

## PROSECUTION v. HAKIZIMANA ET AL

[Rwanda HIGH COURT – RPA 0735/13/HC/KIG, RPA 0750/13/HC/KIG, RPA 0766/13/HC/KIG (Uwamariya P.J.) June 13, 2014]

*Criminal Law – Concurrence of offences – Determining Penalty – In case of concurrence of offences, the most severe penalty shall apply – Organic Law<sup>o</sup> 01/2012/OL of 02/05/2012 instituting the penal code, article 84.*

*Criminal Law – Mitigating excuses – Minority – When the offender got the mitigating excuse basing on his/her minority, the penalty to be inflicted to him/her cannot go beyond the half of the penalty that he/she would have been sentenced to if he/she was adult.*

*Criminal Law – Suspension of sentence – It shall not apply in case the principal penalty does exceed 5 years of imprisonment.*

**Facts:** Hakizimana, Rugero, Mugirwanake and others who did not appeal were accused before the Intermediate Court of Nyarugenge for attempted embezzlement of public property and complicity in attempted embezzlement of public property, theft without violence or threat and complicity in theft without violence or threat, forgery and complicity in forgery. The Court sentenced Hakizimana Pascal to five (5) years imprisonment and the fine of 1,710,000Frw, ten (10) years of imprisonment and the fine of 4,255,000Frw to Rugero Etienne while Mugirwanake Zawadi was sentenced to two (2) years of imprisonment and the fine of 1,710,000Frw.

Not satisfied, they appealed to the High Court. Mugirwanake and his counsel explained that he appealed so that he may get lower penalty as he pleaded guilty and sought forgiveness. He was also requesting the suspension of his sentence basing on the fact that he is sick. Furthermore, he stated that he is minor and should be released for him to be cared. As for Hakizimana, he argues that he appealed because he was sentenced to the severe penalty while he pleaded guilty. Concerning Rugero, he stated that he appealed because the Court treated him differently from his accomplices and inflicted on him the most severe penalty, resulting from the fact that the judge did not consider his defence. He requested the reduction of the penalty and its suspension.

Concerning Hakizimana and Mugirwanake, the prosecution contends that the penalty inflicted on them is not severe, considering the offence they committed. He explained that Mugirwanake benefited the penalty reduction basing on his minority status and his guilty plea. The prosecution added that Rugero could not get the penalty reduction because he was a recidivist.

**Held:** 1. The offences Mugirwanake Zawadi committed constitute the concurrence of offences. Among the offences he committed, the one punishable to the highest penalty is the embezzlement of the public property. Therefore, as he should have been sentenced to ten years of imprisonment and the fine of 1,400,000Frw, basing on his minority status, he is sentenced to five (5) years of imprisonment and fine of 700,000Frw. Furthermore, the fact that there are some mitigating circumstances, the High Court finds right and reasonable two years of imprisonment he was sentenced to, considering the offence he committed.

2. However, as Mugirwanake proved to be sickly and the first offender, the court finds that two years of imprisonment sentenced to him could be suspended of six months for one year, and he could serve one year and half in prison.

3. The fact that Hakizimana Pascal should have been sentenced to ten years of imprisonment instead of 5 years imprisonment that was inflicted to him, the Court finds that he got the lenient sentence for the person benefiting the penalty reduction based on mitigating circumstances. Thus, the penalty must be upheld. With regards to the sentence suspension, although his penalty is within the range provided by the law: not being beyond five years of imprisonment, the Court finds that in eyes of the public, it would be considered as the way to support thieves or those who attempt to steal or/and destroy the citizen's property. Thus, Hakizimana must serve his penalty in prison.

4. Though Rugero appeared as a witness in the first instance court and stated that people plotted to incriminate him but pleaded guilty later on, the court finds that it cannot be considered in reducing his penalty because even in case he would have not pleaded guilty, there were other incriminating evidences. The fact that the offences Rugero committed constitute concurrence of offences whereas the highest penalty of forgery is seven (7) and ten (10) years of imprisonment in case of embezzlement of public property, and he was sentenced to ten (10) years imprisonment, the court finds that he was not discriminated from others as he alleges, rather, he was punished according to the provisions of the law. Thus, his penalty must be upheld. With regards to the suspension of the sentence, it is not legally possible, as his penalty is beyond five (5) years of imprisonment.

**Appeal of Mugirwanake Zawadi has merit in part.**

**Mugirwanake Zawadi is sentenced to two years of imprisonment and fined 700,000Frw, he shall serve one year and a half of imprisonment and six months are suspended during one year.**

**Appeal of Hakizimana is without merit.**

**Appeal of Rugero is without merit.**

**Penalty previously inflicted to Hakizimana and Rugero is upheld.**

**Court fees charged to the public treasury.**

**Statutes and statutory instruments referred to:**

Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, articles 78 and 84.

