IN THE HIGH COURT OF RWANDA AT KIGALI,

APPEAL AGAINST DECISION N° RDP 0312/10/TGI/GSBO

The APPELLANT: Prof. Carl Peter Erlinder, son of Atwood Erlinder and Jane Lois Bihl, born on 14April 1948 in Chicago Illinois, married to Masako Isui and a lawyer by profession;

Vs

PROSECUTION: Represented by National Prosecutors Jean Bosco MUTANGANA and Bonaventure RUBERWA;

FACTS:

[1]. This is an appeal from a decision of GASABO Intermediate Court delivered on 7th June 2010, ordering that Prof. Carl Peter Erlinder be on pre-trial detention at KIGALI Central Prison for 30 days pending completion of the Prosecution's investigations into his case.

[2]. A summary of the facts of the case are as follows:

The Prosecution alleged that the appellant, Prof. Carl Peter Erlinder, had committed two offences namely;

a. Denying and minimizing of genocide by means of publications and conferences contrary to article 4 of Law N°33 bis/2003 repressing the crime of genocide, crimes against humanity and war crimes.

b. Malicious spread of rumours that threaten or could cause a threat to the national security, contrary to article 166, of the Rwandan Penal Code Book II.

[3]. A criminal investigation was opened at the Criminal Investigation Department of the Rwandan National Police. Prof. Carl Peter Erlinder was arrested from the LAICO-UMUBANO HOTEL, charged and detained at Kicukiro Police Station while his interrogation at the Police went on. On completion of the police interrogation his file was forwarded to the Prosecution Department who in turn did their part of the preliminary investigation and filed a criminal case against him, at the GASABO Intermediate Court, seeking that he be put on pre-trial detention pending completion of investigations into his case. The prosecution argued that they had strong reasons to suggest criminal liability on the part of the appellant and strong reasons why he should be detained pending his trial.

[4]. To prove that there were strong reasons to suggest that the alleged offences were committed the Prosecution relied on excerpts from a number of Proffessor Erlinder's publications including;

i)Publication entitled "The real authors of Congo crimes, Nkunda has been arrested but who will arrest Kagame?"

ii)Publication entitled "Rwanda: No Conspiracy, no genocide planning…. No genocide?"

iii)Publication entitled "Peter Carl Erlinder's response the article: Rwanda perpetrators of genocide jailed"

iv) Publication entitled "Genocide war crimes cover up and UN falsification of history of suppressed UN prosecutors' memoirs and the real politics of UN International Tribunals"

v) Letter entitled "Personally hand delivered open letter", an open letter

Proffessor Erlinder wrote to Prime Minister Harper of Canada when the President of Rwanda was about to visit Canada

vi) Document entitled "Complaint with Jury demand in the United States District Court for the Western District Court of Oklahoma"

a) The Prosecutor also stated that all of Prof Erlinder's publications do not distinguish between genocide and civil war and that this is intentional and deliberate, and amounts to genocide denial.

b) The Prosecutor further told court that the contents of Proffessor Erlinder's publications are intended to stir up civil disobedience, an offence punishable by Article 166 of the law No. 21/77 of August 18, 1977 establishing the Criminal Law Statutes;

c) Citing Articles 93 and 94 of the law No. 13/2004 of May 17, 2004 relating to the Code of Criminal Procedure as modified and completed by the law No 20/2006 of April 22, 2006, the prosecution prayed that the court finds strong evidence to indicate that the alleged crimes were committed and also to find sufficient grounds to warrant his detention pending completion of investigations into his case and his trial..

[5]. In defence Prof. Erlinder argued that he had never denied the Tutsi genocide, that excerpts from his publications were quoted out of context, that others were merely reported from other documents in the public domain, that yet others were made in his professional capacity as a defence lawyer and were thus privileged. He contended, in sum, that the prosecution had not established a prima facie case and/or if they had, they

had not established a case for his detention pending completion of investigations and trial.

