

## PROSECUTION v. UWINKINDI

[Rwanda SUPREME COURT – RPA 0011/15/CS (Mutashya, P.J., Gakwaya na Hitiyaremye, J.) April 24, 2015]

*Human rights – Right to defence and legal counsel – Choice of legal counsel for an indigent person – The accused who has absolute right to choose his legal counsel is the one who has financial capacity to pay his counsel while for the one who doesn't, in case of interests of the court it is realized that he must be assisted, the competent organs appoint him without the participation of the accused – Law n° 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda, article 14(6°).*

**Facts:** The case of Uwinkindi Jean started in the High Court, Chamber of International Crimes and trans border crimes(HCCI) assisted by Counsel, Gatera Gashabana and Niyibizi Jean Baptiste who withdrew from the case. The Court requested the competent organs to help Uwinkindi Jean to find other legal counsels. Rwanda Bar Association appointed two legal counsels named Ngabonziza Joseph and Hishamunda Isaacar to assist Uwinkindi Jean. In the next hearing, Uwinkindi Jean raised an incident that these lawyers have been unlawfully appointed since he had not participated in their appointment.

In the preliminary hearing, the court ruled that these lawyers have been lawfully appointed basing on that the accused who have absolute right to choose his legal counsel is the one who has financial capacity to pay his counsel while the one who doesn't, in case of interests of the court it is realized that he must be assisted, the competent organs appoint him without the participation of the accused.

**Held:** The accused who has absolute right to choose his legal counsel is the one who has financial capacity to pay his counsel while for the one who doesn't, in case of interests of the court it is realized that he must be assisted; the competent organs appoint him without the participation of the accused.

**Appeal has merit.**

**The incident raised by the prosecution is not valid.**

**The appealed decision is upheld, with costs to the public purse.**

### **Statutes and statutory instruments referred to:**

Law n° 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda, article 14(6°).

Organic Law n° 03/2012/OL of 13/06/2012 regulating the organization, functioning and competence of the Supreme Court, article 34(10°).

Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, Article 162 paragraph 2.

### **Cases referred to:**

Affaire n° ICTR-96-4-A, Le Procureur c/ Jean Paul Akayesu Paragraphes 61 and 62.

Affaire n° ICTR9 7-23, Jean Kambanda (appellant) v. Procureur (intimé), Paragraphe 33.

## **Judgment**

## **I. BRIEF BACKGROUND OF THE CASE**

[1] On 21 January, 2015, the High Court, High Court Chamber of International Crimes and transborder crimes decided that the competent organs should help Uwinkindi Jean to have a legal counsel after realizing that his legal counsels Gatera Gashabana and Niyibizi Jean Baptiste have withdrawn from the case.

[2] On 5 February, 2015 Uwinkindi Jean appeared in the High Court with Counsel Ngabonziza Joseph and Hishamunda Isacaar who were appointed by the Rwanda Bar Association as his legal counsels. At this time, Uwinkindi Jean raised an incident that he was unlawfully given legal counsels since he has not made his choice.

[3] In the preliminary hearing n<sup>o</sup> RP 000/12/HCCI of 6 February 2015, the High Court Chamber of International Crimes ruled that Counsel Ngabonziza Joseph and Hishamunda Isacaar have been lawfully appointed by Rwanda Bar Association.

[4] In taking the decision, that court based on article 14, paragraph 6 of the Law no 47/2013 of 16/6/2013 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and other states, finds that the right to choose a legal counsel is reserved to someone who has the capacity to pay himself while for indigent person, the Bar chooses the advocate for him for free.

[5] This court also based on the case law of Akayesu Jean Paul rendered by International Criminal Tribunal for Rwanda (ICTR) found that, even though Uwinkindi Jean was given the list of advocates and chose; it was not the law to the extent that he should consider that as absolute right.

[6] Uwinkindi Jean appealed to the Supreme Court on 3 March 2015 stating that he denied the right to defense and legal counsel that is ought to him in accordance to article 18, par three (3) of the Constitution of Rwanda, article 150(3<sup>o</sup>) of the law n<sup>o</sup> 30/2013 of 24/05/2015 regulating to criminal procedure and article 14(6<sup>o</sup>) of the law n<sup>o</sup> 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda.

