PROSECUTION v. Col. BYABAGAMBA ET.AL

[Rwanda SUPREME COURT – RPA00001/2019/CA (Mukanyundo, P.J., Kanyange and Rugabirwa, J.) 12 July 2019]

Criminal Law – Penalty of imprisonment – Torture – The fact that a detained person is held alone in detention place should not merely be considered as torture if he/she is treated with humanity and with respect for the inherent dignity of the human person.

Medical insurance – Medical insurance for a detained person – The type of insurance scheme does not matter, instead, what is important is ensure that a detained person is properly treated, the fact that he/she treated using medical insurance contrary to his or her choice should not be a ground for provisional release.

Facts: This case started at Military High Court whereby Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza Francois were prosecuted by Military Prosecution for various offences.

That Court found them guilty of the offences charged, however, the Court acquitted Rtd. Sgt Kabayiza for the offence of possessing a gun illegally, the Court sentenced Col. Byabagamba to 21 years of imprisonment, Rtd Brig. Gen Rusagara to 20 years of imprisonment whereas Rtd.Sgt Kabayiza was sentenced to 5 years of imprisonment.

The accused did not contend with the rulings of the judgment, consequently, they appealed to the Supreme Court, after restructuring of the judicial organs, the case was transferred to the Court of Appeal, before that Court, the Military Prosecution raised a preliminary objection for the inadmissibility of the appeal stating that it was illegally filed. The accused also raised an objection seeking for provisional release, they state that they suffer from diseases and that they cannot consult the physicians in case of need, they further state that the management of the prison does not allow them to use medical insurance of MMI. They also submit that the medical secret is not respected when consulting the physician because they consult the physician in the presence of a Military policeman.

The Military Prosecution states, the fact that the accused are ill, a remedy should not be provisional release because this ground is not provided by the law so that a person is granted the provisional release. With regard to medical treatment, the Prosecution states that the accused are properly treated, that they also have a physician of Military police who daily cares of them. Concerning the issue of consulting the doctor in the presence of Military policeman, it states that they are accompanied to the hospital and that what is important is that they get proper medical treatment.

The accused also seek for the provisional release on the ground that they are illegally detained, that they are incarcerated in a place different from that one ordered by the Court, that they are detained at Military police instead of Mulindi Military prison, they add that they are incarcerated in solitary confinement, that they stay in a very narrow place covered by surveillance cameras where they cannot meet any other person except a military who serves them meals, they also say that they were deprived rights to family contact, hence, they find no any gound to deny them right for being visited, contrary to other prisoners.

The Military Prosecution contends that the accused falsely state that they are incarcerated in solitary confinement since during investigation, the Court found that their place of detention complies with standards conditions for human health because they possess all living equipment and they are also allowed to receive money from families for satisfying their needs, however, they should not ignore that incarcerated person is deprived some rights. It prays the court to consider the purpose of its investigation because the statements of the detainees have no link with the case.

The Military Prosecution further states that cameras placed where the accused are detained should not be an issue because those cameras were put in place for the security purpose and that is the practice for all countries with financial resources. With regard to the issue of being detained in the extension of Mulindi Military prison at Kanombe, the Prosecution states that they were given special treatment because of their rank, that is why they are detained in a different place with Rtd. Sgt Kabayiza Francois who is in public place.

Held: 1. The fact that a detained person is held alone in detention place should not merely be considered as torture if he/she is treated with humanity and with respect for the inherent dignity of the human person.

2. The fact that the accused cannot consult the physician whenever they need, it is not permanent or particular issue because of incarceration, but this is a general concern even to others who are not imprisoned because it is due to lack of sufficient specialist medical staff, therefore, this cannot be a ground of granting them provisional release.

3. With regard to medical insurance for a detained person, type of insurance scheme does not matter, instead, what is important is to ensure that a detained person is properly treated, the fact that he/she is treated using medical insurance contrary to his or her choice should not be a ground for provisional release.

4. The right to medical secrecy for a detained person has to go hand in hand with the functions of the authority of the prison of protecting those in their custody, however, all have to be applied without violating each other.

5. Prisoners have the right to supervised family and friends contact whether by writing or by visit, therefore, the accused have to get back the rights to family contact.

Objections seeking for provisional release lack merit;
The hearing will proceed on the merits.

Statute and statutory instruments referred to:

The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 14(1), (2), 21 and 22.

Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code, article 176.

Universal Declaration of Human Rights of 10/12/1948, article 25 paragraph one.

International Covenant on Civil and Political Rights of 19/12/1966 adopted by Rwanda on 12/02/1975, article 7 and10 paragraph one.

International Covenant on Economic, Social and Cultural Rights of the 19/12/1966 ratified by Rwanda on 12/02/1975, article 12.