[6]. The Learned Judge of the Intermediate Court after due consideration of the Prosecution's submissions and the defence decided, on 7th June 2010 that a prima facie case against Prof. Erlinder had been established and sufficient grounds to warrant pre-trial detention adduced. He accordingly ordered that Prof. Erlinder be detained for 30 days.

[7]. Immediately thereafter Prof. Erlinder announced his intention to appeal, this decision hence the present appeal.

GROUNDS OF APPEAL

[8]. For his appeal Prof. Erlinder, the appellant, relied on the following grounds:

Public order grounds:

a) That the Gasabo Intermediate Court Lacked material and territorial jurisdiction to try his detention case

He argued that the decision on preventive detention was made by the Intermediate Court of Gasabo whereas he is an American citizen and the alleged offenses against him , which he denies, were committed outside Rwanda. He submitted that, therefore, the alleged crimes can only be competently tried by the High court by virtue of the following legal provisions:

- Article 149 of the Constitution which provides, *inter alia*, that:

"..... [The High Court] has jurisdiction to try in the first instance certain serious offences committed in Rwanda as well as some offences committed outside Rwanda as specified by law..."

- Article 90 of Organic Law No. 51/2008 of 09/09/2008 determining the Organization, Functioning and Jurisdiction of Court, which provides that it is the High Court that has the jurisdiction to try such a case or a case of similar nature.

- Article 89 of the same Organic law which provides that offences relating to national security shall be tried by the High Court. The Appellant submitted that the alleged crime falls under the definition of international crimes as specified in the said article and, that, thus, the Intermediate Court lacks jurisdiction to try the alleged crime and consequently also lacks jurisdiction to order his preventive detention. He argued that therefore the order for preventive detention having been made without jurisdiction is itself null and void.

b) That the Appellant's rights were violated by the Court by delivering a decision in a Language he neither speaks nor understands

The Appellant argued that he made his submissions in English which were translated unofficially to the Kinyarwanda speaking Learned Judge of First Instance, and that the Learned Judge rendered his decision both orally and in

writing in Kinyarwanda, a language which the Appellant neither understands nor speaks. He argued further that at the beginning of the proceedings during delivery of the decision, Counsel for the Appellant, Mr. Kazungu asked the Learned Judge to order that an interpreter be provided, but that the Learned Judge ordered that it was not necessary and that Counsel could interpret the conclusions to the Appellant.

The appellant argued also that three of the Appellant's lawyers also neither understood nor spoke Kinyarwanda and that this is contrary to internationally recognized legal standards especially The Universal Declaration of Human Rights of 10 December 1948 Article 11 of which provides that a suspect is entitled to public trial with all guarantees for his defence. He told court that the same entitlement is set forth by the International Covenant on Civil and Political Rights. He contended that under these provisions an accused must be presumed to have the right to understand the language in which he is charged and in which any decision against him is written.

He argued, therefore, that a decision against a suspect in a language that he does not understand is tantamount to condemning him without affording him the opportunity to defend himself or to receive advice of Counsel and that he was forced to rely on an unofficial translation of the Decision to make his Appeal.

Grounds from the Decision:

a)That the Judge rejected submissions on the medical condition of the Appellant as well as his plea to be released on medical grounds

The Appellant argued that the Judge of First Instance rejected the submissions by the Appellant and his Counsel for release on the grounds of health despite documentary proof of the gravity of the Appellant's medical conditions, yet there was sufficient evidence from King Faisal Hospital, a Government recognised medical facility, clearly showing a link between the appellant's health and his detention as well showing his long history of health problems that would be excerbated by continued detention.

b)That the Learned Judge failed to appreciate the fact that the Prosecutor had, during the detention case, conceded that the health of the appellant was paramount and that he was not, in principle, opposed to release of the Appellant on medical grounds

The appellant argued that the Learned Judge failed to consider the fact that the Prosecutor had, during the detention trial, indicated that in principle he would not oppose bail on medical grounds if there was proof that prison conditions were detriemental to the appellant's health, and that the appellant had twice been hospitalized and risked deteriorating.

c)That the Appellant's right to be presumed innocent was violated

The appellant submitted that his right to be presumed innocent was violated and in concluding that the appellant was not entitled to bail

the learned Judge exceeded his authority by considering the merits of the case and concluding that the appellant was guilty before he had had opportunity to defend himself.

d) That a prima facie case to warrant further investigations and continued detention was not established

The appellant submitted that on the basis of the prosecutor's submissions in the lower court there was no strong or prima facie case established against the appellant to warrant further investigation and/or continued detention.

