

Heading Seal of the Federal Democratic Republic Federal High Court

Criminal File No. 43246

Date: 5 April 2007

Judges:- Adel Ahmed

Leul Gebremariam

Mohammed Amin Sani

Accuser:- Federal Prosecutors Shimelis Kemal, Michael Teklu and Abrha Tetemke are present

Accused:- Er. Hailu Shawl and others all the accused are present

Defense attorney for Daniel and Netsanet Colonel Mengistu Hailemariam is present. Defense attorney for Kassahun Kebede, Ato Wondawek Ayele is present. This file had been adjourned to complete the ruling already started. Thus, we will proceed from the point where we stopped.

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In relation to the 26<sup>th</sup>, 94<sup>th</sup> and 95<sup>th</sup> accused, the witnesses have testified on the activities of the accused before and after the May 2005 elections as follows:

- The 92<sup>nd</sup> prosecution witness testified that, while working as facilitators in a training workshop organized for election observers representing civil society organizations prior to the elections on the 10<sup>th</sup> and 11<sup>th</sup> of May 2005 the 94<sup>th</sup> and 95<sup>th</sup> accused have said that the EPRDF will attempt to win the elections through fraud, the EPRDF is a thief and will disrupt power in the evening; thus, you will be provided with electric torches to avoid problems during power disruptions. Accordingly, electric torches were provided for each group during the election orientations given at CRDA on 14 May 2005. The witness, based on the emphasis on the possibility of fraud by the EPRDF while nothing has been said on the possibility of fraud on the part of Kinijit or other organizations, has surmised that the civil society was partial to one side.
- The 91<sup>st</sup> prosecution witness on her part stated that she has participated in the civil society meeting held on 5 August 2005 representing the Addis Ababa Women's Association. She testified that she has heard the 94<sup>th</sup> and 95<sup>th</sup> accused who were leading and coordinating the meeting saying that the results of the election have been defrauded, the EPRDF is repressive and the election should be repeated in 299 voting stations where fraud has occurred. She specifically testified to hearing the 95<sup>th</sup> accused saying that a transitional government should be established, the

Election Board that is partial to the EPRDF should be replaced, the Board is not credible enough to issue the election results.

- The 89<sup>th</sup> prosecution witness has testified on his relationship with the three accused prior to and after the elections. He testified that the 95<sup>th</sup> accused has before the elections told him to campaign in his community to elect Kinijit and told him that since it is the EPRDF that only benefits Tigrians that is responsible for youth unemployment, he should campaign among the youth by coordinating the those in his neighborhood. He also testified he was told by the accused after the elections to instigate mutny and disobidience saying that the EPRDF has defrauded the elections and that he should instigate the public to confront the police during the demonstrations called by Kinijit and Hibret on 2 October 2005 and that the accused told him in person to instigate the disturbances in the Adisu Gebeya where he is a resident on 2 November 2005 as a result of which properties were damaged. The witness also said that he was paid for his activities and that he was promised employment if Kinijit won the election. In relation to the 26<sup>th</sup> and 94<sup>th</sup> accused the witness said that they similarly encouraged him to continue in his instigations and distribute leaflets. According to the witness, the leaflets he was distributing were let out votes be heard call for the youth in Addis Ababa and a list showing the name of officials and the amount of money they have in foreign banks as shown by the prosecution in the additional documentary evidence.
- The 11<sup>th</sup> prosecution witness on his part stated that he has met with the 94<sup>th</sup> accused in the month of June 2005 at which time the accused told him to instigate the youth and other sections of the society on the issue of Kinijit winning the election and that EPRDF should be removed since it is ruling at the point of a gun. The witness said that the accused told him to distribute leaflets to instigate the youth for mutny and gave him Br. 200 for the purpose. The witness testified that he has been engaged in these activities and the disturbances on November 1 & 2, 2005 caused damage to property.
- Moreover, the Court has examined the documents submitted by the prosecution allegedly used by the 94<sup>th</sup> and 95<sup>th</sup> accused to communicate decisions pertaining to their criminal intent by using the associations they represents outside the purview of their establishment objectives and activities. These documents include the report of the half-day civil society meetin;, press releases and decisions allegedly given by the accused in the name of the civil society on 8 August 2005 entitled lets put the interest of the country before the interest of political parties and the May elections and the political impasse our country is in; and, letters written by Elias Kifle from the US to Frezer Negash and Berhane Haile stating that the accused work as communications officers for the Kinijit. Except for the private letters relating to the relationships the accused had with Kinijit which could be considered circumstantial, these documents generally examined mutually support the contention that the accused have committed the alleged crimes. As could be surmized from these documents, while individuals who have come together as the leadership of Kinijit were attempting to forcefully abolish the constitutional order by instigating mutny saying that the elections suffer from

