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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 3 - 2019 Nyakanga, 2019



RWANDA LAW REPORTS

Law Report, V. 3 - 2019 July, 2019





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ABAGIZE KOMITE Y'UBWANDITSI

ITSINDA RY'ABANYAMATEGEKO BATEGUYE IMANZA

KAGABO U. Stephanie

KAVUTSE M. Claude

KUBWIMANA Jean Claude

MUJABI K. Naphtal

MWIHOREZE Claudine

KOMITE YEMEZA IMANZA

Prof. Dr. NGAGI M. Alphonse: Perezida wa Komite

Umucamanza mu Rukiko

rw'Ubujurire

Dr. MUHIRE G. Yves : Visi Perezida wa Komite

Umwalimu muri

Kaminuza y'u Rwanda

Dr. KARIMUNDA M. Aimé : Perezida w'Urukiko

rw'Ubujurire

NDAHAYO Xavier : Perezida w'Urukiko Rukuru

RUTAZANA Angeline : Visi Perezida w'Urukiko

Rukuru rw'Ubucuruzi

NGENDAKURIYO Alice : Umwanditsi wa Komite,

Umugenzuzi w'Inkiko

BAGABO Faustin : Avoka mu Rugaga

rw'Abavoka

BWIZA N. Blanche : Umugenzuzi w'Inkiko

GIRANEZA Clémentine : Umucamanza mu Rukiko

Rwisumbuye

HABARUREMA Jean Pierre : Umushinjacyaha ku

Rwego rw'Igihugu

KALIWABO Charles: Umucamanza

w'Urukiko rw'Ubujurire

Dr. KAYIHURA Didas : Umuyobozi wa ILPD

KIBUKA Jean Luc : Umucamanza mu Rukiko

Rukuru rw'Ubucuruzi

Lt. col. MADUDU A. Charles : Umucamanza mu Rukiko

Rukuru rwa Gisirikare

MUREREREHE Saouda : Umucamanza mu Rukiko

Rukuru

BUNYOYE Grace : Umushinjacyaha ku rwego

rw'Igihugu

KABIBI Specioza : Intumwa ya Leta

RUKUNDAKUVUGA F. Regis : Umucamanza mu Rukiko rw'

Ikirenga

UWANTEGE Yvette : Perezida w'Urukiko

Rwisumbuye

IRIBURIRO

Basomyi bacu,

Nkuko bisanzwe, Urwego rw'Ubucamanza runejejwe no gutangaza nomero ya gatatu y'Icyegeranyo cy'Ibyemezo by'Inkiko mu mwaka wa 2019.

Dukomeje kubashimira, ko mudahwema kutugezaho ibitekerezo byanyu, munatwereka aho mwifuzako hanozwa kurushaho. Ibi bizatuma turushaho kubagezaho Icyegeranyo gikozwe neza kandi gifitiye akamaro abantu b'ingeri zitandukanye bahura n'ibibazo by'amategeko mu mwuga wabo.

Muri iyi nomero y'Icyegeranyo cy'Ibyemezo by'Inkiko murasangamo, imanza zirindwi (7) harimo rumwe (1) rwerekeranye n'imiburanyishirize, mu gihe izindi esheshatu (6) ari izi zikurikira: imanza ebyiri (2) z'ubucuruzi, imanza ebyiri (2) nshinjabyaha, urubanza rumwe mbonezamubano n'urundi rumwe (1) rurebana n'ikirego gisaba kwemeza ko itegeko rinyuranye n'Itegeko Nshinga.

Tuboneyeho kubibutsa ko imanza ziri muri iki cyegeranyo ziboneka no kurubuga rwa murandasi rw'Urukiko rw'Ikirenga ruborohereza kubona urubanza mukeneye mu buryo bwihuse, munyuze kuri http://decisia.lexum.com/rlr/kn/nav.do.

