



**IN THE APPEALS CHAMBER**

**Before:**

Judge Mohamed Shahabuddeen, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Fausto Pocar  
Judge Wolfgang Schomburg  
Judge Inés Mónica Weinberg de Roca

**Registrar:** Mr Adama Dieng

**Decision of:** 04 October 2004

**Pauline NYIRAMASUHUKO**

**v.**

**THE PROSECUTOR**

*Case No ICTR-98-42-AR73.2*

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**DECISION ON PAULINE NYIRAMASUHUKO'S APPEAL ON THE ADMISSIBILITY OF EVIDENCE**

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**Counsel for the Prosecution**

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Mr Jonathan Moses  
Ms Adesola Adeboyejo  
Mr Manuel Bouwknecht

**Counsel for the Defence**

Ms Nicole Bergevin  
Mr Guy Poupart

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed

in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (□Appeals Chamber□ and □International Tribunal□, respectively), is seized of an appeal filed on 26 July 2004 by Pauline Nyiramasuhuko[1] (□Appeal□ and □Appellant□) against Trial Chamber II□s oral decision of 24 June 2004 (□Impugned Decision□).[2] The Appeal was certified by the Trial Chamber on 15 July 2004 (□Certification□) pursuant to Rule 73(B) of the Rules of Procedure and Evidence (□Rules□).[3]

2. The Appeal concerns the admissibility as evidence of a diary allegedly belonging to the Appellant. Excerpts thereof were referred to in a report prepared by a Prosecution expert witness in the present case. From the parties□ submissions, it appears that the diary was seized at the time of the Appellant□s arrest by Kenyan authorities on 18 July 1997, and handed over to the Prosecution. The diary, which was placed under seal by an order of this Tribunal,[4] has been in the custody of the Prosecution since.

3. In her Appeal, the Appellant raises a number of arguments, notably, that she has never claimed ownership of the diary, that there has been a break in the chain of custody and that the document is incomplete, there being a number of pages missing. She contends moreover that admission of the diary as evidence violates her right to a fair and speedy trial, that the burden of proof of ownership of the diary would be reversed, as she would have to disprove ownership, and that she would be forced to testify against herself. The Prosecution contends that the Appeal should be dismissed as the diary was properly admitted and that matters such as authenticity and chain of custody can be verified during trial.[5]

4. The Appeals Chamber recalls that pursuant to Rule 73(B) of the Rules, certification to appeal may only be granted where the appeal □involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings□.

5. In the case at hand, the reason for which the Trial Chamber certified the Appeal is unclear. The issues which have been raised by the Appellant relate to the admissibility of the diary as evidence. Indeed, the submissions regarding the chain of custody, ownership of the diary, and whether pages are missing are all matters which go to the authenticity, reliability and admissibility of the diary, the assessment of which falls within the discretion of the Trial Chamber. It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence.[6] Consequently, as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it does not justify such an exception and should not have been certified.

6. The Appeals Chamber deems it nevertheless appropriate to note that in the Impugned Decision, the Trial Chamber correctly pointed out that a distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative weight to be attached to it.[7] The former requires some relevance and probative value, whereas the latter is an assessment to be made by the Trial Chamber at the end of the case. The Trial Chamber did not abuse its discretion at this stage of the proceedings, and there is thus no need for appellate intervention.

7. As the Appeals Chamber has previously indicated, Rule 89 (C) of the Rules grants a Trial Chamber a broad discretion in assessing admissibility of evidence. Evidence may be deemed inadmissible where it is found to be so lacking in terms of the indicia of reliability, such that it is not probative. Thus, at the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible. Finally, the admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are to be assessed by the Trial Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence.[8]

## Disposition

8. For the foregoing reasons, the Appeals Chamber dismisses the Appeal.

Done in French and English, the English text being authoritative.

Done this 4th day of October 2004,  
At The Hague,  
The Netherlands.

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Judge Mohamed Shahabuddeen,  
Presiding

**(Seal of the International Tribunal)**

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[1] Mémoire d'appel interlocutoire de la décision orale du 25 juin 2004 déclarant recevables en preuve un agenda allégué appartenir à P. Nyiramasuhuko et les parties du rapport de l'expert Guichaoua qui reprennent, analysent et réfèrent à cet agenda, filed on 26 July 2004; See also Réplique à la réponse du procureur au mémoire d'appel interlocutoire de la décision orale du 25 juin 2004 déclarant recevables en preuve un agenda allégué appartenir à Pauline Nyiramasuhuko et les parties du rapport de l'expert Guichaoua qui reprennent, analysent et réfèrent à cet agenda, filed on 04 August 2004.

[2] T, 24 June 2004, pp. 12-16.

[3] Decision on Pauline Nyiramasuhuko's Motion for Certification to Appeal the Oral Decision of 24 June 2004 on the Defence Motion for Admissibility, dated 15 July 2004.

[4] Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, dated 12 October 2000.

[5] Prosecutor's Response to Nyiramasuhuko's Interlocutory Appeal of an Oral Decision Dated 25 June 2004 Admitting Into Evidence the Alleged Diary of Pauline Nyiramasuhuko, filed on 29 July 2004.

[6] See Decision on Pauline Nyiramasuhuko's request for reconsideration, dated 27 September 2004.

[7] T, 24 June 2004, p. 14.

[8] *The Prosecutor v. Georges Rutaganda*, Appeal Judgement, Case No. ICTR-96-3-A, 26 May 2003, para. 33, citing *Prosecutor v. Delalić*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, Case No. IT-96-21-T, 19 January 1998, para. 31