African Charter on Human and Peoples Rights 27/06/1981, adopted by Rwanda on 11/11/1981 and ratified on 17/05/1983, article 16 paragraph one.
United Nations standard minimum rules for the treatment of prisoners (Nelson Mandela Rules), rule 13 and 44

Case laws referred to:
Bagosora v. the Prosecutor, ICTR, Case N°. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File Corrigendum, 2 September 2009.
Prosecutor v. Rašić, ICTY, Case N°. IT-98-32/1-R77.2-A, Judgement, 16 November 2012.
Karemera et al. v. the Prosecutor, ICTR, Case N°. ICTR-98-44-A, Decision on Mathiew Ngirumpatse's Motion for Provisional Release, 11 December 2012.
Rhode v. Denmark, European Court of Human rights, application Nº10263/83
Ramirez Sanchez v. France, European Court of Human rights, application Nº59450/00

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started before Military High Court where the Military Prosecution accused Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza Francois for the offences mentioned above, that court rendered the judgment N° RP0006/014/HCM on 31/03/2016 holding that Col. Tom Byabagamba is guilty for inciting insurrection or trouble, for an act aimed at tarnishing the image of the Country or the Government while he was a leader, for concealing objects which would facilitate the prosecution of a crime or misdemeanour, identification of evidence or punishment of the offender and for contempt of the national flag, the court also held that Rtd Brig Gen Frank Kanyambo Rusagara is guilty of inciting insurrection or trouble, for an act aimed at tarnishing the image of the Country or the Government while he was a leader, for possessing gun illegally, it further held that Rtd. Sgt Kabayiza Francois is not guilty of possessing a gun illegally, it decided that he is guilty of concealing objects which would facilitate the prosecution of a crime or misdemeanour, identification of evidence or punishment of the offender, that he has to be sentenced.

[2] The court sentenced Col. Tom Byabagamba to 21 years of imprisonment and stripping off ranks as an additional penalty, it sentenced Rtd Brig Gen Frank Kanyambo Rusagara to 20 years of imprisonment whereas Rtd. Sgt Kabayiza Francois was sentenced to 5 years of imprisonment and fine 500,000Frw

[3] Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza Francois appealed to the Supreme Court and after judicial reform, the case was transferred to the Court of appeal basing on article 105 of Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts, that case was registered on N° RPA00001/2019/CA.

[4] Before the Court of Appeal, the Military prosecution raised an objection for inadmissibility of the appeal stating that it was not legally filed. Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza Francois also raised an objection seeking for provisional release and plead at liberty, they stated that the provisional release they claim is

based on article 105 paragraph 1 and 2 of the Law Nº 30/2013 of 24/5/2013 relating to the code of criminal procedure.

[5] The hearing was held in public on 22/05/2019, Col. Tom Byabagamba assisted by Counsel Musore Gakunzi Valery, Rtd Brig Gen Kanyambo Rusagara Frank assisted by Counsel Buhuru Pierre Celestin and Rtd. Sgt Kabayiza Francois was assisted by Counsel Munyandatwa S.Nkuba Milton while the Military Prosecution was represented by Capitaine Nzakamwita Faustin, the Court first examined the objections raised, and the parties were informed that the decision on the objections will be pronounced on 31/06/2019.

[6] On 31/05/2019, the Court of Appeal rendered an interlocutory judgment on the objection of inadmissibility of the appeal raised by the Prosecution and the Court held that it lacks merit. With regard to the objection raised by the appellants, the court decided that before it rules on it, it will conduct an investigation where they are detained, that the hearing will resume on 13/06/2019.

[7] The investigation was scheduled on 05/06/2019, at 9 am, on that day, the investigation was conducted in the presence of the accused, their advocates and the Prosecution.

[8] On 13/06/2019, the case resumed, the appellants were assisted and the Prosecution was represented as before, each party was given an opportunity to react on the investigation result.

[9] On 28/06/2019, the court made an order to the authority of the Military police where Rtd. Sgt Kabayiza Francois is detained, to take him to the physician who treats him for examination and issue a report containing his health situation and whether his illness requires to be admitted in hospital or if he can get treatment and return to prison as usual.

[10] The hearing resumed on 08/07/2019, the accused appeared and assisted, as usual, the Prosecution was represented and Dr. Nahayo who prepared the report using Rtd. Sgt Kabayiza Francois's electronic medical file, appeared before the court to explain his report.

II. ANALYSIS OF LEGAL ISSUE

1. **Whether Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza Francois would be released due to lack of appropriate medical treatment**

[11] Col. Tom Byabagamba states that one of the reasons he is seeking the provisional release, is that he has illness of his back, that marching sport and swimming are his treatment, he adds that those are not possible when he remains in his detention because it is very narrow place and that swimming place cannot be found. Rtd Brig Gen Frank Kanyambo Rusagara also states that he is living with old age illness of prostate, that if he is released he can get appropriate treatment so that it may decrease.