Prof. RUGEGE Sam Perezida w'Urukiko rw'Ikirenga akaba na Perezida w'Inama Nkuru y'Ubucamanza

IBIKUBIYE MURI IKI CYEGERANYO

Iki cyegeranyo gikubiyemo imanza zaciwe n'Urukiko rw'Ikirenga n'Urukiko rw'Ubujurire zikoreshwa hakurikijwe inyito ivugwa hasi.

INYITO

Imanza ziri muri iyi volime zikoreshwa muri ubu buryo: [2019] 3 RLR

AMATEGEKO YASHINGIWEHO

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 4,10,15,17,18,38,41,97,98 niya 10811
Itangazo Mpuzamahanga ku Burenganzira bwa Muntu ryo 1948, ingingo ya 1911
Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki, ingingo ya 1911
Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, Ingingo ya 9, 147 niya 153
Ingingo ya 1498
Itegeko $N^{\circ}68/2018$ ryo ku wa $30/08/2018$ riteganya ibyaha n'ibihano muri rusange, ingingo ya 2, igika cya 1, agace ka 5.176
Itegeko N°30/2013 ryo kuwa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 85 na 165
Itegeko №54/2011 ryo ku wa 14/12/2011 ryerekeye uburenganzira bw'umwana n'uburyo bwo kumurinda no kumurengera11
Itegeko Nº17/2010 ryo ku wa 12/5/2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa mu Rwanda, ingingo ya 36135
Itegeko N°10/2009 ryo ku wa 14/5/2009 ryerekeye ubugwate ku mutungo utimukanwa, ingingo ya 19 n'iya 24135

IMANZA ZIFASHISHIJWE

European Court of Human Rights, Handyside v. United Kingdom, Judgment of 7 Dec. 1976, Series A No. 24
Joseph Burstyn, Inc. v. Wilson, U.S. Supreme Court, 343 U.S. 495 (1952)12
Joseph Shine v Union of India 2018 SCC Online SC1676 delivered on 27 September, 201812
Re Uwinkindi, RS/INCONST/PEN0005/12/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 22/02/201312
Ubushinjacyaha v. Ndungutse, RPA0042/14/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 02/06/2017160
Ubushinjacyaha v. Nyirahabimana, RPA0229/10/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 19/09/2014160
UN Human Rights Committee, Communication N°414/1990, Mika Miha v. Equatorial Guinea, Views adopted on 8 July 199412

AMAGAMBO MPINE

 Inyungu – Inyungu zisanzwe n'iz'ubukererwe – Mu gihe uwahawe inguzanyo atabashije kwishyura kandi yaratanze ingwate yishingira inguzanyo, inyungu zisanzwe n'iz'ubukererwe ntizikwiye gukomeza kubarwa. ARLCOM Ltd N'UNDIV. ECOBANK RWANDA Ltd.
Amategeko agenga ibimenyetso — Inyandiko ihinnye y'urubanza - Inyandiko ihinnye y'urubanza si incarubanza, ariko ni ikimenyetso kidashidikanywaho ko habaye urubanza hagati y'ababuranyi kandi yerekana icyemezo cyarufashwemo. MUKARWEGO N'ABANDI v. NGIRIYABANDI95
Kwemera icyaha — Buri gihe kwemera icyaha ntibiba ikimenyetso ntakuka gihagije cyashingirwaho mu kwemeza ko uregwa ahamwa n'icyaha akurikiranyweho — Kuba uregwa yemera icyaha ubundi akagihakana bishyira inshingano ku Bushinjacyaha zo gutanga ibindi bimenyetso bishyigikira ukwemera icyaha k'uregwa. UBUSHINJACYAHA v. DUSABIMANA
Ibimenyetso – Gukekwaho icyaha – Kuba uregwa n'uwahohotewe (victim) bari basanzwe bafitanye amakimbirane ntago ubwabyo byafatwa nk'ikimenyetso gihamya icyaha. UBUSHINJACYAHA v. SIBOMANA
Amategeko agenga imiburanishirize y'imanza mbonezamubano – Ubujurire – Kurega uwo mwari mufatanije urubanza – Kugirango umuntu arege undi mu