[7] The prosecution lodged an incident of non-admissibility of the appeal lodged by Uwinkindi Jean since it was unlawfully filed. However, the prosecution added that once the court finds it otherwise, it should rule that it is invalid.

[8] The hearing was ordered on 9 March 2015 but on that day the case was not heard since Counsel Gatera Gashabana and Niyibizi Jean Baptiste who assisted Uwinkindi Jean had no right to assist him since they had not paid the fine that has been ordered by the court and the hearing was postponed on 6 April 2015. On that date, after realizing that the advocates of Uwinkindi had fulfilled their obligations, the hearing was rendered publicly and Uwinkindi appeared assisted by Counsel Gatera Gashabana with Counsel Niyibizi Jean Baptiste while the prosecution was represented by Ruberwa Bonaventure with Mutangana Jean Bosco, national public prosecutors.

## **II. ANALYSIS OF THE LEGAL ISSUES**

**To know whether the appeal of Uwinkindi Jean was lawfully lodged.**

[9] The representative of the prosecution stated that basing on article 162 of the Law n°21/2012 of 14/6/2012 relating to the Civil, Commercial, Labour and Administrative Procedure the appeal on preliminary hearing is analyzed with the case in substance. They also added that this idea is the one encountered in article 34,10<sup>0</sup> of the Organic Law n°03/2012/OL of 13/06/2012 regulating the organization, functioning and competence of the Supreme Court prohibits the chief registrar to receive the appeal of preliminary hearings in case they are separate from the case in merit. They concluded requesting the court to take a decision basing on the provisions of the Rwandan law since article 18 of the law regulating the transfer of cases in the Republic of Rwanda providing how the appeal is conducted.

[10] Uwinkindi Jean states that this incident does not consider the article he based on while appealing including article 18 and 27 of the law regulating the transfer of cases to the Republic of Rwanda which provides that in case of two contradictory laws, that the latter takes precedent. He also stated that basing on article 180 relating to the code of criminal procedure, the case should stop until the final ruling on the appeal since his appeal contained a very sensitive issue which constitutes a major hindrance on the case in merit since it cannot continue without legal counsels, that in that case it would be considered as if there is no case.

[11] Counsel Niyibizi Jean Baptiste states that the side of defense finds that the incident of non-admissibility of this appeal cannot be valid since Uwinkindi Jean appealed basing on article 18 of the regulating the transfer of cases in the Republic of Rwanda gives to parties the right to appeal against any decision of the High Court and this has been done by Uwinkindi Jean. He kept stating that he proves this since Uwinkindi Jean was denied the right to legal counsel as provided by article 18 of the Rwandan Constitution, which states that he right to defense is an absolute right in all organs and in any circumstance.

[12] He also stated that he finds that article 162 of the Law relating to civil, commercial, labour and administrative procedure cannot be considered since it doesn't relate to criminal cases and that considering that this case was transferred to Rwanda from the International Criminal Tribunal for Rwanda whereby there is a special law providing these cases will be tried and the latter is the one to be considered in case there is contradiction. He states that, it is in that context that basing on article 18 of the law regulating the transfer of cases in the Republic of Rwanda, Uwinkindi Jean has the right to choose his legal counsels and that there is no prohibition to appeal against the decision denying him this right.

[13] He concluded stating that article 34(10<sup>0</sup>) of the Organic Law regulating the organization, functioning and competence of the Supreme Court is respected by the Chief registrar of the Supreme Court, the latter received the appeal and gave it the number and ruled that the appeal is admissible.

[14] Counsel Gatera Gashabana also stated that the incident of the prosecution is not valid since the appealed decision is not provisional but rather it has been based on article 14 of International Covenant on Civil and Political Rights which was ratified by the Republic of Rwanda in 1975 is a final decision which has been res judicata on the incident that was raised for the rights of Uwinkindi Jean to be assisted by a legal counsel while article 18 of the Constitution of the Republic of Rwanda and article 14 of the law regulating the transfer of cases in the Republic of Rwanda give him rights to choose his legal counsel.