[12] Counsel Munyandatwa S. Nkuba Milton assisting Rtd. Sgt. Kabayiza Francois, states that at the beginning of the trial, he did not cease to reveal to courts health issues of his client due to sickness caused by torture he faced after his arrestation where he states that he suffers from venous disease and high blood pressure issues (180), he suffers from those diseases in addition to his chronic disease of hepatitis B. He states that he is treated by CARAES Ndera and RMH and

that he swallows 25 tablets per day. He requests to be released especially that his penalty is about to end, he adds, the fact that the place of his detention is congested because he is staying in public cell, this disfavors him as a patient who is extremely sick, and also, the authority of prison refused him to be admitted in hospital as ordered by the physician.

[13] The court ordered that Rtd. Sgt. Kabayiza Francois is taken to the physician for examining him and prepare a report which demonstrates his current health conditions. The Prosecution stated that Rtd. Sgt. Kabayiza Francois refused to be taken to RHM, while he states that he did not refuse it, rather, he wanted to be treated at CARAES Ndera where he has always been treated. Dr. Ndahayo Ernest, the one who checked his electronic medical file, he explained to the court the content of his report, he stated that he did not himself examine Kabayiza, instead, he used other physicians'reports who treated him before. He said that Kabayiza suffers from illness which weakens his body parts of the extremity of the legs and arms, that he also suffers from illness of hepatitis B and high blood pressure issues, he further proves that those are normal illnesses and that they cannot prevent Kabayiza to work except when it requires energy, that, his symptoms do not require to be admitted in hospital except when it becomes necessary to inject medicines in veins and even in such case he would recover and return home.

[14] The accused state that they do not contend with medical treatment because they cannot consult the physicians whenever in need because sometimes the prison says that it has no means of transport, it could also delay to transport them whereas the physician often ordered some examinations, they further claim that in their medical treatment, they are not given specialist physicians of the diseases which they suffer from.

[15] With regard to that issue of medical treatment, Rtd Brig Gen Frank Kanyambo Rusagara and Counsel Buhuru Pierre Célestin assisting him, Rtd. Sgt. Kabayiza Francois and his Counsel Munyandatwa S. Nkuba Milton state that if they got provisional release, they would freely be treated because for the moment, they consult physician being accompanied by a soldier from military, consequently, they cannot talk to the doctor on their illnesses, that they do not benefit professional secret between physician and a patient which infringes on their health. They request that in case the court finds that they have to remain detained, it would order to be detained in conditions which do not infringe on their health and get appropriate medical treatment.

[16] Rtd Brig Gen Frank Kanyambo Rusagara also states that he has medical insurance of MMI, but he was denied to use it, instead he was compelled to use health insurance *scheme known as mutuelle de santé* while he cannot get some of the medicines because of that insurance or to be examined by specialists doctors. The issue is the same for Col. Tom Byabagamba who states that this issue should be analyzed in an extensive way because he finds no reason why a detained military should be removed in MMI beneficiaries as long as there is no final verdict finding him/her guilty because since he is still pleading, he is presumed to be innocent as provided by the Constitution of the Republic of Rwanda

[17] Counsel Munyandatwa S. Nkuba Milton states article 14 and 15 of the Constitution of the Republic of Rwanda provides that a human being has right to medical treatment and that a human being is sacred, but Rtd. Sgt. Kabayiza Francois was subject to violence since his arrest which caused illness he suffers from, he, therefore, requests to court the provisional release to enable him looking for a physician at his choice.

[18] The Prosecution states, the fact that the accused are sick (Rtd Brig Gen Frank Kanyambo Rusagara invokes that he suffers from an enlarged prostate) it should not result for releasing them because this motive is not provided by the law, to be relied on in deciding that the accused has to be provisionally released. It adds that the provisional release they request before the Court, they base on article 105 of the Law Nº 30/2013 of 24/5/2013 relating to the code of criminal procedure mentioned above, which is wrong, instead, they should base their request on article 184 of that law which provides that the accused may petition the Court seized of the appeal to grant him/her provisional release.

[19] With regard to the medical treatment, It states that the accused are treated properly, that there is also a physician of military police who always cares of them, concerning the issue of consulting the doctor in presence of the military in charge of security, the Court did not notice that, but the reality is that they are accompanied to the hospital and receive proper treatment.

COURT'S DETERMINATION

[20] The Court finds, getting a provisional release for the detained who is prosecuted, he/she must prove exceptional reasons, the court assesses them in relation to the particularities of the issue of the accused.

[21] Article 21 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 provides that **a**ll Rwandans have the right to good health whereas article 22 provides that everyone has the right to live in a clean and healthy environment.

