

Dissenting judge: Kabuga failed to demonstrate unfitness to stand trial

James Karuhanga

The New Times, 13 juin 2023

A Moroccan judge gave a dissenting opinion in the recent decision by the International Residual Mechanism for Criminal Tribunals which deemed key Rwandan genocide suspect Felicien Kabuga was unfit to participate meaningfully in his trial.

The decision which was rendered by The Hague-based UN court, had survivors of the 1994 genocide against the Tutsi and rights activists dismayed and frustrated.

Kabuga, known as the financier of the 1994 Genocide against the Tutsi in Rwanda, was a wealthy businessman and the president of what was called the National Defence Fund from about April 25, 1994 to July 1994.

The dissenting opinion was given by Judge Mustapha El Baaj – a criminal justice expert – who said that Kabuga and his defence did not give satisfactory evidence to back incapacity claims.

“I respectfully disagree with the Majority’s finding that Kabuga is unfit to stand trial. I consider that Kabuga has not demonstrated his unfitness to stand trial and that such unfitness is not supported by the medical evidence on the record,” El Baaj concluded, considering the consequences on Kabuga’s fundamental rights.

“On the contrary, I am convinced that Kabuga retains a number of capacities which allow him to reach the legal standard set out in our jurisprudence.”

Further, and in order to safeguard Kabuga’s best interests and his right to legal capacity in accordance with the Convention on the Rights of Persons with Disabilities (CRPD), El Baaj noted that he was of the view that Kabuga should be tried within the regular framework *“established by the Statute, the Rules and the jurisprudence, and should benefit from*

all necessary accommodations to facilitate his meaningful participation.”

“I am further convinced that the Statute and the Rules enable the Trial Chamber to exercise its discretionary powers to ensure that Kabuga’s fair trial rights are guaranteed. In my opinion, such [an] approach would be in the interest of justice, as it would strike a fair balance between the interests of the victims and Kabuga’s right to participate in the proceedings against him.”

A core member of the Akazu – a small circle of architects of the 1994 Genocide, Kabuga was also the founding president of the board of shareholders of hate radio RTLM, known as a key enabler of the Genocide against the Tutsi.

The radio regularly gave detailed information about the people to be massacred and where they could be found.

Kabuga’s health and his fitness for trial have been central issues in his trial proceedings from the outset.

The Trial Chamber has closely, and on a regular basis, monitored Kabuga’s health since his transfer to The Hague Branch of the Mechanism in October 2020.

Judge El Baaj’s dissenting opinion

The Judge noted that after considering the applicable law, the medical evidence on the record, and the written and oral submissions of the parties, as well as observing Kabuga’s demeanor in court since September 29, 2022, “*I respectfully disagree with the finding from the Majority that Mr. Kabuga is unfit to stand trial.*”

“I note that the Majority relied on the applicable legal standard regarding fitness to stand trial before the Mechanism as stated by the Appeals Chamber in its Decision of 12 August 2022 in the present case, referring in particular to the Strugar Appeal Judgement delivered by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY).”

“I actually agree with the Trial Chamber’s reasoning that its task is to apply the Strugar standards while giving full effect to all relevant human rights norms, including those set forth in the [Convention on the Rights of Persons with Disabilities].”

Nevertheless, he disagreed with the evidentiary assessment undertaken by the Majority, and considered that Kabuga had not demonstrated his unfitness to stand trial.

El Baaj noted that his assessment of the facts is further supported by

the evolution of the legal standard of fitness to stand trial in international human rights law.

“I finally disagree with the deci-

sion of the majority to proceed on the basis of an alternative finding procedure rather than continuing with the

trial.”