[15] He concludes stating that article 18 of the law regulating the transfer of cases in the Republic of Rwanda is the special law which gives Uwinkindi Jean and any other party the right to appeal against any decision and that appeal suspends the principal case waiting for

the decision of the higher court and that stating that he would wait for the hearing of the case in merit is not valid.

## **THE VIEW OF THE COURT**

[16] Article 3, par.1 of the law n° 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda states that “This law regulates the cases transferred to the Republic of Rwanda by the ICTR and other cases from other countries relating to the offence of genocide committed against Tutsis and crime against humanity.

[17] Article 18 of the Law n° of the law no 47/2013 of 16//6/2013 above mentioned states that “the prosecutor and the defendant have rights to appeal against any decision rendered by the High Court in case of the following grounds:

1° an error on a question of law invalidating the Decision;

2° an error of fact which has occasioned a miscarriage of justice;

The Supreme Court can confirm all decisions of the High Court or some of them or not to confirm all of them. If necessary, the court orders the High Court to review the judgment”.

[18] Article 27 of the Law n° 47/2013 of 16/06/2013 abovementioned provides that “This law takes precedence in case it is contradictory to another ordinary law”.

[19] Article 34(10°) of the Organic Law n° 03/2012/OL of 13/06/2012 regulating the organization, functioning and competence of the Supreme Court provides that “The Chief Registrar of the Supreme Court shall check whether the appeal is admissible before it is recorded in court registers. He/she shall not register a lodged appeal in the event of [...] appeal on interlocutory judgment which is not ruled together with the final judgment”[...].

[20] Article 162, paragraph 2 of the law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provides that “The appeal against an interlocutory judgment shall be made only jointly with the final judgment. In this case, the time limit for appealing against the interlocutory judgment starts running from the date on which the final judgment was notified to the party”.

[21] Concerning this case, the court finds that the fact the case was received basing ordinary ways of claims, the chief registrar had received it and gave it a number and the president of the Supreme Court ordered the date of hearing, this proves that the decision has been res judicata and therefore, there is no need to come back on that issue.

[22] The court finds that, the fact that article 18 of the law n° 47/2013 of 16/06/2013 abovementioned which provides that any decision of the High Court can be appealable. In addition to this, this law is the one which has to take precedence without considering other laws in case they are contradictory to it. Therefore, Uwinkindi Jean had rights to appeal against the decision against taken by the High Court Chamber of international Crimes and transborder crimes, concerning the right to legal counsel.

[23] Apart from what has been explained in the previous paragraph, the Court also finds that, the appellate decision was considered as the preliminary hearing but when analyzed very well, it is realized that it is not among the preliminary hearings mentioned in article 162 of

the Law n° 21/2012 of 14/06/2012 abovementioned since this decision was taken in an absolute way with intention to end the debate which was raised on the issue regarding the right to legal counsel of Uwinkindi Jean in the High Court, while the preliminary hearings intend to solve the issues which are attached to the principal case in process.

[24] For the difference between these cases, the legal scholars state that the case in merit end the issues to the extent that it will not be necessary to come back on them while the preliminary hearings do not end issues but rather are decisions taken within the hearing intending to save some interests before the end of the hearing or intending to find what can help in rendering the judgment (les jugements définitifs mettent fin à une contestation, de telle sorte qu'il n'y aura pas lieu d'y revenir tandis que les jugements avant dire droit ne règlent pas le litige, mais, rendus au cours de l'instance, ils assurent la protection de certains intérêts durant le procès (jugements provisoires) ou permettent de réunir des éléments utiles pour parvenir à une solution (jugements relatifs à l'instruction)<sup>1</sup>.

[25] Basing on the abovementioned explanations, the court finds that the incident raised by the prosecution regarding the non-admissibility of the appeal lodged by Uwinkindi Jean is not valid and therefore, his appeal is admissible.

**B. To know whether Uwinkindi Jean has the right to choose his legal counsels.**

[26] Uwinkindi Jean states that his ground of appeal is especially based on his right to defense and legal counsel which he derives from the law, that on article 5 February, 2015 he was forced to plead without legal counsel and he was forced to accept advocates that came in his case without his knowledge since he did not have chance to choose them after taking his legal counsels from the case. He therefore holds that what has been done is contrary to article 18 of the article 18, paragraph three (3) of the Constitution of Rwanda, article 150(3<sup>o</sup>) of the law n° 30/2013 of 24/05/2015 regulating to criminal procedure and article 14(6<sup>o</sup>) of the law n° 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda.