[22] Article 16, paragraph one of the African Charter on Human and Peoples Rights of 27/06/1981, adopted by Rwanda on 11/11/1981 and ratified on 17/05/1983[1] stipulates that every individual shall have the right to enjoy the best attainable state of physical and mental health. Paragraph 2 stipulates that the States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

[23] Article 10, paragraph one of the International Covenant on Civil and Political Rights of 19//12/1966 adopted by Rwanda on 12/02/1975[2] stipulates that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 12 of International Covenant on Economic, Social and Cultural Rights of 19/12/1966 ratified by Rwanda on 12/02/1975[3] stipulates that The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Paragraph 2, litera d) of that article adds that the steps to be taken by the States parties to achieve the full realization of this right shall include the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[1] See the Law Nº10/1983 of 17/05/1983
[2] See Decree-Law Nº85/75 of 12/02/1975.
[3] See Decree-Law Nº85/75 of 12/02/1975.

[24] Article 25, paragraph one of the United Nations Universal Declaration of Human Rights of 10/12/1948 stipulates that Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing, and medical care and necessary social services.

[25] With regard to the rights of prisoners to health care services, this was decided about by United Nations General Assembly in its resolution A/RES/70/175 of 17/12/2015 in reviewing the standard minimum rules for the treatment of prisoners often known as Nelson Mandela rules, affirms that the rights of the prisoners include the following :

a) The provision of health care for prisoners is State responsibility. Prisoners should enjoy the same standards of health care that are available in the community. (rule 24)

b) Every prison shall have in place a health care services with qualified personnel, and paying particular attention to prisoners with special health care needs. (rule 25)

c) The health care services shall maintain an individual medical file on all prisoners and all prisoners should be granted access to their files upon request. A prisoner may appoint a third party to access his or her medical file. (rule 26)

d) All prisoners shall ensure prompt access to medical attention in urgent cases and receive appropriate treatment by specialized staff. (rule 27)

[26] With regard to the provisional release due to exceptional reasons of sickness while the case in appeal is pending, the International Criminal Tribunal for Rwanda and International Criminal Court for former Yugoslavia, all held that there is no common principle to be relied on by courts, but those special circumstances are assessed considering particularities of every case.[4] Those courts motivated that the special circumstances in which the accused is granted provisional release, have to be based on an acute justification in relation to humanity.[5]

[27] The Court finds, right to life provided by article 21 of the constitution of the Republic of Rwanda of 2003 revised in 2015, that right is implemented considering the vision undertaken by the government to ensure that people have access to medical treatment when they suffer from illness, Rwanda committed itself this responsibility in article 16, paragraph one of the African Charter on human and people's rights of 17/06/1981 and in article 12 of International Covenant on Economic, Social and Cultural Rights of the 19/12/1966, implementing this responsibility, is to give dignity to human being even for imprisoned person as provided by International Covenant on Civil and Political Rights of 19/12/1966 mentioned above.

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[4] Bagosora v. the Prosecutor, Case N°.ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File Corrigendum, 2 September 2009, para. 16; Prosecutor v. Rašić, Case No. IT-98-32/1-R77.2-A, Judgement, 16 November 2012, para. 6. See also Karemera et al. v. the Prosecutor, Case No. ICTR-98-44-A, Decision on Matthiew Ngirumpatse's Motion for Provisional Release, 11 December 2012, para. 4.

[5] Bagosora v. the Prosecutor, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File Corrigendum, 2 September 2009, para. 23; Karemera et al. v. the Prosecutor, Case No. ICTR-98-44-A, Decision on Matthiew Ngirumpatse's Motion for Provisional Release, 11 December 2012, para. 4. Karemera et al. v. the Prosecutor, Case No. ICTR-98-44-A, Decision on Matthiew Ngirumpatse's Motion for Provisional Release, 11 December 2012, para. 11.

[28] The court finds that every person has the right to social welfare so that he or she takes care of his or her health, hence, article 25 paragraph one of the Universal Declarations of Human Rights of 10/12/1948 provides that everyone is given chance to food, medical care, clothing, etc.

[29] With regard to medical care in general, it is not easy to know whether the prisoners are properly treated, but it all depends on how health care has developed in the country. It is true that prisoners face difficulties to get medical treatment because there are no sufficient medical staff in prisons and high cost of medical treatment, but concerning the present case, though the accused state that they are not contented with how authorities of the prison care their medical treatment, they do not negate to have medical treatment because Rtd Brig Gen Frank Kanyambo Rusagara has even produced before the Court the medical document which proves that he was examined by specialist physician with expertise. In addition, Rtd. Sgt. Kabayiza Francois's medical file shows that he gets treatment from reputable hospitals such as RMH, CARAES Ndera and that he was given a medical prescription to Mediheal. The issue of not consulting the physician whenever they need, the Court found it to be not permanent or particular issue because of incarceration, but this is a general concern even to others who are not imprisoned because it is due to lack of sufficient specialist medical staff, therefore, this cannot be a ground of granting them provisional release since the authority of the prison takes care of them and there is also a physician who looks after them almost on daily basis, and if needed, he seeks for them, appointments to the specialist physician of their choice.