bit my	jurire, agomba kug ashoboka kugira ii vari mufatanyije u SHIMWE v. MU	nyungu ukuri rubanza. mu	kirana mu b nkiko zibar	oujurire ku nza.	wo
Igi kib baı	aburanyi benshi he hari ababura buranwa, ubujurir ndi, n'iyo baba bat SHIMWE v. MU	nyi benshi e bw'umwe taje mu rubar	basangiye bugira ing nza	inyungu garuka no	ku ku
cya nta	ubanza rwabaye n amaze gufatwaho kuka n'ikosa, riko U KARWEGO N'	icyemezo sorwa nuko i	mu ruba urwo rubanz	nza rwaba za rukurwa	aye ho.
w'ige rw ite: risl w'	Gutesha agad Inkiko yarateje magaciro rya abagenagaciro, ni shwa agaciro – Ite hyiraho kandi igenagaciro ku ni ningo ya 36	cyamunara teshejwe i impamvu iti geko Nº17/20 rikagena	ingwate a agaciro uma cyamu 010 ryo ku imikorere	ashingiye n'Urwe nara yakoz wa 12/5/20 y'umwi	ku ego we 010 uga
NY	/IRANJANGWE ABANDI				
Un bir icy bya abo	Nshinga — Ibiko nushingamategeko nwe bibangamira raha gihanishwa aba bifitanye isano o byangirije kuba b regera indishyi cya	ashobora inyungu rus igihano cy'i o n'amasezer oakoresha n'i	gufata ibik sange akage gifungo ka ano kandi i nzira y'imb	torwa bim ena ko big abone nub byo ntibibi onezamuba	we ize wo uza ano

Re MUGISHA1
Ingaruka z'igihano cy'igifungo ku muryango – Ingaruka z'igihano cy'igifungo ku muryango ntizikwiye gushingirwaho havanwaho ingingo ziteganya icyo gihano, kuko igihano cy'igifungo gitangwa hagamijwe gutanga urugero rutuma abantu batishora mu byaha, kigamije guhana, kugorora no kwigisha. Re MUGISHA
Ubwisanzure bw'umuryango — Ubwisanzure bw'umuryango ntabwo ari ugukora icyo buri wese ashaka, gishobora kubangamira umudendezo n'umutekano w'abagize umuryango — Itegeko nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 18. Re MUGISHA
Ubwisanzure bw'itangazamakuru n'ubwo kugaragaza ibitekerezo — Kubijyanye n'ubwisanzure bw'itangazamakuru n'ubwo kugaragaza ibitekerezo, umuntu afite uburenganzira bwo gutanga ibitekerezo ku mihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo ndetse nubwo gushaka nugukwirakwiza amakuru n'ibitekerezo mu ruhame birebana niryo idini akaba yanabinenga, apfa kudakora ibibujijwe n'ingingo ya 38 y'Itegeko Nshinga. Re MUGISHA
Kureka ikirego kirebana n'icyaha cy'ubusambanyi – Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho

akareka ikirego cye – Kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no kuwakoranye icyaha n'uregwa.

Re MUCISHA

Re MUGISHA1
Gutandukanya abantu — Gutandukanya abantu ubwabyo ntabwo ari ivangura cyangwa kutareshyeshya abantu imbere y'amategeko, bishobora gukorwa iyo hari impamvu igaragara irengera abari mu cyiciro cy'abanyantege nke,iyo mpamvu igomba kuba igaragarira buri wese (objective justification or legitimate objective) kandi bikaba biri mu rugero urebye uburyo bwakoreshejwe mu kugera ku ntego cyangwa ikigamijwe. Re MUGISHA
Gutanga ibitekerezo no gutangaza amakuru ku bikorwa n'abayobozi – Kugaragaza ibitekerezo no gutangaza amakuru ku bikorwa n'abayobozi, bushimangira ihame rya demokarasi ryo gukorera mu mucyo no kubazwa inshingano ku byo abayobozi bakorera abaturage Re MUGISHA
Ubwisanzure bw'itangazamakuru n'ubwo kugaragaza ibitekerezo – Amakuru cyangwa ibitekerezo byemewe gutangazwa ntibigomba gusa kuba ari ibishimisha ubuyobozi cyangwa bidafite abo bibangamiye, ahubwo ibitanogeye ubutegetsi na bamwe mu baturage bikwiye kwemerwa kuko iyo hatari ibitekerezo binyuranye, ubworoherane no gutekereza byagutse, demokarasi iba idashoboka.
Re MUGISHA 1

