

# *PROSECUTOR V FÉLICIEN KABUGA*

MICT-13-38

March 17, 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*

## **Cross-examination of Professor Kennedy by the Defense**

The defence, represented by Dov Jacobs continued the examination of Professor Kennedy. He asked the expert if the participation of Mr Kabuga in a trial of facts would contribute to his deterioration and tire him needlessly. The expert witness explained that if the trial was upsetting and traumatic it would indeed further the deterioration of the accused but simple fatigue would not, although it would progressively affect his ability to be mentally present. Mr. Jacobs then asked if, because of the constant deterioration of Mr. Kabuga's cognitive abilities, discussing the evidence and his potential culpability would increase his emotional trauma. The expert witness testified that having interviewed Mr. Kabuga several times, hearing evidence does not seem to have caused additional trauma as he simply denies the evidence presented. Mr. Jacobs asked Professor Kennedy if Mr. Kabuga testifying could still happen even considering the length of the proceedings. The expert witness answered that it is clinically hard to predict a decline in the mental state of a person and thus could not answer this question. Before the expert witness's first hearing this week, there was an "unexpected development" as the Presiding Judge referred to it. The Defense asked the Professor to explain its nature. Professor Kennedy testified that a geriatric physician had concluded a neuropsychological assessment of Félicien Kabuga and the report had just been made available to him. This report was helpful in better assessing the situation of the accused as it indicated a progression of Mr. Kabuga's situation towards dementia.

## **Questions from Judges**

Judge El Baaj asked if Mr. Kabuga could truly testify in written form via his Counsel. Professor Kennedy explained that this possibility would be possible but very limited as the accused appeared to be unable to read or write and as such all evidence needs to be read to him. In addition, his answers would still be limited to "correct/incorrect", which questions the extent to which he would truly be able to answer them. The expert also added that as his higher cognitive functions are declining, his understanding and appreciation of the importance of the evidence would be limited. Professor

Kennedy had previously testified that Mr. Kabuga still had the ability to plead and fully understand his situation. Judge El Baaj asked the expert witness whether this was still the case. Professor Kennedy explained that the accused still understands the meaning of the charges, the consequences of the pleas available and can communicate his own pleas. He added that in April 2022, Mr. Kabuga was able to discuss the charges in some detail and understood that being found guilty would result in his detention and damage to his reputation. Judge El Baaj then asked if Mr. Kabuga when deciding to be present was rationally expressing his decision and if he had the mental capacity to make such a decision. Professor Kennedy confirmed that this was the case.

When asked by Judge El Baaj about Mr. Kabuga's ability to follow the trial, the expert witness testified that the accused's understanding of the trial fluctuates over time, and his fatigue may cause him to fall asleep thus preventing him from following the proceedings. He added that some more complex aspects of the evidence presented may also escape him. Professor Kennedy believed, in the Expert Report of March 2023, that Mr. Kabuga could not, as of now, meaningfully participate in the proceedings. Judge El Baaj asked him if it was possible that his condition would improve and that he would thus be capable to participate. The expert witness explained that while the future was a matter of probability regarding health, it was probable that Mr. Kabuga would not substantially recover. Judge El Baaj questioned Professor Kennedy on the type of dementia Mr. Kabuga is affected by. The witness explained that the accused was suffering from vascular cognitive dementia, which was confirmed by the neuropsychological Report done by the geriatric physician.

Judge deGuzman asked Professor Kennedy about his previous testimony which stated that he relied on "objective factors" when assessing the mental state of the accused. The witness explained that he heavily relied on the testimonies of the staff caring for Mr. Kabuga 24 hours a day. He added that the accused has been more and more dependent on the nursing staff to find his way around the detention unit and to dress himself which shows his progressive decline. Focusing now on a potential trial of the facts, Judge deGuzman asked what is encompassed in Mr. Kabuga's "ability to express his will and preferences". Professor Kennedy testified that while Mr. Kabuga can formulate his will and preferences, they would result from his understanding of the proceedings which would most likely be limited. Nonetheless, his participation would not be harmful to his health as he has not shown particular signs of anger or sadness when confronted when the evidence of his case. Professor Kennedy added that his diagnosis and opinion were "probable" which means that the situation of the accused would either remain as such or deteriorate thus further limiting his ability to express his will and preferences. Judge de Caires Batista Rosa asked whether Mr. Kabuga would be capable of explaining his own version of the events, which Professor Kennedy confirmed. On the matter of potential treatments for dementia, the expert witness explained that there was no effective treatment for the type of dementia affecting Mr. Kabuga.

The Presiding Judge, Ian Bonomy, asked if the confirmation of the dementia diagnosis of Mr. Kabuga would exclude any improvement. Professor Kennedy confirmed that this would be the case. Judge Bonomy then asked if the expert witness had any experience with accused persons in a trial of facts who still gave testimony, the witness answered that he did not have such experience. Finally, Judge Bonomy asked Professor Kennedy if he believed the detention unit was the right environment for Mr. Kabuga considering his health. The expert confirmed that based on conversations with medical experts, the detention unit was appropriate.

### **Additional questions from the Prosecution**

The Prosecution represented by Mr. Elderkin asked Professor Kennedy if, during his last assessment of Mr. Kabuga's health, it was possible that the accused had not fully recovered from the illnesses he

had contracted previously (in December 2022 and January 2023, Mr. Kabuga contracted influenza, pneumonia and a gastrointestinal infection), which could affect his abilities. The witness did not back this assumption of the prosecution.

### **Additional questions from the Defense**

The Defense Counsel, represented by Mr. Jacobs, asked Professor Kennedy to explain his testimony which stated that Mr. Kabuga could express his will and preferences but was limited in his ability to understand the proceedings. The expert witness explained that the accused can say his will and preference, but that this would not necessarily be done in full capacity as he cannot follow the full process of the proceedings. Mr. Jacobs then explained that because Mr. Kabuga is limited in his understanding of the significance of the evidence, his written testimony would have to be taken by his Counsel over time, in the course of several sessions. He then ask Professor Kennedy if he believed the accused would remember his previous declarations from one meeting to the next. The expert replied that while in earlier stages of the proceedings this might have been possible, due to Mr. Kabuga's decline, it would become more and more difficult. This concluded the evidence of Professor Kennedy and marked 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.**

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