[27] He also stated that, apart from that he did not take part in the appointment of Counsel Hishamunda Isacaar and Counsel Ngabonziza Joseph, who were appointed by Rwanda Bar Association, he criticizes that stating that the don't have the capacity to plead in his case especially that Counsel Ngabonziza Joseph does not have enough experience while the Primary Court of Nyarugunga ruled that counsel Hishamunda Isaccaar does not have the capacity to plead in such cases.

[28] He also stated that he case was far at the extent that it was at the end since it was at the stage of listening to the witnesses. He kept stating that it is in that time when they were suspended by the Court while he came from Arusha with hope that he will have fair trial as the state of Rwanda had promised.

[29] Uwinkindi Jean also states that there have been three mistakes which are: the fact that the court accepted the case laws of other courts while the hearing was closed and he had not have time to defend himself on them; the fact that he did not disown his attorneys but rather it is the court that dismissed them which is different from the case of Akayesu who is said in the case law since he disowned them; and that the court has disregarded article 16 of the Constitution of the Republic of Rwanda which provides that the law protects all persons in a general way without any discrimination and thus he states that he was given list so as to make

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<sup>1</sup>Jacques Ghestin, Gilles Goubeaux avec le concours de Muriel Fabre-Magnan, *Traité de Droit Civil, Introduction Générale*, 4ème Edition, p.588, Para. 617 in fine.

his own choice while it is provided by the law and it has been done to others including Munyagishari and Mbarushimana who was given this right on 25/03/2015.

[30] Uwinkindi Jean requests that he can retain the advocates that he had since his case is at the end and that they had no fault so that the case may continue where it was. He added that this request is impossible he can be given the list so that he can his own choice of legal counsels and that they can be given enough time to study the case which will be to start the case he accused of serious crimes.

[31] Counsel Niyibizi Jean Baptiste emphasized on the statement of Uwinkindi Jean stating that his client has been denied the right to be assisted by his chosen advocate which was normally done and that he has a letter which gives him the right to be part in the case of Munyagishari after that he was chosen by him and that this is what is done in in international courts such as International Criminal Tribunal for Rwanda.

[32] He also stated that the case law that was brought by the prosecution is not similar to the case of Uwinkindi since he doesn't intend to change the advocates as Akayesu who was denied that for the purpose of fair trial but rather that he want to keep them in the context of getting the fair trial.

[33] He also stated that even though the case law used by the court in taking the decision would not have been based on while it was brought after the closing of the hearing without re-opening the hearing so that Uwinkindi should say something on that. He then states that this contrary to article 18 of the Constitution of the Republic of Rwanda.

[34] Concerning the "case law" above mentioned, he states that the reason that the International Criminal Tribunal for Rwanda has rejected the request of Akayesu to change advocates, it stated that it was for the good process of the case and thus he asks himself why advocates of Uwinkindi Jean can be changed while they spent two years and a half in this case, having prepared court submissions of 120 pages and thus finds that these new advocates cannot be able to explain them in court and if they can study them, it would not be the needed fair trial.

[35] He concludes stating that the court may order that Uwinkindi can continue with his former advocates since apart from that he did take part in choosing the advocates appointed to him by the court; they don't even have experience of 10 years required so that someone can assist in these cases.

[36] Counsel Gatera Gashabana also states that the High Court made a mistake by incorrectly explaining article 14(6<sup>o</sup>) of the law regulating the transfer of cases in the Republic of Rwanda ruling that the person who has right to choose the legal counsel is the one who have the financial capacity and once he doesn't, the legal counsel is appointed by the Court. He states that this is incorrect basing the principle provided by article 14(d) of International Covenant on Civil and Political rights which states that all people are equal before the courts and that they have right to be assisted by advocates whom the choose themselves, either being able to pay them or no and that treaty takes precedence to Rwandan laws.