IMANZA ZISABA GUKURAHO AMATEGEKO ANYURANYIJE N'ITEGEKO NSHINGA

Re MUGISHA

[Rwanda URUKIKO RW'IKIRENGA – RS/INCONST/SPEC00002/2018/SC (Rugege, P.J., Kayitesi Z, Mutashya, Kayitesi R na Cyanzayire, J.) 24 Mata 2019]

Itegeko Nshinga — Ibikorwa bibangamira inyungu rusange — Umushingamategeko ashobora gufata ibikorwa bimwe bimwe bibangamira inyungu rusange akagena ko bigize icyaha gihanishwa igihano cy'igifungo kabone nubwo byaba bifitanye isano n'amasezerano kandi ibyo ntibibuza abo byangirije kuba bakoresha n'inzira y'imbonezamubano baregera indishyi cyangwa iyubahirizwa ry'amasezerano.

Itegeko Nshinga — Ingaruka z'igihano cy'igifungo ku muryango — Ingaruka z'igihano cy'igifungo ku muryango ntizikwiye gushingirwaho havanwaho ingingo ziteganya icyo gihano, kuko igihano cy'igifungo gitangwa hagamijwe gutanga urugero rutuma abantu batishora mu byaha, kigamije guhana, kugorora no kwigisha.

Itegeko Nshinga — Ubwisanzure bw'umuryango — Ubwisanzure bw'umuryango ntabwo ari ugukora icyo buri wese ashaka, gishobora kubangamira umudendezo n'umutekano w'abagize umuryango — Itegeko nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 18.

Itegeko Nshinga — Ubwisanzure bw'itangazamakuru n'ubwo kugaragaza ibitekerezo — Kubijyanye n'ubwisanzure bw'itangazamakuru n'ubwo kugaragaza ibitekerezo, umuntu afite uburenganzira bwo gutanga ibitekerezo ku mihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo ndetse nubwo gushaka nugukwirakwiza amakuru n'ibitekerezo mu ruhame

birebana niryo idini akaba yanabinenga, apfa kudakora ibibujijwe n'ingingo ya 38 y'Itegeko Nshinga.

Itegeko Nshinga – Kureka ikirego kirebana n'icyaha cy'ubusambanyi – Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye – Kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no kuwakoranye icyaha n'uregwa.

Itegeko Nshinga — Gutandukanya abantu — Gutandukanya abantu ubwabyo ntabwo ari ivangura cyangwa kutareshyeshya abantu imbere y'amategeko, bishobora gukorwa iyo hari impamvu igaragara irengera abari mu cyiciro cy'abanyantege nke,iyo mpamvu igomba kuba igaragarira buri wese (objective justification or legitimate objective) kandi bikaba biri mu rugero urebye uburyo bwakoreshejwe mu kugera ku ntego cyangwa ikigamijwe.

Itegeko Nshinga — Gutanga ibitekerezo no gutangaza amakuru ku bikorwa n'abayobozi — Kugaragaza ibitekerezo no gutangaza amakuru ku bikorwa n'abayobozi, bushimangira ihame rya demokarasi ryo gukorera mu mucyo no kubazwa inshingano ku byo abayobozi bakorera abaturage

Itegeko Nshinga — Ubwisanzure bw'itangazamakuru n'ubwo kugaragaza ibitekerezo — Amakuru cyangwa ibitekerezo byemewe gutangazwa ntibigomba gusa kuba ari ibishimisha ubuyobozi cyangwa bidafite abo bibangamiye, ahubwo ibitanogeye ubutegetsi na bamwe mu baturage bikwiye kwemerwa kuko iyo hatari ibitekerezo binyuranye, ubworoherane no gutekereza byagutse, demokarasi iba idashoboka.