fraud, the Electoral Board is partial and a coalition government should be established, the accused have engaged in activities with intent to realize the criminal actions mentioned in the 1<sup>st</sup> charge. They have moreover used the civil society organizations they represent for political purposes outside their establishment objectives to state that the EPRDF will defraud the elections persisting with their belief after the elections claiming that they suffer from fraud. While the accused know the normal procedures for the establishment of government, they have promoted the establishment of a coalition government. And, despite the fact that one of the items stated in the press release entitled lets put the interest of the country before the interest of political parties calls on political parties to join parliament accepting the seats they have officially won, the other items in the same press release as well as other documents and their oral communications as established by witnesses are predominated by claims of election fraud and partiality of the Electoral Board. This, rather than a press release issued by civil society organizations to create better relations between the government and opposition groups reflects the stand taken by the accused claiming that the elections suffer from fraud. Moreover, in relation to the defense that the testimony given by prosecution witnesses is conflicting, the testimony was not found to be conflicting as it relates to the major issue at hand. As such, the defense was not accepted.

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- Thus, since the charges brought against the accused have been proved by the public prosecutor, the Court has ruled as per article 142/1 of the Criminal Procedure Code that the accused present evidence in their defense under criminal code articles 32/1/a & b, 38, 27/1 and 238/1/2.

[Dissenting Opinion]

- We will proceed with the ruling. I the 1<sup>st</sup> judge have a dissenting opinion in relation to the 26<sup>th</sup>, 94<sup>th</sup> and 95<sup>th</sup> accused. I will start by stating my dissenting opinion. In relation to 94<sup>th</sup> and 95<sup>th</sup> accused Daniel Bekele and Netsanet Demissie, the prosecution has submitted a number of writings as additional documentary evidence claiming that these pieces of evidence prove the specific participation of the accused and presented testimony of witnesses. I have assessed the testimony of witnesses as follows. The witness named Wro. Meseret has stated that she knows the accused during the training for election observers prior to the May 2005 elections, that Netsanet and Daniel were leading the podium at the time and that they said the EPRDF will defraud the elections, the EPRDF is a thief, torch lights will be prepared and [the observers] should be cautious.
- The witness named Wro. Nigist has on the other hand stated that she was present to testify on the issues raised during the proceedings of the civil society discussion forum organized to address the problems following the May 2005 elections. This witness has testified that she has participated in the half-day meeting conducted at the Red Cross auditorium on 5 August 2005 representing the Addis Ababa Women's Association, that the meeting was called by the Civil Society Network and that the proceeding were chaired by Ato Fikru Zewdu, Daniel and Netsanet. According to the witness the meeting focused on whether the opposition should join parliament and Ato Daniel has said that election fraud has occurred in 299 [election centers], the government is repressive. Both the accused have said that opposition parties have sought their counsel, what should we do? The Election Board is partial. Then, a task force composed of 5 members has been established to issue a press release to communicate our plight to the public. The members of the task force were 1<sup>st</sup> Ato Fikru, 2<sup>nd</sup> Ato Netsanet, 3<sup>rd</sup> Ato Daniel, 4<sup>th</sup> Ato Eshetu and 5<sup>th</sup> Wro. Bezuwork. Generally, this witness has tried to testify that the statements made by the two accused indicate that they have aligned themselves with the opposition and reflected hatred for the government and the ruling party.
- The prosecution witness named Ato Adane Bekele testified that he lived in the same neighborhood with Ato Netsanet Demisse and known him [the accused] for a long time. Around the 2005 elections he was telling me that the public should vote for Kinijit since the ruling party is partial to one nationality and other things and I was acting accordingly. After the elections we had many discussions on the need to forcefully remove the EPRDF since it has committed fraud although the public has voted for Kinijit. Similarly, among the documentary evidence submitted by the prosecution are found a one page leaflet entitled let our votes be heard, a one page call for the youth in Addis Ababa and a one page leaflet entitled the amount of money officials have in banks abroad. On the last page of these documents we see a statement "Netsanet Demisse has given me to make five copies and distribute", an intelligible signature and the name of Adane Bekele. Adane Bekele has also stated that the documents were given to him by Netsanet

