witness's evidence due to alleged untimely disclosure. Specifically, the Appellant contends that the Prosecution incorrectly told the Chamber that the statement was disclosed in November 2000, whereas he submits that it was not disclosed until at least May 2002. The record is not transparent as to the exact moment when the statement was first disclosed. However, even assuming that the Appellant's submission is correct, the Appellant does not make clear what harm has resulted. The decision whether to permit the witness to testify was within the discretion of the Trial Chamber. The Appellant has not shown that, even assuming the statement was not disclosed until May 2002, the Trial Chamber failed to exercise its discretion properly when it permitted the witness to testify. This ground of appeal is therefore dismissed.

The Appeals Chamber therefore finds that the Appellant had insufficient notice of two of the material facts underpinning the charges against him, namely the allegations that he had participated in an attack at Kivumu at the end of April or the beginning of May 1994 and that he had participated in an attack at Muyira Hill on 14 May 1994. The Trial Chamber therefore committed an error of law in making findings with regard to these allegations and in finding the Appellant guilty under various counts of the indictment for having participated in these two attacks. These errors of law do not invalidate the decision, however, because no conviction on any count of the indictment rested solely on the attack at Kivumu or the 14 May attack at Muyira Hill. Accordingly, there is no basis for disturbing the Appellant's convictions due to these errors of law.

The eighth category of arguments concerns the sentence imposed by the Trial Chamber. The Appellant argues that the Trial Chamber erred in its consideration of the evidence he offered in mitigation and gave insufficient weight to mitigating circumstances. Having reviewed the Appellant's arguments, the Appeals Chamber concludes that the Appellant has not shown that the Trial Chamber's decision exceeded the discretion conferred upon it in matters of sentencing. The Appeals Chamber has also considered whether the Prosecution's failure to give proper notice of the Kivumu attack and the Muyira Hill attack on 14 May 1994 affects the sentence imposed in this case. The fact that the Prosecution was derelict in its duty to provide adequate notice of two individual attacks does not mitigate the seriousness of the Appellant's remaining crimes that were properly tried under fair procedures. Accordingly, the Appeals Chamber concludes that these errors of law do not invalidate the decision and do not warrant re-sentencing.

The Appellant raises additional grounds of appeal which fail to meet the requisite standards for consideration by the Appeals Chamber pursuant to Article 24 of the Statute and are therefore dismissed. They are described in the Appeals Chamber's written Judgement.

I shall now read the Appeals Chamber's disposition of the appeal in full.

For the foregoing reasons, THE APPEALS CHAMBER

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the hearings on 21 and 22 April 2004;

SITTING in an open session;

DISMISSES the Appellant's appeal in its entirety;

AFFIRMS the sentence of imprisonment for the remainder of his life;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules;

ORDERS, in accordance with Rules 103(B) and 107 of the Rules, that Eliézer Niyitegeka is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

The Judgement was signed by Judges Shahabuddeen, Mumba, Schomburg, Weinberg de Roca and myself on the fifth day of July 2004, at The Hague and issued this ninth day of July 2004 in Arusha.

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