Incamake y'ikibazo: Nyuma y'uko hatangajwe mu Igazeti ya Leta Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, Me Mugisha yatanze ikirego mu Rukiko rw'Ikirenga asaba urwo Rukiko kwemeza ko ingingo ya 233, 236, 136, 138, 154 n'iya 139 ziryo tegeko zinyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15, 18 na 38. Akomeza avuga ko izo ngingo zisabirwa kuvanwaho ziri mu byiciro bibiri: icyiciro cya mbere kigizwe n'ingingo eshatu iya 154, 233 n'iya 236 naho icyiciro cya kabiri nacyo kikaba kigizwe n'ingingo eshatu iya 136,138 n'iya 139.

Intumwa ya Leta yatanze inzitizi yo kutakira ikirego ku mpamvu z'uko urega nta nyungu afite zo kugitanga. Ku wa 18/03/2018, Urukiko rwafashe icyemezo kuri iyo nzitizi, rwemeza ko afite inyungu yo gutanga ikirego gisaba kwemeza ko ingingo z'itegeko zinyuranyije n'Itegeko Nshinga kandi kubera uburemere bw'ibibazo biri muri uru rubanza Urukiko rwasabye ko abantu n'ibigo cyangwa imiryango itegamiye kuri Leta bifuza gutanga ibitekerezo muri uru rubanza nk'inshuti z'urukiko (Amicus Curiae) kandi babifitiye ubumenyi babisaba, mubabisabve Urukiko rwemeza ko ARI (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda), Impuzamiryango PRO-FEMMES / TWESE HAMWE n' Ishuli ry'Amategeko rya Kaminuza y'u Rwanda (School of Law), aribo bagomba kwitaba urukiko mu iburanisha ry'uru rubanza nk'inshuti z'urukiko.

Ku ngingo urega yashyize mu cyiciro cya kabiri arizo iya 136 iteganya ko umuntu wese washyingiwe ukorana imibonano mpuzabitsina n'uwo batashyingiranywe, aba akoze icyaha ,138 iteganya ko umuntu ubana nk'umugabo n'umugore n'uwo batashyingiranywe umwe muri bo cyangwa bombi bafite uwo bashyingiranywe, aba akoze icyaha n'iya 139 iteganya ko umwe

mu bashyingiranywe uta urugo rwe mu gihe kirenze amezi abiri (2) nta mpamvu zikomeye akihunza ibyo ategetswe, aba akoze icyaha, Urega avuga ko izo ingingo zinyuranyije n'ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda, kuko ziteganya igihano cy'igifungo kuri umwe mu bashakanye, wahamijwe icyaha cy'ubusambanyi, ubushoreke cyangwa se guta urugo, kandi umuryango udashobora kurengerwa cyangwa ngo ugire ubwisanzure, umwe mu bawugize afunze ,cyane cyane ko ingingo ya 18 y'Itegeko Nshinga iha Leta inshingano yo gushyiraho amategeko n'inzego bikwiye mu kurengera umuryango, ariyo mpamvu basanga ibikorwa by'ubusambanyi, ubushoreke no guta urugo kuba byarashyizwe mu mategeko ahana atari uburyo bukwiye mu rwego rwo kurengera umuryango. Akomeza avuga ko ibiteganywa muri izo ngingo byagombye kuba mu mategeko mbonezamubano, bishingiye ku masezerano y'abantu babiri hagati yabo.

Intumwa ya Leta yo ivuga ko hari ibikorwa byinshi bifatwa ko ari ibyaha ku isi kandi bishingiye ku masezerano kandi ko ibyaha by'ubusambanyi, ubushoreke no guta urugo ari ibikorwa bibi bishobora kugira ingaruka kuri rubanda nyamwinshi, ku gaciro ka muntu, ku ndangagaciro z'igihugu n'abenegihugu bagenderaho akaba ari imyitwarire itandukanye n'imyitwarire myiza, n'imyifatire mbonezabupfura bitesha umuntu agaciro, ariyo mpamvu Leta iba igomba kubyinjiramo mu rwego rwo kubihana no kubikumira.