[37] Counsel Gatera Gashabana states that that the principle of the Bar Association is to give the party an advocate of his/her own choice and that the administration should do its utmost so that this principle should be respected. He kept stating that the High Court took a decision which is contrary to the principle and that the advocates that Uwinkindi Jean had

chosen were dismissed in the case basing on the laws that are found in the letter written by the Ministry of Justice, and that this is contrary to the Constitution since the Judiciary is independent and thus requests that the Executive Power should not intervene in the Judicial power. He finally requested that Uwinkindi Jean can be assisted the advocates of his own choice it is the right that is provided to him by the law.

[38] The representatives of the prosecution state that right to choose an advocate is not absolute especially when he does not have the financial capacity and thus to have a legal counsel requires a certain procedure that the Rwanda Bar Association provide advocates and the Ministry of Justice provides the advocates fees.

[39] Concerning Uwinkind Jean and all other people who were transferred by the International Criminal Tribunal for Rwanda located in Arusha and other countries, the representatives of the prosecution explain that the Ministry of Justice has decided that the advocate who will intervene in these cases will be paid fifteen millions (15,000,000Frw) until the end the case. They added that this program has been adopted when Counsel Gatera Gashabana and Niyibizi Jean Baptiste who assisted Uwinkindi Jean had the contract of being paid one million (1,000,000Frw) per month until the end of the case and when these advocates had been told this new decision, they refused and the contract was cancelled, and this is what they call interference in of the Ministry justice. Therefore, they find that these advocates have not been dismissed by the court but rather it is the contract which they had with the Rwanda Bar Association which has been cancelled because of misunderstanding.

[40] They state that after the withdrawal of the advocates of Uwinkindi Jean from the case, in appointing other, it was lawful since article 14, 6<sup>o</sup> of the law n<sup>o</sup> 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda provides that in case the defendant does not have the financial capacity to pay advocates, they must be appointed to him/her and in that case he has not the right to choose and that what has been done.

[41] They further explained that issues like these ones are raised in international courts and decided that what is called Right to counsel whereby these courts explained that the accused has a right to elect self-representation but that right is not unlimited and may be denied where for instance the election is made mid trial and has the potential to seriously disrupt the proceedings. This is based on the case of appeal of Krajisnic, paragraph 118.

[42] They also stated that those courts explained when the accused elects self-representation; he forfeits the right to legal assistance even if he is indigent. They base this on the case of Vojslav Seselj concerning the court contempt, case number IT-03-67-RR77.4-A Paragraph 39.

[43] Another example provided by the prosecution is that of the International Criminal Tribunal for Rwanda (ICTR) which decided that the right of an indigent defendant to effective representation does not entitle him to choose his own counsel. The right to choose counsel applies only to those accused who can financially bear the costs of counsel. They base this on the case of Nahimana and others in appeal, the case of Kambanda in appeal and the case of Akayesu in appeal.

[44] In supporting the idea that it is not every time that the defendant chooses his counsels, the representatives of the prosecution also based on the decision taken by the International Criminal Tribunal for Rwanda whereby in the case of Akayesu the judge stated that “Although an indigent accused may choose from among a list of counsel generated by the

registrar, the registrar is not necessarily bound by the indigent accused's wishes. The accused's choice regarding counsel "should be respected" but the registrar may decide not to appoint the accused first choice of counsel, if there are sufficient grounds overriding the accused's preference". That an accused would have preferred another counsel is not a sufficient basis to warrant intervention by the Appeals Chamber. The registrar has wide discretion, which he exercises in the interest of justice.

[45] They added that, the fact that the Bar has appointed counsels to assist Uwinkindi Jean and the Ministry of Justice accepted to pay the legal counsels of his choice but meanwhile the contract got cancelled due to misunderstanding of both parties, they find that he must accept the counsels appointed by the Bar called Counsel, Hishamunda Issacaar and Counsel, Ngabonziza Joseph since it did that considering the interests of the justice since his former counsels had withdrawn from the case themselves and once he doesn't want them he has right to choose the counsels that he can pay himself. They explained that this what has been decided in the case between Nahimana and the Prosecution in ICTR ,where the court decided that the appointment of new counsel cannot take place until existing counsel withdraws his or representation

[46] To conclude, they stated that Ukwinkindi Jean cannot base on article 39 of the code of Criminal Procedure providing that if a suspect is unable to find a legal counsel, the Judicial Police Officer or the Prosecutor shall inform the Chairperson of the Bar Association so that he/she assigns a legal counsel for the suspect. The suspect shall have the right to accept or refuse to be represented by such a legal counsel, and state that Uwinkindi Jean has no right to refuse the legal counsels appointed to him by the Bar Association basing on that article since he is not imprisoned by the prosecution.