The appellant contended that his publications are protected by free speech guarantees under the US Constitution, the laws of the Commonwealth, Rwanda's Constitution and various international instruments like the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

The appellant further argued that he was arrested in the course of his professional duties, was being charged on allegations relating to his functioning as a defence lawyer at the ICTR and that his professional duty is protected under the Basic Principles on the Role of Lawyers

The appellant submitted further that he is entitled to freedom of expression, belief, association and assembly and therefore he has a right to take part public discussion on public issues without suffering any restrictions for it

He argued further that he cannot be charged on account of publications the contents of which are not a product of his personal thought and consequently he can not have formed the requisite intent to author them; and that he cannot be charged on account of pleadings he filed as a lawyer acting for his clients as he enjoys professional immunity in respect of his functioning as an attorney

He argued therefore that the Judge erred in finding that there were strong grounds that led to suspicion that he might have committed an offence

e) That the Judge failed to appreciate that the Prosecution had not established a case for preventive detention.

The appellant contended that simply submitting that there were serious charges was not sufficient to warrant a finding of pre trial detention. He further argued that the prosecution had not argued any of the grounds outlined in paragraph 39 of the Decision.

f)That the Judge failed to establish the nature of investigations required and the time frame necessary

The appellant contended that the court did not address the issue of whether any further investigations were required and if so which, where and when in order to arrive at the decision that further investigations were required .

g) That the erred in his finding with regard to tampering with evidence, threat to prosecution witnesses or fraudulent communication with accomplices

The appellant contended that no cogent arguments were advanced by the prosecution to support this finding, considering that much of the evidence relied on was in the public domain

h) That the Learned Judge erred in finding that the Appellant would be unavailable for his case or would tamper with investigations

The appellant argued that whereas he wished to travel back to the USA the court could release him on conditions including a requirement that he stays in the Country.

[9]. The Prosecution opposed the appeal. The learned Prosecutor prayed the court to consider their grounds at the first trial, since they had obtained the order sought, responded to the public order grounds and made additional submissions on the appeal.

[10]. The Leaned Prosecutor argued responded to the public order grounds as under:

On Lack of jurisdiction, the prosecution contended that the appellants' the argument regarding lack of jurisdiction by the Gasabo Intermediate Court is wrong. He argued that Article 20 of the criminal procedure code provides that pre-trial detention will be heard by intermediate and primary courts, and that The High Court is competent to try, inter alia, crimes that threaten the national security as provided by article 89, but that this jurisdiction relates to the substance of cases. He argued further that the High Court hears appeals from pre-trial detention decisions, as in the instant case. He argued that the Gasabo Intermadiate Court had jurisdiction in this case.

On Language barriers the learned Prosecutor argued that the rendering of the decision in Kinyarwanda could not constitute a public order ground of appeal because it was a simple rendering of the judgement after closure of debates. At this stage, he contended, the suspect was not defending himself, counsel had concluded debate and therefore not rendering advice as provided by article 7.1(c) of the African Charter of Human and Peoples Rights. He contended further that Kinyarwanda is a national and official language in Rwanda and that the Judge had suggested that Counsel who understand the language translate for those who did not. The prosecutor argued further that the appellant ground of appeal did not disclose the type and extent of abuse of his rights and prayed court to reject it.