**No case referred to.**

## **Judgment**

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

[1] In case RP 0086/13/TGI/NYGE the Intermediate Court of Nyarugenge convicted Ndayambaje Pierre, Nyandwi Dismas, Mugirwanake Zawadi, Hakizamungu André and Rugero Etienne for having attempted embezzlement of public property and complicity in attempted embezzlement of public property, theft without violence or threat and complicity in theft without violence or threat, forgery and complicity in forgery. The Court sentenced Ndayambaje Pierre, Nyandwi Dismas, Hakizamungu André and Hakizimana Pascal to five (5) years imprisonment and the fine of 1,710,000Frw each, ten years of imprisonment and the

fine of 4,255,000Frw to Rugero Etienne while Mugirwanake Zawadi was sentenced to two (2) years of imprisonment and the fine of 1,710,000Frw.

[2] Not pleased, Hakizimana Pascal, Rugero Etienne and Mugirwanake Zawadi appealed to the High Court. Mugirwanake and his counsel explained that he appealed, for him to get lenient penalty as he pleaded guilty and sought forgiveness. He was also requesting the suspension of his sentence basing on the fact that he is a sickly person. Furthermore, he added, he is minor and should be released, for him to get care. As for Hakizimana, he argues that he appealed because he was sentenced to the severe penalty while he pleaded guilty. Concerning Rugero, he stated that he appealed because the Court treated him differently from his accomplices and inflicted on him the most severe penalty, resulting from the fact that the judge did not consider his defence. He requested the reduction of the penalty and its suspension.

[3] Concerning Hakizimana and Mugirwanake, the prosecution contends that the penalty inflicted to them is not severe, considering the offence they committed. He explained that Mugirwanake got penalty reduction basing on his minority status and on his guilty plea. The prosecution added that Rugero could not get the penalty reduction because he was a recidivist.

The issues to be analysed in this case are whether Mugirwanake Zawadi could once again benefit the penalty reduction and the sentence suspension; whether Hakizimana Pascal could get the penalty reduction and whether Rugero could benefit the reduction of the penalty and its suspension.

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

### **Whether Mugirwanake Zawadi could benefit from penalty reduction and sentence suspension.**

[4] Mugirwanake Zawadi and his counsel state that he appealed because he was sentenced to severe penalty. He argues that he keeps on seeking forgiveness although the Court reduced his penalty, requesting for another penalty reduction with sentence suspension because he suffers from the illness that obliges him to regularly get the blood transfusion. They request the Court to consider the law relating to the right and protection of the child during the case deliberation, for him to join the family and get care.

[5] The prosecution contends that the penalty inflicted to him is not severe, considering the offence he committed and that he got mitigating excuse based on his minority status. He emphasised that to request for another penalty reduction is not a mistake in the appealed judgment and regarding the sickness, the prison may facilitate him to get medical care. Furthermore, the prosecution contends that the Court did not disregard the fact that he is minor, instead, he was sentenced to the lenient sentence comparing to his accomplices. With regards to the suspension of the sentence, the prosecution stated that the judge is not obliged to grant it.

[6] As found by the Intermediate Court, the court finds that offences Mugirwanake Zawadi committed constitute the concurrence of offences. Among the offences he committed, the one punishable to the highest penalty is the embezzlement of the public property,

sentenced from seven (7) years up to ten (10) years of imprisonment<sup>1</sup> and the fine of two to five times of the value of the embezzled or destroyed property.

[7] The Court finds the fact that Mugirwanake Zawadi should have been sentenced to the imprisonment and fine, he has to benefit the mitigating excuse based on his minority status. Thus, the penalty to be inflicted to him should not exceed the half of the penalty that should have been inflicted to him if he had been adult. The fact that Mugirwanake Zawadi is found guilty of the complicity in attempted embezzlement of the public property, theft without violence or threat and forgery, the court finds that he should have been sentenced to ten years of imprisonment and the fine of five times of the money he intended to steal; equalling to 1,400,000Frw pursuant to the provisions of article 84 of the Organic Law instituting the penal code. However, the fact that Mugirwanake is minor implies that his penalty to be reduced for him to be sentenced to five years of imprisonment and the fine of 700,000Frw. The fact that there is also mitigating circumstances, the Court relied on article 78 paragraph 4 of the Organic Law in reducing his penalty and he could get penalty reduction up to two months. At this point, the law precises the lowest penalty that the judge may not go below but does not for the highest. Thus, it is right to have sentenced Mugirwanake Zawadi to two years of imprisonment and the court finds it reasonable considering the offence he committed.

[8] However, as Mugirwanake proved that he is the sickly man and as the first offender, the court finds that six months of two years of imprisonment could be suspended of one year, for him to serve one year and a half in prison.