[30] With regard to the issue for which Rtd Brig Gen Frank Kanyambo Rusagara submits that the medical secret is not respected when consulting the physician, the court finds that though the patient has right to be examined in privacy, a detained person cannot be considered as other persons, it is reasonable that he is accompanied for his security purpose and that of others as well as that of the country, that right to medical secrecy has to go hand in hand with the functions of the authority of the prison of protecting those in their custody, however, all have to be applied without violating each other.

[31] Concerning the issue raised by Col. Tom Byabagamba and Rtd Brig Gen Frank Kanyambo Rusagara that in medical treatment, the authority of the prison does not allow them to use MMI insurance which they used to have, the Court finds that the type of insurance scheme does not matter, instead, what is important is ensure that they are properly treated, before this Court, they have admitted that they are treated in Kanombe Military Hospital, one of the reputable hospitals of the country, with specialist physicians for treating various diseases, the fact that they are treated using *Mutuelle de santé* should not be ground for provisional release, because in case of need, the authority of the prison takes them where they are examined by physicians with expertise.

[32] Regarding the issue of Rtd. Sgt. Kabayiza Francois who states that due to his disease, he should not remain detained, the Court finds that in its decision of 28/06/2019, the Court needed to know his current health status, whether there is a need for hospital admission, unfortunately, in the hearing of 08/07/2019, the Court realized that he refused that order to be executed, because the one in charge to take him to the hospital, made it known to the Court that he disallowed to be examined in Kanombe hospital, that he wants to be examined by Ndera hospital and also, Rtd. Sgt. Kabayiza Francois admits for having expressed this desire whereas if he was taken to Kanombe hospital, it would have transferred him if found necessary.

[33] In addition, like his co-accused, Rtd. Sgt. Kabayiza Francois is treated by physicians, and the moment during which the Court conducted the investigation at the place of his detention, the Court checked his medical file, the file proves that he gets appointments of specialist physicians, and in the last hearing he demonstrates that he has an appointment for some tests at MEDIHEAL.

[34] The Court finds that the statements of the accused that they are not satisfied with medical treatment, there is no tangible evidence to prove that their medical care is not helpful to their health conditions, since the State cares of them as it does to other citizens, for them, they receive special treatment because they have physician of the prison who always cares of them whereas for a citizen who is not serving a sentence cannot often have access and means to be treated by specialist physicians. In addition, during Court investigation, the accused admitted that the prison allows their families to get for them medicines when the cost is higher than available means of the State, therefore, the fact that there is compliance with the provisions of the Constitution, Laws and International conventions, as well as united nations minimum standard rules mentioned above with regard to health care services for prisoners, this ground basing on the request for the provisional release due to poor health care, lacks merit.

2. Whether Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza Francois would be released due to illegal detention

[35] Counsel Buhuru Pierre Celestin assisting Rtd Brig Gen Frank Kanyambo Rusagara, Counsel Musore Gakunzi Valery assisting Col. Tom Byabagamba and Counsel Munyandatwa S.Nkuba Milton assisting Rtd.Sgt Kabayiza Francois, state that their clients are detained in a place which is not the one ordered by the court because they are now detained at Kanombe in Military police instead of military prison at Mulindi, that the Prosecution makes the wrong statement that Military prison of Mulindi was extended to Military police at Kanombe because it was not provided by any decree and that even if it was an extension, Military police should not violate the decision of the High Military Court with regard to the place of detention. They add that the place where persons are incarcerated and conditions of incarceration are governed by laws instead of the management of the prison as the Prosecution intends to convince because it would be violating the provisions of the Constitution that court decisions are binding.

[36] Counsel Buhuru Pierre Celestin and Counsel Musore Gakunzi Valery further state that their clients are incarcerated in solitary because they stay in a very narrow place and that they cannot meet any other person except a military who serves them meals, they add that the authority of Military police restructured their place of incarceration, to avoid for them to listen or meet others, including other incarcerated persons, that these are conditions of detention for almost five(5)years, they consider those conditions as mental torture whereas it is prohibited by rule 6 of standard minimum rules for the treatment of prisoners.

[37] Col. Tom Byabagamba explains that he is incarcerated in solitary because he is detained alone without any human contact, that he cannot even meet Rtd Brig Gen Frank Kanyambo Rusagara considered to be his accomplice. He wonders why he is incarcerated in such conditions whereas offences alleged to have committed are not sanctioned by imprisonment with special provisions, he adds that this is a torture they are facing since the standard minimum rules often known as Nelson Mandela rules prohibits such imprisonment conditions particularly its article 43 which provides that in no circumstances may restrictions or disciplinary sanctions amount to

torture especially that solitary confinement should not exceed time period of 15 consecutive days and article of the above-mentioned rules stipulates that prisoners shall be informed of the nature of the accusations against them, that he was unfortunately not informed of the grounds of his solitary confinement.

[38] He further states that the research of the scholars revealed that it becomes solitary confinement when a person deliberately passes 22 hours without meeting others for exchanging views for 15 consecutive days, that they realized that social isolation may cause mental disturbances than drugs.