## **THE VIEW OF THE COURT**

[47] Article 14,3(d) of the International Covenant on Civil and Political Rights provides that every person who is accused of an offence has right To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it<sup>2</sup>.

[48] Article 14(6<sup>o</sup>) of the law n<sup>o</sup> 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda provides that "the defendant in the case transferred to Rwanda from ICTR or in other states has right to choose his own counsel in any interrogation. In case he/she is indigent he is given a legal counsel".

[49] The court finds that the major legal issue to be examined in this case is to know if Counsel, Ngabonziza Joseph and Counsel Hishamunda Isacaar who were appointed to Uwinkindi Jean were lawfully appointed as it is the legal issue that was analysed in appealed judgment.

[50] The court finds that after realizing that on 21 January 2015, Uwinkindi Jean had no counsels, the High Court, High Court Chamber on international Crimes and transborder

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<sup>2</sup> Pacte international relatif aux droits civils et politiques, ratifié par le Rwanda le 12/2/1975, D.L n<sup>o</sup> 8/75 du 12/2/1975, J.O. du 01/03/1975, p.230.



crimes decided that to write a letter to the President of the Rwanda Bar Association requesting him to appoint counsels who will assist him freely since he is indigent and then on 29 January 2015, he appointed Counsel, Ngabonziza Joseph and Counsel, Hishamunda Isacaar. However, on 5 February 2015 arriving in court to start their duties, Uwinkindi Jean refused them stating that they were unlawfully appointed since he did not take part in choosing them and the court decide that they must assist him since they were lawfully appointed.

[51] In the pleadings of this case in court, both the prosecution and Uwinkindi Jean with his counsels, have in common stated the provisions of laws which have been abovementioned but the only difference comes in their interpretation whereby the prosecution finds that when the defendant is indigent has no right to choose his counsel while Uwinkindi Jean and his legal Counsels state that even though he may be indigent, the defendant enjoys his right to choose the legal counsel who is paid by the organs in charge.

[52] The court finds that the analysis of article 14.3(d) of the international Covenant on Civil and Political Rights and 14(6<sup>o</sup>) of the law n<sup>o</sup> 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda, proves without doubt that the defendant has the right to be assisted by the counsel of his own choice only when he has the financial capacity to pay him but he does not he has to be given a legal counsel. This means that the counsel is appointed by the competent organs (Rwanda Bar Association) without necessarily that he takes part in the appointment.

[53] The court finds that even though in the functioning of those organs, in some cases, you may that in appointing the counsel to the indigent defendant, he may be given the chance to choose the counsel himself but basing the abovementioned articles, the principle is that even though the defendant has right to counsel, this does not give him the right to choose the counsel.

[54] Apart from what is provided by the abovementioned provisions, there are other international conventions which come on this issue. Among them, there are European Convention on Human rights in its article 6,3(c) which provides that the accused has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”<sup>3</sup>. This is also what is stated by legal scholars confirming that the accused on one side has the right the accused has the right to defend himself in person or through legal assistance of his own choosing, on the other side, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”<sup>4</sup>.

[55] In explaining this article, legal scholars Doydas Vtkaus and Grigory Dikov, in their document entitled “La protection du droit a un procès equitable par la convention Europeenne des droits de l’homme”, on page 105, last paragraph, also confirmed that the accused who have right to choose their legal counsel are those who have the capacity to pay them but that those who do not have that capacity do not enjoy that right. They added that when it is realized that the appointed legal counsel does not perform well his attributions, the competent

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<sup>3</sup> Annick SADZOT, l'égalité des armes et la contradiction dans le procès pénal, Les droits de la défense, Actes du colloque «Jacques Henri» organisé par la Conférence libre du Jeune Barreau de Liège le 28 mai 1997, éditions du Jeune Barreau de Liège, 1997, p.153.