#### **Whether Hakizimana Pascal could benefit the penalty reduction**

[9] Hakizimana explains that he appealed because he was sentenced to the severe penalty while he pleaded guilty, explaining the way he committed the offence and revealed the perpetrators. He requests for the reduction of the penalty and its suspension.

[10] The prosecution states that Hakizimana was not sentenced to severe penalty considering the offence he committed, that his penalty was sufficiently reduced and no legal provision was disregarded. With regards to the suspension of the penalty, the prosecutor stated that it would be without merit.

[11] The fact that Hakizimana Pascal should have been sentenced to ten years of imprisonment instead of 5 years imprisonment that was inflicted to him, the Court finds that he got the lenient sentence for the person benefiting the penalty reduction based on mitigating circumstance. Thus, it must be upheld.

[12] With regards to the sentence suspension, although it is provided by the law as the penalty is less than five years of imprisonment<sup>2</sup>, the Court finds that in the eyes of the public, it would be like the way of encouraging the thieves or those who attempt to steal or destroy the citizen's property. Thus, Hakizimana must serve his penalty in prison.

#### **Whether Rugero could benefit the reduction of the penalty and its suspension**

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<sup>1</sup>See article 325 of the Organic Law n° 01/2012/OL of 02/5/2012 instituting the penal code.

<sup>2</sup>Article 85 paragraph 1 of Organic Law n° 01/2012/OL of 02/5/2012 instituting the penal code states: "For the purposes of this Organic Law, the suspension of penalty is a judge's decision to order the stay of execution of a penalty of imprisonment not exceeding five (5) years if the convict has not been previously sentenced to imprisonment or to community service as an alternative penalty to imprisonment of more than six (6) months as a result of a final judgment".

[13] Rugero stated that he appealed because he was sentenced to heavy penalty; that the Court treated him differently from his accomplices and did not consider his defence and evidences he provided. He keeps on stating that he pleaded guilty and explained the way the offence was committed, and the person who brought the cheque admitted it. He acknowledges to have signed on the cheque, forging signatures found on copies of cheques used in payment by the responsible of the mutual health insurance of Kayenzi. He requests the Court to have mercy on him by reducing and suspending his penalty, because after being imprisoned, his wife died in accident and his kids do not have anybody to look after them.

[14] The prosecution contends that Rugero was sentenced to ten years of imprisonment because he pleaded not guilty and the prosecution had not prosecuted him. He added that it is good for him to tell the truth but it cannot serve as a mitigating circumstance because he is a recidivist.

[15] Although on 24 July 2013, in the public hearing of the previous court, Rugero appeared as a witness and stated that people plotted to incriminate him, but pleaded guilty on 25 July 2014, the court finds that it cannot be considered in reducing his penalty because even in case he would have not pleaded guilty, there would be other incriminating evidence. Furthermore, considering the way the offence was committed as explained by people who were given the cheques, it is clear that he was master in what he was doing as if he was experienced enough. When the bank refused to give them money because of doubt on signatures, he advised them to go to another agency. Another evidence proving that he was master in the offence was the time when "Union des Banques Populaires" refused to give them money and Rugero called them requesting signatures as explained by Hakizimana Pascal, while he knew that he was the one who forged the signature on the cheque.

[16] As found by the Intermediate Court, there were concurrence of offences. The highest penalty of forgery is seven (7) while and in case of embezzlement of public property it is ten (10) years. The court finds that he was not differentiated from others when he was sentenced to ten years of imprisonment as he states, but rather, he was punished according to the provisions of article 84 of Organic Law n<sup>o</sup> 01/2012/OL of 02/5/2012 instituting the penal code stating that "If an offender would receive several penalties of imprisonment or fine as a result of one or several acts, the judge shall apply the most severe penalty and increase its duration or the amount depending on the circumstances of the offences, but not exceeding half (1/2) in addition to the maximum of the most severe penalty". By this article, the judge may add five more years of imprisonment to ten years of imprisonment inflicted on him. For all the above explanations, the court finds that the penalty cannot be reduced; therefore, it must be upheld.

[17] With regards to the suspension of the sentence, it is not legally possible, as his penalty is beyond 5 years of imprisonment.

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

[18] Finds the appeal of Mugirwanake Zawadi with merit in part while the one of Hakizimana Pascal and Rugero Etienne lacks merit.

[19] Decides that the penalty of Mugirwanake Zawadi changes. He is sentenced to two (2) years of imprisonment and the fine of seven hundred thousand Rwandan francs

(700,000Frw), but he must serve one year and a half in prison as six months are suspended for a year.

[20] Decides that the penalty of Hakizimana Pascal and Rugero Etienne is upheld.

[21] Orders the court fees to be charged to the public treasury as Hakizimana Pascal and Rugero Etienne who appealed are in jail.