Bekele during his testimony. These documents, especially the first two documents, state that the elections have been defrauded and removing this government by force is the only alternative. This witness has also testified that Netsanet has introduced him to Daniel Bekele and has met Daniel not more than three or four times and that Ato Daniel has similarly told him to distribute the above documents. Responding to questions posed by the accused in cross examination, this witness has stated that: he was alone when he met with Ato Daniel all three times; the accused said a transitional coalition government should be established; we have other means of opposition if this fails; since the movement will cover the whole of Addis Ababa and other parts of the country, we will be able to remove the EPRDF from office. The witness stated that he [the accused] has told him to mobilize the youth and has been working accordingly; that he does not know the names of the persons he mobilized although he lived in that neighborhood for more than 25 years; and that they have been mobilizing any one they could find.

- The other prosecution witness named Ato Wondosen testified that he met Ato Daniel after the 2005 elections in a café. At the time I [the witness] was discussing with another person at which time he came up and encouraged me and gave me his phone number. I have met him one or two times since then at which time we discussed on ways to organize the youth and remove EPRDF and gave me two hundred Birr. I was mobilizing [the youth] accordingly. The witness also reiterated that he has been hiding for two months after the disturbances in the private home of persons whose names he does not recall.
- The prosecution has submitted a number of pieces of documentary evidence on the accused. Some of these are documents found at the office of Daniel Bekele and others relate to civil society meetings and documents submitted to show the alleged relationship between the accused and Kinijit. I will focus on documents showing civil society activities and alleged to show relationships with Kinijit. The document submitted to indicate the relationships had with Kinijit is the letter written by the 51<sup>st</sup> accused named Elias Tekle to Frezer Negash and Berhane Haile. In this letter he states that Ato Hailu Shawl has told him that Netsanet and Daniel are the contact persons for Kinijit. The accused have argued the document should not be admitted as evidence as a result of the manner in which it was acquired, since it does not refer to what they have said and they do not know either the writer or the addressees. The document being acquired through a court order and in the presence of witnesses, it could not be deemed inadmissible only because one of the witnesses said that he does not know whether there was a valid court order or because one of the addressees, the one named Frezer, declined to sign on the document.
- The document should be considered in light of the role of the 51<sup>st</sup> accused. Moreover, in examining if the document could be considered as evidence against the other accused, we should take in to consideration on what they have stated in their defense. In the context where the accused did not know the writer or the addressees of the letter, while this has not been proved, while the accuracy of the

statement 'Ato Hailu Shawl has told him that Netsanet and Daniel are the contact persons for Kinijit' has not otherwise been proved, I did not find the mere fact of the statement sufficient to show the alleged relationship between the accused and Kinijit.