<sup>4</sup> Michel Franchimont, Ann Jacobs, Adrien Masset, Manuel de procédure pénale, 2ème édition, p.1147 in fine.

organs can change him/her (Seuls les requérants disposant de moyens financiers leur permettant de s'assurer les services d'un avocat ont le droit de sélectionner le praticien de leur choix (Campbell et Fell); un requérant bénéficiant de l'aide juridictionnelle ne jouit pas de cette faculté (Kremppovskij, dec.). Parallèlement, Lorsqu'un avocat commis d'office ne s'acquitte manifestement pas de ses devoirs, les autorités ont l'obligation de le remplacer)<sup>5</sup>.

[56] Apart from what is provided in in the international conventions stated and the laws stated above which have been mentioned above, there are other decisions which have been taken in different cases rendered by other courts on the issue of legal assistance of the accused who does not have the capacity to pay him/herself especially those cases rendered by the International Criminal Tribunal for Rwanda. In the case of Akayesu, regarding this issue, the court decided that it finds that in general the right to counsel does not relate to the right to choose the legal counsel, since this right is enjoyed by the accused who has the capacity to pay him/herself (La Chambre d'appel considère qu'en principe, le droit à l'assistance gratuite d'un avocat ne confère pas le droit de choisir celui-ci. Le droit de choisir son avocat est uniquement garanti aux accusés qui peuvent assumer financièrement les frais d'un conseil)<sup>6</sup>.

[57] That decision kept providing that the legal counsel of an indigent accused is appointed by the registrar of the court who selects him from the list of advocates available and fulfils the required conditions by the court. It added that, normally, the indigent accused chooses the legal counsel found on that list and then the registrar takes it into consideration. However, the registrar of court is not necessarily bound to appoint the legal counsel basing on the wish of the indigent accused (La commission d'un conseil à un accusé indigent est effectué par le Greffier à partir d'une liste de conseils disponibles qu'il considère qualifiés en fonction des critères officiels du Tribunal. Certes, en pratique, l'accusé indigent à la possibilité de choisir parmi les avocats figurants sur la liste et le Greffier prend généralement en considération le choix de l'accusé. Il n'en reste pas moins que, de l'avis de la Chambre d'appel, le Greffier n'est pas forcément lié par les vœux de l'accusé indigent et a un large pouvoir d'appréciation, qu'il exerce dans l'intérêt de la justice)<sup>7</sup>.

[58] In the case of Kambanda Jean, in the Appellate level on the issue regarding the right to choose the legal counsel, the appellant stated that he had that right and if not so, it would be considered as violation of fair trial. On that issue, the appellate level of the International Criminal Tribunal for Rwanda based on how the First Instance level analysed the this issue in the case of Ntakirutimana by also analysing the laws regulating the court and its internal rules and regulations in relation with the decisions taken by the Human rights Committee and organs of the European Convention of Humana Rights, decided that the right to free legal assistance does not confer the right to choose his legal counsel (En ce qui concerne le droit de choisir un avocat, l'Appellant soutient qu'il aurait dû bénéficier de ce droit et que la violation de ce droit constitue une violation de droit à un procès équitable. La Chambre d'appel se réfère sur ce point au raisonnement suivi par la Chambre de Première Instance I dans l'affaire Ntakirutimana et conclut, à la lumière d'une interprétation textuelle et systématique des dispositions du Statut et du Règlement, lues en parallèle avec les décisions pertinentes du Comité des Droits de l'Homme et des organes de la Convention Européenne des Droits de

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<sup>5</sup> [www.coe.int/t/dgi/hr-natimplement/source/documentation/hb12\\_fairtrial\\_fr.pdf](http://www.coe.int/t/dgi/hr-natimplement/source/documentation/hb12_fairtrial_fr.pdf)

<sup>6</sup> Affaire n° ICTR-96-4-A, Le Procureur c/ Jean Paul Akayesu Paragraphe 61.