[39] Col. Tom Byabagamba prays the Court for provisional release and be prosecuted while at liberty because rule 45 of Mandela rules prohibit that a prisoner is incarcerated in solitary confinement when he has mental disturbance or health issues because that solitary confinement may make matters worse, for him, he has demonstrated that he has got health issues.

[40] Counsel Buhuru Pierre Celestin and Rtd Brig Gen Frank Kanyambo Rusagara state that the later has another concern in relation to lack of sports facilities for prisoners (they claim that they cannot get involved in physical exercises).

[41] All appellants state that they have no rights to meet their defense counsel except during hearing sessions, that three years have elapsed without consulting them because they last met on 30/03/2016 at High Military Court, the day of the case pronouncement, the advocates were permitted since May 2019 when summoned for the case in appeal, whereas an advocate should not be denied to meet his client pursuant to the United Nations standard minimum rules for the treatment of prisoners. Rtd Brig Gen Frank Kanyambo Rusagara and Col. Tom Byabagamba also contest the prohibition of their family contact whereas article 43(3) of Mandela rules which states that disciplinary sanctions or restrictive measures shall not include the prohibition of family contact, therefore, they find no ground of restricting their family contact which is not the case for other prisoners.

[42] Counsel Buhuru Pierre Celestin states that the statement of Col. Kayigire Joseph, the Director of Military Police where the accused are detained, that the prohibition of family contact is due to misconduct of his client, Counsel Buhuru Pierre Celestin argues that this statement should not be considered because of lack of proof. In addition, article 18 of rules regulating the treatment of prisoners provides rights for the prisoner to meet his/her advocate, that for them they were allowed to meet their advocates when the hearing of the case was scheduled, he adds that the Court realized that the consultation place with their advocates lacks freedom because it is conducted in the presence of other people whereas a client should consult his advocate in absence of other persons.

[43] Counsel Musore Gakunzi Valery stressed the statement of his colleague stating that the accused has right to defense counsel as long as he pleads even if the case has become final because prohibiting to meet his client for the period of 3 years should be qualified as solitary confinement stipulated in International convention against torture(PIDCP) as well as in minimum standard rules known as Mandela rules. He concludes, praying for provisional release for his client because he can no longer influence the witnesses since the case was rendered in the first instance, that if needed, he may be subject to some obligations.

[44] Counsel Musore Gakunzi Valery states that they want to accentuate the request of their clients for provisional release as long as the case in merit is pending, he also agrees that the detention deprives rights of movement, however, he finds that the detention should not prohibit to meet other persons, he adds that the statement of the Prosecution is wrong that the place in which Rtd Brig Gen Frank Kanyambo Rusagara and Col. Tom Byabagamba are detained is due to their honour, because there are other colonels who are detained at Mulindi.

[45] The Prosecution contends that the accused are not incarcerated in solitary confinement because as found by the Court, Rtd Brig Gen Frank Kanyambo Rusagara stays in a wide place, with a bed and mattress, mosquito net, fridge, self-contained room, water and electricity, It add that doors and windows are sufficient. And that he made the wrong statement that he has no place for physical exercises because there is a wide ground in front of his room, in addition during investigation, the participants saw that he has sport bicycle, therefore they falsely state that they face torture especially that his advocate knows what torture is, the Prosecution wonders whether being detained alone should be considered as torture, It adds that as it was demonstrated, their place of detention complies with standards conditions for human health since they possess all equipment and they are also allowed to receive money from families for satisfying their needs, however, they should not ignore that incarcerated person is deprived some rights, It prays the court to consider the purpose of its investigation because the statements of the detainees have no link with the case.

[46] With regard to whether doors and windows were demolished and if there are cameras placed in the place of the detention, the Military Prosecution finds it to be not an issue since those cameras were put in place for the security purpose and that is the practice for all countries with financial resources. With regard to the issue of being detained in the extension of Mulindi Military prison, the Prosecution states that they were given special treatment because of rank, that is why they are detained in a different place with Rtd. Sgt Kabayiza Francois who is in public place. The Prosecution adds that Brig. Gen. Frank Kanyambo Rusagara was moved from Mulindi Military prison because of misconduct and to avoid his disruptive influence to other inmates because he already revealed that behavior while he was still in Mulindi Military prison.

[47] The Prosecution states that all issues in relation to the place in which the accused are detained, modalities of detention, medical treatment, etc, that the management of the prison only should bear those responsibilities since at a certain moment the authority of the prison decided to apply some conditions on them because of their conduct. Concerning the prohibition of having contacts with their families, the Prosecution states that Col. Tom Byabagamba was caught with documents that are in relation to the offenses for which they are prosecuted, that if they change behaviors, they would get previous conditions.