[11]. The learned Prosecutor then responded to the Grounds from the decision;

On the medical condition of the appellant the learned Prosecutor argued that the appellant demonstrates a clear pattern of dishonesty when it comes to describing the condition of his health and medical history. He submitted that while the prosecution respects the word of the medical professional who made the reports the reports were by no means complete and were contradictory in certain significant aspects.

The prosecution strongly objected to the authenticity and accuracy of the medical reports and prayed that the court orders that the authors of the same be cross examined before the appellant can benefit from their contents. He submitted further that the Prosecution was already making arrangements for the appellant to have an MRI scan in a third country, should it be deemed necessary.

The Prosecutor contended, in sum, that the appellant's physical, psychological and mental health might not be as grave as he paints it because he travels to places like Rwanda and Tanzania, places he now claims lack adequate medical care.

[12]. In further opposition to this appeal the Prosecution contended that the Appellant is a Tutsi genocide denier and deniers' mouthpiece not just an American Law Professor.The Prosecutor told court that at his trial the Prosecution will seek to show that Prof Erlinder has become a perverted Tutsi genocide denier, willing to twist history, to misquote international statesmen or quote them out of context, to misrepresent positions of the UN and of his own Government, to deny matters that have been factually and consistently proven at the ICTR and generally to turn indisputable truths about the Tutsi genocide upside down to fit his criminal perversion.

That the Prosecution will seek to prove the appellant has earned his fame from knowingly becoming the intellectual mouthpiece, the justifier and the international face of the Tutsi genocide deniers and that, as they will show this Honourable Court, he has made it his professional mission. That the Prosecution will seek to show this court that Erlinder, in this self

imposed genocide denial campaign, manufactured his own terminologies like "terrible massacres", "horrific events", massive civilian killings", civilian-civilian killings" etc in wanton disregard of facts already taken judicial notice of by the ICTR and other Courts and accepted as evidenced historical facts by the UN, The EU, The AU and all credible International Organizations, and used his high profile status to mount and sustain a bitter struggle against the truth that the Tutsi genocide was planned and executed.

He submitted that given the appellant's conduct the prosecution is convinced that he is incorrigible and cannot change and, hence, humbly urge this court to keep him in custody pending his trial for to release him, on any type of bail, is tantamount to granting him a blank cheque to continue denying that over 1.000,000 innocent citizens of Rwanda were killed in a planned and organized genocide.

[13]. The Prosecutor submitted further that the appellant is a genocide denier himself not just a defence lawyer for genocide suspects and deniersHe submitted that at his trial the prosecution will prove that Erlinder long ago overstepped his professional mandate of defending those accused of the 1994 Tutsi genocide and those who deny it today, that the prosecution recognizes the right, even of those responsible for genocide, to a proper defence and that they will show this Honourable Court, names of hundreds of respected defence lawyers who perform this difficult duty with honour and integrity and whose mandate, it is on record, the Rwandan State recognizes, values and supports. He submitted further that the prosecution will show that they do their work with vigour and zeal as any good defence lawyer will do for his client. He asserted that the prosecution will then seek to show the Court that the personal actions, publications, conference papers and speeches of the accused go far beyond the appellant's mandate as a defence lawyer, are not those of a vigorous, passionate or overzealous defence lawyer but are clearly and unashamedly those of a conscious denier of the genocide against the Tutsi and, hence, constitute a crime. He told court that they will show that his mandate does not include collective defence of all genocide masterminds

and deniers and that he has never, at any material time, been hired to embark on a Tutsi genocide denial mission.

The Prosecutor further told court that they will show that unlike the hundreds of defence counsel whose services are procured by their clients, the accused carefully selects and chooses his clients then seeks their mandate to represent them in his personal quest for a platform to advance his criminal agenda and that they will seek to prove that his representation of the 1994 genocide masterminds and today's genocide deniers is by design, has very little to do with *bona fide* defence of those clients but rather it has more to do with an individual in search of every available opportunity to deny the Tutsi genocide, give those responsible for it a renewed sense of victory, give those who deny it today the legal justification, the protection and the fighting edge they need to re-emerge as democratic contenders for political office, and give a combination of the two renewed options for completion of the last genocide or preparation of the next.

