

PROSECUTOR V FÉLICIEN KABUGA

MICT-13-38

March 15, 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.

Hearing to discuss medical report.

Mr. Félicien KABUGA attended the hearing via video

Following a medical report declaring Mr. Kabuga unfit to stand trial, today the chamber called in a hearing the three independent medical experts, authors of the report, to discuss their findings.

Examination by the Bench of Professor Harry Gerard Kennedy, Forensic Psychiatrist.

The Expert Report of 2023, written by the three experts concluded that the accused could not "participate meaningfully in his trial" as Judge Bonomy reminded the Court.

Presiding Judge Bonomy started the examination of Professor Kennedy by reminding him that in the Joint Report of December 2022, all three experts considered that Mr. Kabuga was fit to plea, to understand the nature of the proceedings and to understand the course of the proceedings, and asked him to confirm these findings as of this day. Professor Kennedy confirmed the ability of Mr. Kabuga in these regards. Judge Bonomy explained that one of the points made in the 2022 Expert Report, was that Mr. Kabuga did not complete most tasks asked by the experts but appeared to make an effort to complete them. He asked Professor Kennedy if the same conclusion was reached for the Expert Report of 2023. Professor Kennedy explained that Mr. Kabuga did not complete many tasks and that even those completed indicated a lack of ability.

The Expert Report of December 2022 concluded that Mr. Kabuga was not able to understand the details of the evidence or at best was not able to understand more than immediate or face-to-face evidence. Judge Bonomy asked Professor Kennedy whether Mr. Kabuga was able of understanding factual evidence. The expert testified that, at the time of the 2022 Report, the accused was equivocally unable to understand the factual evidence and that, as of this day, Mr. Kabuga cannot understand said evidence. Indeed, during the defendant's interview, on 17th February 2023, the experts found that he

was unable to appreciate the significance of some of the questions put to him. While he could make helpful remarks, he did not grasp the significance of the questions asked.

In the Expert Report of 2022, Professor Kennedy's colleagues concluded that Mr. Kabuga was not able to instruct Counsel, while he concluded that upon the improvement of the accused's frontal lobe deficit, such a capacity was possible. The frontal lobe functions refer to the executive functions, particularly relevant to the exercise of the making of decisions based on all the information available. Judge Bonomy asked the expert to explain his position as of now. Professor Kennedy explained that, back then, his position was equivocal, as it was unclear whether the defendant's deficit was fixed or only temporary. As of now, the condition of the accused has deteriorated rather than improved and he is not capable of instructing his Counsel.

The following questions were asked and answered in camera.

Professor Kennedy explains that Mr. Kabuga is less able to understand the consequences of the proceedings to the point where there is now a material change in his capacity to understand them. He added that this conclusion was consensual among the three experts. In November 2022, Professor Kennedy believed that Mr. Kabuga would not be able to testify. Judge Bonomy asked him his position on the matter now. He explained that there was no evidence that the defendant's capacity had returned and that the loss had, indeed, been sustained. This loss continues to prevent the accused from being able to testify. While there is a small possibility that his capacity may return, Professor Kennedy deemed a substantial improvement "very unlikely at his age". Judge Bonomy informed the expert that the Prosecution had agreed to the possibility of Mr. Kabuga giving evidence through written statements and to foregoing cross-examination. He then asked Professor Kennedy if this would change his opinion on the accused's capacity to testify. The expert explained that he would need more time to reach a conclusion on the accused's capacity to testify. He added that written testimony could make a difference, as according to his conclusions, a live cross-examination was the greatest challenge for Mr. Kabuga.

Regarding the Expert Report of 3rd March 2023, Judge Bonomy asked the expert if the fact that Mr. Kabuga was still recovering from the effects of three separate illnesses during their evaluations had influenced their views about his capacities. Professor Kennedy explained that while there is a possibility of transient matters, such as mild cardiac failure in Mr. Kabuga's case, the evidence of the deterioration of capacity has been objective and continuous, and as such larger than the illnesses.

The Report of 2023 concluded that Mr. Kabuga met the clinical criteria for dementia. Judge Bonomy asked the expert what had changed his opinion as he had previously concluded that these criteria were not met. Professor Kennedy testified that he had found evidence of impairment in different cognitive abilities, such as memory, perception, reasoning and communicating, which allowed him to now have a complete picture of the defendant's case and draw this conclusion.

Judge Bonomy then asked Professor Kennedy if there were significant differences between the three separate occasions in which him and his colleagues interviewed Mr. Kabuga. The expert explained that on the first and second occasions, he talked to Mr. Kabuga, the nurses, the medical staff of the detention unit and the hospital wing. On the last occasion, he interviewed Mr. Kabuga, spoke on the phone with the medical staff, and interviewed the nurses in the detention unit but did not interview the staff in the hospital wing. Nonetheless, he considers that the interviews conducted allowed for enough evidence and the changes did not constitute an omission. Judge Bonomy asked Professor Kennedy if there was a possibility that Mr. Kabuga was giving the impression that he was suffering from a greater degree of mental incapacity than he actually is and if he is confident that the accused is not faking his condition to any extent. The expert testified that it is always possible for a psychiatrist

to be deceived and that one must always have that in mind. He added that Mr. Kabuga is also very clear now that he would rather not see the trial proceed. Nonetheless, taking into account the totality of the information available, Professor Kennedy and other clinicians working regularly with the accused concluded that the deterioration of the accused's condition was real.

Judge Bonomy asked the expert if, during his last visit to Mr. Kabuga, the latter was able to engage in rational conversations. Professor Kennedy explained that he could not do so, although at times his responses were not only rational but aware, as he was capable of good-humoured repartee but these were limited to one-sentence replies. The expert added that the accused had limited flashes of engagement, pointing out for instance the cultural incorrectness of certain questions. While in 2022, Professor Kennedy had concluded that Mr. Kabuga could make use of higher cognitive functions, as of this day, he deemed this ability rare and limited.

Judge Bonomy asked Professor Kennedy if a "trial of facts", which is a method of determining the criminal conduct of the accused which is not followed by a determination of guilt but allows for the determination of his criminal actions, would cause psychiatric harm to Mr. Kabuga as he would no longer meaningfully participate in the proceedings. While one of his colleagues and Mr. Kabuga himself believe that such harm would occur, the expert testified that he does not believe such proceedings would cause emotional trauma to the accused. He added that the trial of facts would likely have to proceed without Mr. Kabuga as his ability to express interest and to convey his will and preferences is likely to be fleeting and can only reduce over time. And this was the end of today's hearing.

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.

The program receives financial support from the government of Belgium through the Directorate General for Development (DGD). The program also receives occasional support from the Embassy of France in Rwanda. Program communications do not engage the responsibility of the DGD or the Embassy of France.