[48] The Prosecution argues that Rtd. Sgt Kabayiza Francois was moved from Mulindi Military prison to Kanombe Military Police for the purpose of his interests, that the management of the prison wanted him to stay near his specialist physician of Rwanda Military Hospital at Kanombe, It adds that in case he no longer desires to remain in the place, he would request Military Police to move him to Mulindi, the Prosecution concludes stating that with regard to the right of the family contact, Kabayiza regularly meets his family.

[49] The prosecution states that the accused make false statements that they are detained in isolation confinement because Military prison complies with the laws like other prisons, that it has no place for isolation confinement since it has no convicts for that penalty, that it is also false stating that they are detained in Military camp because they are detained at Kanombe, the extension of Mulindi Military prison.

[50] The Prosecution also states that the statement of Brig. Gen. Frank Kanyambo Rusagara's counsel that consultation with his client is monitored, It states that he fails to prove it, therefore it should not be considered.

COURT'S DETERMINATION

[51] Article 14(1) and (2) of the Constitution of the Republic of Rwanda of 2003 revised in 2015 provides that everyone has the right to physical and mental integrity. No one shall be subjected to torture or physical abuse, or cruel, inhuman or degrading treatment.

[52] Article 22 of that Constitution mentioned above, provides that everyone has the right to live in a clean and healthy environment.

[53] Article 44 of the United Nations standard minimum rules for the treatment of prisoners (Nelson Mandela rules) stipulates that solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.[6]

[54] Article 13 of the rules for the treatment of prisoners provides that all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating, and ventilation.

[55] The Court finds without merit the statements of Brig. Gen. Frank Kanyambo Rusagara, Col. Tom Byabagamba and that of Rtd.Sgt Kabayiza Francois, that they are detained illegally because they are incarcerated in a place different from the one ordered by the Court, that they are detained at Military police instead of Mulindi Military prison, the fact that military police watches over their security does not prove that they are detained in Military investigation cell whereas that Militay unit is also in charge of security for the convicts of Military Courts, the Military police autorities explained to Court that the accused are detained in a branch of Mulindi Military prison, with regard to rooms of incarceration, the Court is of the view that this issue should be handled by the management of the prison since it is in right position to place a prisoner where it finds appropriate considering his/her health conditions, social status conducts, background,honour, severity of the offenses, etc, these must respect his/her fundamental rights as well as human dignity, therefore, they fail to prove that they are detained in illegal place since Military police authorities and the Prosecution explained that they stay in a branch of Mulindi

[6] Mandela rules, rule 44 provides that solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

Military prison and that they were brought in that detention place due to reasonable grounds including those of facilitating Rtd. Sgt Kabayiza Francois to stay near his physicians from RMH and that for others, the management of the prison wanted to avoid Brig. Gen. Frank Kanyambo Rusagara's disruptive influence among other detainees, hence, the allegations of illegitimate detention place are groundless.

[56] Concerning the issue of solitary confinement raised by Brig.Gen. Frank Kanyambo Rusagara and Col. Tom Byabagamba, that they are facing torture, article 176 of Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code provides that torture means any act by which severe pain or suffering, whether physical or mental, inhuman, cruel or degrading, are intentionally inflicted on a person for such purposes as obtaining from him/her or a third person, especially information or a confession, punishing him/her of an act he/she or a third person committed or is suspected of having committed, or intimidating him/her or coercing him/her or a third person or for any other reason based on discrimination of any kind.

[57] International Covenant on Civil and Political Rights of 10/12/1966 ratified by Rwanda provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment whereas article 10 of the same covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

[58] The issue of isolation confinement was discussed by several persons, such as United Nations Human commission on human rights in assessing the case of Vuolanne vs. Finland suing his country stating that he was detained in isolation confinement, that committee found that it is necessary to examine particularities of each case in deciding whether being held in special cell of the prison can be qualified as torture. This committee decided that Vuolanne was not put in isolation since he was held in a room of 2×3 meters, with windows, a bed, chairs, tables and electricity and that he was allowed to work out physical exercises though he was not authorized to talk to others prisoners.[7]

[59] This position is similar to that of European Court on Human Rights in the case Rohde v.Denmark whereby the Court held that Rohde was not facing torture even though he was incarcerated alone because the applicant was kept in cell of approximately six square metres, that he was allowed to listen radio and watch television , he was allowed exercise in open air for one hour every day , he could borrow books from prison library , he was in daily contact with the prison staff several times a day and sometimes also with other persons in connection with police interrogations and the courts hearings, he was under medical observation, and finally, that although he was subjected to restrictions with regard to visits during this period, he was allowed to receive controlled visits by his familly[8], this precedent was also upheld by the same Court in

[7] Communication NO 265/1987, A. Vualanne v.Finland (view adopted on 7 April 1989), in UN doc. GAOR, A/44/40, p.249,para.2.2 and p.250, para.2.6.