[14]. The Learned Prosecutor told court that the prosecution recognizes and respects freedom of expression and the right to free speech but that the Prosecution seeks to draw a line between freedom of expression, the right to free speech and genocide denial; that they will show the court that Rwanda's Constitution recognizes and respects these rights in its bill of rights but that what they are pursuing the appellant for is genocide denial. He submitted further that they will rely on impeccable and established material comprising case law and professional publications to show the court that the distinction is clear and that the accused, when it comes to the Tutsi genocide, knowingly, wilfully and wantonly crosses the boundary by espousing views criminalized under our law and under international law.

[15]. The Prosecution submitted also that the appellant has perfected his Tutsi genocide denial and moulded it into a fierce, unprovoked, malicious and criminal propaganda war against the Leadership and Government of Rwanda and that in his Tutsi genocide denial perversion, the

appellant has, through publications, conference papers,open letters, knowingly wilfully and intentionally provided material support to genocidaires.

The learned Prosecutor submitted that they will prove to court;

1. That the intentional assertion, with no evidence whatsoever, that the Tutsi genocide was a mere human eruption triggered by the assassination of a President amounts to denying that genocide

2. That not only does the appellant have no evidence to substantiate his claims that President Kagame ordered and the RPA downed Habyalimana's plane, he is also aware of international investigations going on into this matter

3. That the appellant has over the years touted this theory, knowing it to be false and/or unsubstantiated, in order to suppress or twist the truth about the planning of the genocide

4. That the appellant used his citizenship of a super power nation, professional profile, status and connections to tout this falsehood in order to create a fictional alternative theory of the cause of the Tutsi genocide of 1994

5. That in so doing he not only sought to provide material, moral and legal support for the extremist masterminds of the genocide but also sought to tell the world that President Kagame and the RPA, known in out of Rwanda for halting the genocide are, also, co-responsible for the "civilian-civilian" massacres and, therefore, it is wrong to blame the Hutu extremist elements for planning and executing the genocide as none took place. The prosecution will contend that this is genocide denial pure and simple.

The Prosecutor further told court that the appellant, by touting these falsehoods and engaging in international scare monger intends and has always intended that the lawful Government of the Republic of Rwanda

be suspected and perceived by the population international partners and friends to be responsible for his invented "civilian –civilian" massacres.

That his ultimate motive, the prosecution will contend, at his trial, is to reverse the gains the Rwandese people have made since 1994 in building the rule of law, in unity and reconciliation, in accountable government etc and in place of these, him and his co-deniers, intend to achieve suspicion, disaffection, anger and another round of ethnic conflict.

The prosecutor submitted that they will contend that while the appellant's motives are sadistic and myopic, and neither he nor his local or foreign "comrades" will have the pleasure of achieving, nevertheless harbouring, spreading and taking steps to implement them constitutes crimes established and punishable under sections 164-166 of the Penal Code.

[16]. Summing up his rather windy submission the Learned Prosecutor Submitted that while they recognise the appellant's presumption of innocence they nevertheless believe they have shown the court compelling grounds on which a reasonable suspicion that he committed crimes can be based, and prayed that he remain on detention pending his trial, as has happened at the ICTR as well as in Belgian, American and German courts.

[17]. From the foregoing the court framed the following issues:

Public Order issues

a) Whether the Judge had material and territorial jurisdiction to try the appellant.
b) Whether delivery of the decision in the Kinyarwanda language violated the appellant's rights

Issues from the Case

a)Whether the Judge failed to properly appreciate the medical condition of the appellant and consequently grant him bail on health grounds

b)Whether the Judge failed to appreciate the Prosecutor's concession that they would not oppose bail on medical grounds.

c)Whether the appellant's right be presumed innocent was violated.

d)Whether a prima facie case to warrant further investigation and continued detention was established.

e)Whether the nature of further investigations required and time frame necessary were established.

f)Whether the Judge erred in finding that the appellant might tamper with evidence, threaten witnesses or fraudulently communicate with accomplices

g)Whether the Judge erred in finding that the appellant might, once released, might become unavailable for the investigations to be completed

EXAMINATION OF THE ISSUES

Whether the Judge had jurisdiction to try the appellant

[18]. The appellant contends that the Judge did not have material and territorial jurisdiction and the prosecution argues that he had, as shown.