PRO-FEMMES / TWESE HAMWE ivuga ko izo ingingo zitakurwaho kuko byatuma ubusambanyi, ubushoreke no guta urugo bifatwa nkaho byemewe kandi byagira ingaruka zikomeye zisenya umuryango nyarwanda ku buryo nta muryango utekanye wakongera kubaho, kuko uba wavukijwe umudendezo kandi ingingo ya 18 y'Itegeko Nshinga iha Leta inshingano yo

kurengera umuryango kuko ariwo shingiro kamere ry'imbaga y'abanyarwanda.

Ishuli ry'amategeko rya Kaminuza y'u Rwanda rivuga ko kuba ishyingirwa rishingiye ku bushake bukomoka ku rukundo, bugamije gushinga urugo, mu gihe ubwo bushake cyangwa urukundo bitagihari kugeza aho umwe mu bashakanye afata icyemezo cyo kutubahiriza isezerano yahaye mugenzi we, inkiko nshinjabyaha atarizo zagakwiye gukemura icyo kibazo ahubwo ko cyagakemuwe n'inkiko mbonezamubano kuko ari nazo zahawe inshingano yo kuburanisha cyangwa gukemura ibibazo by'umuryango kandi ko guteganya igihano cy'igifungo ku busambanyi, ubushoreke no guta urugo, bituma abagize umuryango batumvikaka, ntibite ku nshingano zo kurera abana no kubishyurira amashuli, ku buryo bigera aho uwahemukiwe ahatirwa gutanga imbabazi.

Kubirebana n'icyiciro kigizwe n'ingingo ya 154, 233 na 236, ingingo ya 154, iteganya ko umuntu wese usebya mu ruhame imihango y'idini, ibimenyetso byaryo n'ibikoresho by'imihango yaryo akoresheje ibikorwa, amagambo, ibimenyetso, inyandiko, amarenga cyangwa ibikangisho abigiriye aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa, aba akoze icyaha. Urega avuga ko ibiteganywa n'iyi ngingo bidasobanutse neza ku buryo ishobora gukoreshwa nabi mu gukurikirana uwakoze ibyo bikorwa kandi ko bibangamira uburenganzira bw'itangazamakuru no kugaragaza ibitekerezo no gutanga ibitekerezo ku madini n'imikorere yayo kuko abanyamakuru kugira bavuga ku madini kugirango batinya icyo badakurikiranwa.

Kuri iyo ingingo, Intumwa ya Leta ivuga ko kuba bimwe mu biri muri iyo ngingo bidasobanutse atari impamvu yatuma itegeko cyangwa iyo ngingo yose ivaho, ahubwo ko ryasobanurwa. Naho Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda (ARJ) ivuga ko iyo ingingo yirengagiza uburenganzira bw'abantu ku myemerere y'abantu, ku buryo ibyo iteganya byatuma abantu badatanga ibitekerezo ku myemerere y'abantu ahubwo ko umuntu cyangwa umuryango ufite ubuzima gatozi, wakumva ko itangazamakuru cyangwa umunyamakuru yamuharabitse, yakwiyambaza inzira y'imbonezamubano kugira ngo arenganurwe. Ishuli ryigisha amategeko muri Kaminuza y'u Rwanda ryo rivuga ko iyo ngingo idasobanura idini icyo aricyo ndetse n'aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa aho ariho, bityo abantu bakaba barengana mu gihe iyi ngingo yaguma uko iri ubu, kuko hagombye gusobanurwa icyo idini aricyo kugira ngo n'imihango yaryo ibe yasobanuka.

Ku ingingo ya 233 iteganya icyaha cyo gukoza isoni umwe mu bagize Inteko Ishinga Amategeko, mu bagize Guverinoma, abashinzwe umutekano cyangwa undi wese ushinzwe umurimo rusange w'igihugu, urega avuga ko inyuranyije n'Itegeko Nshinga mu ngingo zaryo za 15 na 38 kuko ivangura harebwe abo irengera kandi ko ibangamiye ubwisanzure bwo gutangaza amakuru, kuyatara no gutanga ibitekerezo.