[8] European commission of human right, R v. Denmark, application No10263/83, PP.153-154: Commission concluded that having regard to the particular circumstances of the confinement in question , it was not of such of such severity as to fall within the scope of article 3 of the convention, because the applicant was kept in cell of approximately six square metres, that he was allowed to listen radio and watch television , he allowed exercise in open air for one hour every day , he could borrow books from prison library , he was in daily contact with the prison staff several times a day and sometimes also with other persons in connection with police interrogations and the

the case of Ramirez Sanchez vs France, the case adjudicated by 17 judges and found out that when a detained person possesses room materials with sufficient space, toilet, bathroom, books and newspapers, television and radio, walking place, in such conditions he/she is treated with humanity and with respect for the inherent dignity of the human person, that being held alone in detention place should not merely be considered as an inhuman act. The judges also found, the fact that a detained person used to meet a priest once a week and once a month with his defense counsel, he was not detained in total isolation confinement, that he was not in partial isolation.[9]

[60] In its assessment on the case of Gomez de Voituret vs Uruguay, United Nations Commission on human rights qualified his incarceration as torture since the applicant was incarcerated alone for 7 months and natural lighting could not reach his room, hence there was no respect of the dignity of human person, therefore they concluded that article 10(1) of the International Covenant on Civil and Political Rights[10] was violated.

[61] The court finds, in light of the precedents of the foreign courts mentioned above and assessments of the United Nations Commission on Human rights on the cases adjudicated by those courts whereby courts were seized by applicants claiming to be victims of torture because they are detained in solitary confinement, in the case at hand, the court examines whether Rtd. Brig. Gen. Frank Kanyambo Rusagara and Col. Tom Byabagamba's statements that they are incarcerated in solitary confinement can be qualified as torture before Rwandan laws and international conventions ratified by Rwanda.

[62] In court investigation carried out on the detention place, the Court found that Col. Tom Byabagamba and Brig. Gen. Frank Kanyambo Rusagara can satisfy primary needs for a detained person because each one of them stays in a self-contained room with sufficient space, a bed and mattress, mosquito net, water and electricity, windows and doors, they also have space where they can get sunlight. It was also found that cleanliness and washing are done for them, they also have a sports bicycle, in addition, Col. Kayigire Joseph, chief of Military Police explained that the accused get money from families to enable them to satisfy their needs. The Court further finds the statements of the accused of not having human contact cannot be taken into consideration, because they meet prison staff, physician who regularly treats them and in case of need they are taken to hospital, they were also given a military who helps for any arrangement including cooking and serving them meals.

[63] With regard to family contact, Col. Kayigire Joseph stated that the prisoners meet their families in accordance with regulations of the prison, that a detained person may not benefit visit when his/her family did not request so because no one is denied that right, he adds that some changes were put in place for Rtd. Brig. Gen. Frank Kanyambo Rusagara and Col. Tom Byabagamba due to their misconduct, that in case they change the behaviours, the opportunity for the visit will be extended, therefore it is implied and understood that they are not detained in solitary confinement.

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courts hearings, he was under medical observation , and finally , that although he was subjected to restrictions with regard to visits during this period, he was allowed to receive controlled visits by his familly.

[9] *Cour europpenne des droits de l'homme, requête No 59450/00: l'exclusion d'un détenu de la collectivité carcérale ne constitue pas en elle-même une sorte de traitement inhumain*

[10] Communication N°109/1981, T. Gomez de Voituret v. Uruguay (views adopted on 10 April 1984) in UN doc. GAOR, A/39/40, p.168, paras.12.2-13.

[64] However, the Court finds, considering the rules governing the management of the prisons, part five, rule 37 provides that prisoners have the right to supervised family and friends contact whether by writing or by visit, therefore, Col. Tom Byabagamba and Rtd. Brig. Gen. Frank Kanyambo Rusagara have to get back the rights to family contact in accordance with regulations of the prison in which they are incarcerated.

[65] The Court finds, the fact that Col. Tom Byabagamba, Rtd. Brig. Gen. Frank Kanyambo Rusagara are detained separately, it should not be considered itself as torture basing on above motivations because their incarceration complies with the dignity of the human person contrary to the court findings in the case of Gomez de Voituret who sued his country Uruguay because natural lighting could not reach his room as motivated above.

[66] In light of the foregoing, the Court holds that the provisional release requested by the accused can be granted because the grounds of the request lack merit.

III. THE DECISION OF THE COURT

[67] Finds Col. Tom Byabagamba, Rtd. Brig. Gen. Frank Kanyambo Rusagara and Rtd.Sgt Kabayiza Francois's objections without merit.

[68] Holds that Col. Tom Byabagamba, Rtd. Brig. Gen. Frank Kanyambo Rusagara and Rtd.Sgt Kabayiza Francois proceeds their appeal being detained.

[69] Orders that Col. Tom Byabagamba and Rtd. Brig. Gen. Frank Kanyambo Rusagara be given back rights for the family contact with due respect of regulations and management of the prison.

[70] The hearing of the case on merit is adjourned to 24 July 2019.

[71] Holds that the Court fees are suspended.