Indeed article 149 of the Constitution clothes the High court with jurisdiction to try certain serious offence in Rwanda as well as some offences committed outside Rwanda as provided by law.

Also article 90 of Organic Law n° 51/2008 or 09/09/2008 determining Organisation, Functioning and Jurisdiction of courts clothes the High court with jurisdiction to try certain cases of International or cross border nature. Article 89 of the same Law clothes the High Court with jurisdiction to try offences relating to State security.

The Prosecution contended that the judge had jurisdiction as pre-trial detention cases are governed by article 20 of the criminal procedure code (Law n° 20/2006 of 22/04/2006).

[19]. The Gasabo intermediate Court heard and decided the appellant's pre-trial detention case. It did not try the substantive case against him. The deference seems very clear to me. In pre-trial or preventive detention cases the accused is not put to his defence on the substance of the prosecution's full evidence. The pre-trial court considers strong grounds to warrant a decision that a crime might have been committed. The standard of proof is considerably lower. The prosecution does not bear the burden to prove a case beyond reasonable doubt, strong grounds are sufficient. In considering bail it is the judge who considers matters set out in article 94 of the criminal procedure code which are pretty straight forward. Under article 20 above, and I find, in the interest of accused persons as well as in the interest of rapid dispensation of justice,

Parliament found it fit to entrust the duty to try pre-trial detention cases to the lower Courts which are closer to the citizens for easy and fast access.

[20]. If the appelant's main trial had been filed in the GASABO Intermediate Court, this Court would consider the issue of jurisdiction and rule on it. But nothing like that has happened. I find that what has happened so far is within the law.

[21]. On territorial jurisdiction, is it a correct interpretation of article 20 of Law n° 20/2006 of 2006 of 22/04/2006 to say that pre-trial detention of persons suspected of offences should take place at geographically nearest Primary or Intermediate Court?

My reading of the article does not suggest so. The article provides that such cases should be "taken to the nearest jurisdiction with the exception of the High Court and the Supreme Court". The Kinyarwanda version says "…akamushyikiriza urukiko urwo arirwo rwose ruri hafi yaho yafatiwe uretse Urukiko Rukuru n'Urukiko rw'Ikirenga" If Parliament had intended to narrow the article to the "geographically nearest court " it would have said so. But by excepting only the High Court and Supreme Court, and reading both versions together, I find that the other courts within the vicinity where the accused is provisionally arrested are competent. The import of the article, in my view, when read together with the next paragraph which provides that a suspect must be presented before a magistrate within 72 hours, is to provide a larger chance to an accused person to appear before a court expeditiously. If this article were to be interpreted very restrictively, I would find it a denial of justice,

for example, if the docket of the geographically nearest court is so full that they cannot hear the detention application in a short time.

My understanding of this article is that Parliament intended that suspects do not spend long periods waiting for particular courts to hear their bail applications and that is at the back of the liberal framing of the article.

The appellant was arrested and presented before court for his detention trial at the GASABO Intermediate Court. The Prosecution would have explained the reasons why they chose that court if the appellant had so demanded. He did not. The issue is resolved in the negative.

Whether delivery of the decision in the KINYARWANDA language violated the appellant rights.