- As to the documents claimed to show the activities of civil society organizations, I have examined them as follows. The first document is the report of the half-day meeting of civil society organizations held on 5 August 2005. This document indicates that discussions were held on the situation after May 15, the responsibility of civil society to provide advice towards calm down the situation, and describes the different opinions raised during the meeting. The divergent nature of the opinions could be deduced from consideration of the following two points. The first opinion implored opposition parties to join parliament despite the existence of problems so that the democratic processes already underway would not be disrupted. The crux of the opposing opinion equates beseeching opposition parties to join parliament with disregarding the votes given by the public. The document also shows that opinions on the formation of a coalition government have also been forwarded. However, since the differences of opinion could not be resolved on the spot, a 5 member task force was established to which Daniel Bekle was elected as a member.
- The other document is a press release issued by representatives of civil society organizations on 9 August 2005 referring to meetings held on the 5<sup>th</sup> and 9<sup>th</sup> of August. Since the date 5 August has been mentioned in the document, it is logical to assume that the document was prepared by the working group established on that date. This document was entitled let's give priority to the interests of the country rather than political parties. Content wise the document calls on political parties to join parliament; the establishment of the incoming government as per the constitutional system, that those with complaints should go to the courts, for mass media to assign appropriate air time for opposition parties as per the existing editorial policy, for the organization of the Electoral Board with improved capacity, for judges to fulfill their responsibilities on the basis of the principle of judicial independence, for measures to investigate the disturbances after May 15, and for political parties to come together and discuss on laws issued [by the outgoing parliament] after the elections.
- I have examined the documents and the testimony of witnesses as follows. As could be inferred from the documents, the civil society meeting held on 5 August 2005 entertained diverse opinions. One prosecution witness who has followed up on this meeting has attempted to explain the stand taken by the accused in the meeting. This witness has testified that the accused were stating the need to establish a coalition government and election fraud in 299 cases. The other prosecution witness has indicated that they have been saying that the EPRDF will defraud the elections, it is a thief and you [observers] should be cautious. The accused have not counteract these testimonies during the cross-examinations. This implies that the accused had hatred for the ruling party or the government and are partial to opposition parties. However, the charges here relate to something

bigger: attempting to forcefully abolish the constitutional order. When we ask if there is anything to show this, we have to consider the testimony of two other witnesses and documents. The witness named Adane Bekele, although he stated that he lived with Netsanet Demisse for 25 years, his testimony was limited to the two persons [the accused]. That is, he testified that all of his activities were with unknown persons except for his relationship with Netsanet and Daniel. Whenever the credibility of a witness is questioned, the need arises to examine how the content of the testimony will be considered under normal circumstances. It is obvious that a person who has lived for 25 years in one vicinity will start from people he knew intimately when engaging in activities like election campaigning. However, where this witness states that he did not know the people he was working with, especially where he indicated that his meetings with Daniel Bekele were limited to three or four days, it is difficult to believe that they were having discussions on matters like removing the government in power. Similarly, since the second witness knows Daniel for two or three days, his testimony is questionable. Moreover, his claim that he does not know the names of the people in whose house he hid for about two months deprives his testimony of credibility.

- It is also necessary to examine the testimony of these witnesses in conjunction with the documentary evidence. Although it is possible to deduce that the accused had hatred for the ruling party or the government and are partial to opposition parties from the civil society meeting held on 5 August 2005, considered with the press release issued by civil society organizations on 9 August 2005 it does not show that the opinions of the accused in relation to the establishment of a coalition government or use of force amounts to more than free expression of opinions. That is, as long as it is not associated with acts of force, mutiny or uprising, the mere discussion of the establishment of a coalition government or other threats are mere expressions of opinion that do not amount to a crime. It only becomes a crime when the person attempts to forcefully realize these opinions he has been expressing. So, even though the opinions of the accused during the meetings on 5 August 2005 have been proved with the testimony of witnesses, it is not sufficient to prove the 1<sup>st</sup> charge. Especially, the civil society press release on the 9<sup>th</sup> of August 2005 relates to the alternatives peacefully presented by the accused and others rather than having criminal content.
- Since the testimony of Adane Bekele and the other prosecution witness lack credibility as elaborated above, I have given a dissenting opinion that the accused should have been released without the need for presenting defense evidence. Moreover, the testimony given by one of the prosecution witnesses on the 26<sup>th</sup> accused is very general in nature and his testimony lacks credibility due to his testimony on the 94<sup>th</sup> and 95<sup>th</sup> accused. One of the documents submitted on this accused, i.e. the fact that his name is stated as a member of the presidium during the general meeting of the All Ethiopia Unity Organization, does not prove that he has participated in the attempt to forcefully remove the constitutional order as stated in the 1<sup>st</sup> charge. Thus, I dissent to the majority decision saying that this accused should also have been released without the need to present defense evidence.