<sup>7</sup> Idem, paragraphe 62.

l'Homme, que le droit à l'assistance gratuite d'un avocat ne confère pas le droit de choisir son avocat)<sup>8</sup>.

[59] In this case, regarding how Counsel Gatera Gashabana and Counsel Niyibizi Jean Baptiste who had been assisting Uwinkindi Jean withdrew from the case, the court finds that this issue cannot be analysed since it has neither been dealt with in the appealed judgment nor decided upon especially that the intention of the appeal is to criticize the judgment that was rendered in the previous level.

[60] Concerning what is stated by Uwinkindi Jean that the court based on the case of Jean Paul Akayesu that was produced by the prosecution after the closing of the case, the Supreme Court finds that there is no evidence that this document was produced by the prosecution since the Court should have it from anywhere else in motivating its decision.

[61] Regarding the issue of the capacity of Counsel, Hisahamunda Isacaar and Counsel, Ngabonziza Joseph, Uwinkindi states that not only that he did not choose them but they are not competent to plead in his case since for Counsel, Hishamunda Isacaar, the Primary Court of Nyarugunga took a decision that he has no capacity to plead in such cases while Counsel, Ngabonziza Joseph has not enough experience, the court finds that he has no basis to criticize their competence since they were appointed by the Batonnier of the Bar Association as he found that they are competent. In addition to this, Uwinkindi Jean had not accepted that they could even begin to plead the case so that at least he could disqualify them during the process after realising that they are incompetent or that the court itself realizes that they are not competent. The court also finds that finds that Uwinkindi Jean had never produced the case in which Hishamunda Isacaar was declared incompetent apart from stating that only.

[62] Concerning what is stated by Counsel, Niyibizi Jean Baptiste who assists Uwinkindi Jean, that what is said in the case of Akayesu that has been considered does not relate to this cases since Uwinkindi Jean did not refuse his legal counsels while Akayesu Jean Paul had refused them wishing to change them, the Supreme Court finds that this is not valid the idea which is in the case of Akayesu Jean Paul was to analyse in general whether an indigent accused can have right to choose his legal counsel whereby that court ruled that the Chief Registrar of the court in appointing the legal counsel is not necessarily bound to follow the wish of the accused since apart from considering the fair trial of the accused , it has also to consider the management of the court properties.

[63] Therefore, considering what is stated by Counsel Gatera Gashabana, that the court misinterpreted article 14(6<sup>o</sup>) of law n<sup>o</sup> 47/2013 of 16/06/2013 regulating the transfer of cases in the Republic of Rwanda, the Court finds that and added that the court should also consider what is provided in article 14(6) of the international covenant on civil and political rights, the court finds that basing on the above mentioned explanations when it reads these two articles with what is provided in the international conventions and decisions which have taken by other courts as mentioned above, there is no doubt that the accused who have absolute right to choose his legal counsel is the one who has financial capacity to pay his counsel but the one who doesn't, in case of interests of the court it is realized that he must be assisted, the competent organs appoint him without the participation of the accused.

[64] Basing on what is stated above, especially on the issue of whether Counsel, Hishamunda Isacaar and Ngabonziza Joseph have been lawfully appointed by the Bar

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<sup>8</sup> Affaire n<sup>o</sup> ICTR9 7-23, Jean Kambanda (appellant) v. Procureur (intimé), Paragraphe 33.

Association as counsels of Uwinkindi Jean, the Supreme Court finds that there is no mistake committed by the High Court, High Court Chamber of International Crimes and trans border crimes and confirmed that it has been lawfully in the interests of court. Therefore, the appeal of Uwinkindi Jean is not valid.

### **III. DECISION OF THE COURT**

[65] Orders that the appeal of Uwinkindi Jean is not valid.

[66] Orders that the incident raised by the prosecution of not receiving the appeal is not valid.

[67] Orders that the decision RP0002/12/HCCI of the the High Court, High Court Chamber of International Crimes and transborder crimes on 6/2/2015 is upheld; and that Counsel Ngabonziza Joseph and Hishamunda Isacaar who have been lawfully appointed by the Rwanda Bar Association to assist Uwinkindi Jean;

[68] Orders that the court fees are to be allocated to the Public purse.