[22]. The appellant contends that his rights were violated, the prosecution oppose that. It is true that the Decision was rendered in Kinyarwanda, a language the appellant and three of his lawyers neither speak nor understand.The cited Human Rights standards in the Universal Declaration of Human Rights and in the International convention on Civil and Political Rights and African Charter on Human and people's rights are clear on their reference to trials. And it is this Court's view that this is deliberate. It would be a blatant deprivation of fair trial rights, in my view, if a person was tried and put to his defence in a language he does not understand. My reading of the record shows me that this right was respected during the appellant's detention trial.

[23]. But when it comes to judgement my considered opinion is that in the interest of justice and of parties to litigation a Judge should write and deliver his judgement in a language he not only speaks and understands but also feels comfortable using, provided it is a language allowed under the law in force where that judge is. To hold that a Judge should write and deliver a judgement in a language he neither speaks not understands or that if a Judge does not speak and understand the language of one litigant to a case then he should not sit in judgement over that case, even with assistance of interpretation, would go against the same fair trial rights the appellant wants this Court to uphold in his favour.

[24]. A judgement is authored by the Judge making it and he takes personal responsibility therefor. I do not envisage a situation where a judge can be made to write and deliver a judgment in a language does not understand or speak fluently.It is enough, in my view, to provide and ensure that official translations of court judgements can be provided on demand or on request. I was not told that such demand or request was made both immediately or after the decision in the instant case was delivered.

[25]. This Court is aware that because of Rwanda's multi lingual circumstances, such services exist and are paid for by the State. I find the appellant's reliance or unofficial translations a personal or unadvised choice. Lastly the appeal does not disclose the exact prejudice visited on appellant as a result of a Kinyarwanda language Decision. The issue is resolved in the negative.

Whether the Intermediate Court Judge failed to properly appreciate the medical condition of the appellant and consequently grant him bail on humanitarian grounds.

[26]. In his plea to be granted bail, the appellant provided documentary proof of his medical condition to the Judge at Gasabo Intermediate Court. The Prosecution contested the medical reports as insufficient. The Learned

Judge found that the medical reports did not disclose a link between the appellant's detention and any deterioration in health and decided that he would not release him on grounds of ill health which had not been sufficiently established.

[27]. At his appeal the appellant had obtained further documentary proof from his Doctors in the US of his state of physical, psychological and mental health. He tendered three reports, one from his cardiologist, one from neurologists and the other a comprehensive one from his general doctors.

[28]. The Prosecution still contested them and in fact sought to cross examine the Doctors who made them before the appellant's application on humanitarian grounds, could be considered.

[29]. I had ample opportunity to study all the reports. I will quote from each of them. The report of Dr Laurie Radovsky of Grand Avenue Clinic says, in part " …Mr Erlinder has been a patient at our Clinic for almost twenty years. A careful review of his medical records shows that he suffers from the following conditions: bicuspid aortic valve, hypertension, acoustic neuroma, hypertipidemia, divertculosis, depression and chronic insomnia…. I am concerned that Mr Erlinder needs treatment for his

physical and mental issues that is unlikely to be available to him in Rwanda…… his depression could become severe……..it is my professional opinion that Mr Erlinder's multiple physical and mental problems put him at grave risk of morbidity and mortality…."

[30]. The report of Dr Michael J Link of Mayo Clinic, Department of Neuro Surgery, Rochester Minnesota, says, in part, "Mr Carl Peter Erlinder is a 62 year old man who has been a patient under my care since October 2004. He was diagnosed with an acoustic neuroma at that time which we have been following with serial MRI scans and audiograms….."

[31]. The report of Les B Forgosh, of St Paul Cardiology, confirms that the appellant has a congenital cardiac condition known as bicuspid aortic valve…."

[32]. In his own written submission to the Court, the appellant submitted additional information to complete the above said reports, which show that;

a) he has been treated for depression and anxiety disorder by one Dr Farouk Abuzzahab of University of Minnesota and by another Psychiatrist whose names he does not recall

b) he has been hospitalised on at least two occasions at Oakland Ca Kaiser Permanent Hospital and at St Paul, MN, Ramsey County Hospital, for complete collapses from panic attacks during the only time in his life when coping skills failed during divorce proceedings and financial difficulties. And he says that this is what he is experiencing now.

