

PROSECUTOR V FÉLICIEN KABUGA

MICT-13-38

March 8, 2023

The trial of Félicien KABUGA started on September 29th 2022 in The Hague courtroom of the Residual Mechanism for the International Criminal Tribunals. The accused is charged with six counts: One count of Genocide, One count of Direct and Public Incitement to Commit Genocide, One count of Conspiracy to Commit Genocide and Three counts of Crimes Against Humanity, namely Persecution on political grounds, Extermination, Murder.

Procedural hearing to discuss medical report.

Mr. Félicien Kabuga was present via a live stream.

Today's hearing was about procedural matters concerning a joint report of medical experts that states that Kabuga's health has declined in so far that he is unable to participate meaningfully in the trial. Both parties then submitted their arguments on the report and the future of the trial. The Prosecutor started by saying that the report is very short because it is only three pages long and that there are no explications or reasoning "sufficient to determine with confidence that he will never regain his fitness." He underlined that during the fitness hearings in May and June last year, the trial Chamber had already heard that fitness is a dynamic concept and that the assessment of fitness must be determined not on a bad day or based on a time where the subject's cognitive abilities were diminished due to illness. He recalled that Kabuga was ill during the new year with an Influenza virus that was further complicated by a bacterial lung infection. The medical assessments for the present report were conducted in February when he was still recovering from these illnesses. The Prosecution expresses a view that the information is insufficient because it is only based on the February examinations and argues that the experts need to assess a "baseline condition" that is assessed over a longer period of time and takes into account that he needs to have fully recovered from his wintertime illness. The prosecution then proposed possible ways forward. A temporary suspension of the hearings if judges consider that further assessment is required, a suspension only of the hearing of witnesses that would allow parties to continue to move towards a closing of the prosecution's case and would allow the defence to open their case or a presentation of evidence such as RTLTM broadcasts by the Prosecution. The Prosecution also emphasized the public interest to conclude the proceedings in a case of such significance not only for victims, but also for the people of Rwanda and the whole international community. The Prosecution also reminded the Court that Kabuga was a fugitive for two decades and that in the past, cases before the mechanism have only been terminated when a person had died, which is "clearly not the case here". Finishing his submission, the Prosecutor said that hearing evidence even if no criminal liability arose from that would be novel in the context of the mechanism and its

predecessors, but that the idea of a hearing of the facts is known in other jurisdictions and there are merits that they ask the chamber to consider.

The presiding Judge replied that they have to accept the responsibility about the instructions they gave, because it was the Chamber who asked for an expert review. He also asked the Prosecution to clarify what other means of procedure they envisaged. The Prosecutor noted that some jurisdictions put value in procedures which takes into account that some accused are unfit and cannot be held liable, but that there is evident, tangible value for the gathering of evidence for judicial considerations and the purpose of records and continuing a “well-ordered society”. He added that this reflects a large part of what is the business of these mechanisms which is to preserve a record and ensure a judicial confirmation or disapproval of evidence. The judge then turned to the defence counsel.

Maître Altit said that the expert report confirms what the defence had been saying for months and months and that the Chamber said that fitness must be assessed, which was done. The defence lawyer expressed criticism toward a suggestion that Kabuga could be slightly fit before commenting that people need to face up to reality. Maitre Altit also emphasized that the experts said that Kabuga is mentally exhausted, disorganised and that he does not understand the world we're living in. He seems to be affected by dementia, which is a chronic state. To finish, the defence counsel said that for his team, it is clear that there is no debate about that and therefore, the proceedings should be terminated immediately. Anything else, he argued, would be an "extreme violation of Kabuga's fundamental rights" and if the proceedings continued, it would be a sham trial.

The presiding judge then asked the defence counsel about what the estimated volume of the defence case is. Maitre Altit replied that it is impossible to determine at this point since they have not seen all of the Prosecution's evidence yet. The Judge then inquired where Maitre Altit envisaged Kabuga will go if he is released. The counsel replied that if released in such conditions, Kabuga will be presumed innocent, therefore he can theoretically go where he wants. The Defence Counsel stressed that the accused is a Rwandan national but also has relatives around Europe. To that, judge Bonomy asked whether the counsel has discussed with his client the possibility that no country would take him and that he may have no option but stay in detention and would find himself in a limbo, and whether Maitre Altit could identify a jurisdiction where his client could go and which assures that he returns for a possible resumption of the trial. The counsel answered that in his experience countries would be ready to take people like that and that his team has done this for clients before. On this, the presiding judge adjourned the session and announced that they will decide whether witness KAB041 will be further interrogated or not.

This note is a communication from the "Justice and Memory" program which aims to strengthen the involvement of affected populations and local actors, in international and national trials related to the genocide perpetrated against the Tutsi, treated on the basis of the universal jurisdiction, in order to consolidate unity, reconciliation, the perpetuation of the memory of the genocide and social cohesion in Rwanda.

The program is implemented by RCN Justice & Democracy, PAX PRESS, Haguruka and *Association Modeste et Innocent (AMI)*. The program follows the course of the proceedings in the trials of genocide cases based on the universal jurisdiction and informs impacted populations on the progress of the cases.

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