[33]. In his oral submissions to the court the appellant laboured and educated the Court further about the gravity of his psychological and mental health and provided, in case the court needed more evidence, the address of one Dr Howard Gershenfeld, the Regional Medical Officer, Pschiatry, of the United States Embassy. He even prayed the court to consider the possibility that his mental and psychological problems might be the

cause of the very actions and/ omissions he is being prosecuted for in this case.

[34]. Depression alone can be real troublesome. In the Macmillan Dictionary depression is defined as" medical condition in which a person is so unhappy that they can not live a normal life". Wikpedia, the online encyclopedia, defines it as a "State of low mood and aversion to activity…" and says that a depressed person will experience or display, inter alia, persistent sadness, anxiety or feelings of emptiness, feelings of hopelessness, helplessness and/or guilt, contemplating suicide or suicide attempt, problems of concentrating, remembering details or making decisions etc . I find these symptoms consistent with and corresponding to the appellant's oral submissions, in Court, about his health challenges.

[35]. This Court believes that if the Judge had had the information that this court now has he would have paid proper and urgent attention to the medical conditions of the appellant. Having listened carefully to the appellant, having carefully studied his medical records, authenticated by the Secretary of State of the USA, that he tendered in evidence, I find this a proper case for release of the appellant on health grounds.

[36]. Having regard to all the circumstances of the case, and without delving further into the whole of the appellant's physical and mental health records, I have sufficient reason to believe that here is a case of an appellant, still at the pre trial phase, no matter how grave the accusations, whose health must take precedence over the case against him. This Court saw his demeanour and believes that he honestly explained his long history of physical, psychological and mental health problems and his continuous requirement for medical attention.

[37]. One reason he must be released is that it would be unjust to put his life at risk of morbidity or mortality as suggested by his Doctors. The second is that this Court, judging from the appellant's own oral submissions and the various medical reports he tendered in evidence, has sufficient reasons to believe the appellant's account of his past and present state of

psychological and mental health and consequently cannot continue to deal with him as if he was or is and capable of forming an intention to commit an offence. Intent in criminal proceedings must mean that an action or omission was done with full knowledge of the author that it is the act he is doing.

[38]. This Court would be doing grave injustice if it tried a person, even for his detention, over actions or omissions he might have committed under a psychological or mental disorder.

[39]. While I was preparing this ruling I received, from one of the appellant's lawyers, a photocopy of a note verbale, said, in its transmission note, to have been issued by the Registrar of the ICTR, addressed to the Minister of Foreign Affairs, Rwanda, requesting, inter alia, the appellant's immediate release because he enjoys Professional Immunity. I decided that it did not have any value in the case before me and consequently did not re-open debate on it. Also I was not advised how the appellant's lawyer had obtained the photocopy, and/or whether he was transmitting it on behalf of the ICTR or the Rwandan Minister of Foreign Affairs both of whom are not parties to this case.

Equally I received a copy of a letter, written to the Prosecutor General, from Ibuka, The Umbrella Survivors Organisation in Rwanda, offering to be part of the case and objecting to the appellant's release on bail. I did not attach value to it as this case is still in the prosecution and I do not find that the court's decision would change if debate were reopened thereon.

[40]. Having thus released the appellant on health grounds I find it an exercise in futility to continue and determine the rest of the issues.

ORDER OF THE COURT

[41]. It is ordered that Prof. Carl Peter Erlinder be hereby unconditionally released from detention on health grounds as explained above.

[42]. It is ordered further that investigations into his case will proceed while he is not in detention.

[43]. It is further ordered that Prof. Carl Peter Erlinder elects and furnishes the National Public Prosecution Authority with an address for service in Rwanda.

Done and delivered in open Court this 17th day of June 2010 by the High court at KIGALI.

JUDGE **CLERK**

JUSTICE BUSINGYE JOHNSTON NGILINSHUTI JEAN BOSCO