Intumwa ya Leta ivuga ko ingingo ya 15 y'Itegeko Nshinga ivuga kureshya imbere y'amategeko no kurengerwa n'amategeko mu buryo bungana, bivuze ko abantu bagomba gufatwa kimwe iyo bari mu bihe bimwe, ariyo mpamvu hari abarengerwa kubera ko bari mu mirimo runaka cyangwa inzego runaka, cyane cyane ko ikirengerwa ari umurimo cyangwa urwego atari umuntu, kuko iyo avuye kuri uwo murimo, uwugiyeho arengerwa nk'uwari uwuriho

Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda (ARJ) ryo rivuga ko iyo ngingo ibuza ubwisanzure

bw'Itangazamakuru n'ubwo gutanga ibitekerezo kubera ko ituma umunyamakuru wakwandika inkuru ku miyoborere itari myiza ku muyobozi cyangwa undi wese ushinzwe umurimo rusange byakwitwa icyaha kandi umuntu ufite umurimo rusange atareka kwandikwaho niba ntacyo yikeka, akomeza avuga ko iyo ingingo ituma abantu baba bakekwaho imyitwarire mibi idakwiye kuranga abakozi ba Leta cyangwa abashinzwe umurimo rusange, batagira icyo bavugwaho cyangwa bandikwaho. Naho Ishuli ryigisha amategeko muri Kaminuza y'u Rwanda rivuga ko iyo ngingo idasobanura itandukaniro hagati y'igihe umwe mu bavugwa muri iyo ngingo akora umurimo rusange n'igihe biturutse kuri uwo murimo, kandi idasobanura niba abarindwa muri iyo ngingo ari abakozi ba Leta bose aho bava bakagera. ndetse ko itanasobanura icyo gukoza isoni bisobanuye. Ikavuga nanone ko iyi ngingo irengera igice kimwe cy'abantu bakora mu nzego za Leta, ibyo bikaba binyuranye n'ihame ry'uko abantu bose bangana imbere y'amategeko kandi itegeko rigomba kubarengera kimwe.

Naho kubirebana n'ingingo ya 236 igateganya ko umuntu wese utuka cyangwa usebya Perezida wa Repubulika, aba akoze icyaha, Urega avuga ko icyo cyaha gishobora kuba urwitwazo mu kubangamira ubwisanzure bw'abanyamakuru, cyane cyane ko icyaha cyo gusebanya kidasobanutse neza, bityo iyo ngingo inyuranye n'ingingo ya 15 y'Itegeko Nshinga kuko itarengera abantu mu buryo bumwe kuko ihana abatuka cyangwa bagasebya umuntu umwe gusa.

Intumwa ya Leta ivuga ko ubwisanzure bw'umunyamakuru bugomba kugarukira aho icyubahiro cy'umuyobozi gitangirira, n'umutekano we, kandi ko iyo ingingo itabuza kwandika kuri Perezida wa Repubulika ahubwo ibuza kumusebya cyangwa kumutuka.

Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda (ARJ) avuga ko nayo yemera ko Perezida wa Repubulika kubera inshingano agira agomba kugira imvitwarire irenze abantu bose, ariko ko icyamwandikwaho kitagombye kuba icyaha. Naho Ishuli ryigisha amategeko muri Kaminuza y'u Rwanda rivuga iyo ibiyivugwamo bihujwe n'ibiteganywa n'ingingo ya 161 ihana icyaha cyo gutukana, usanga icyaha cyo gutukana gihanwa iyo gikozwe mu ruhame, mu gihe ku birebana n'ingingo ya 236 yumvikanisha ko aho icyo cyaha cyakorerwa hose, bivuze ko niyo abantu 2 baba biherereye, umwe atukana yamubeshyera ko yakoze icyo akagikurikiranwaho. Mugusoza rivuga ko kuba icyaha cyo gusebya cyaravanywe mu mategeko ahana ku bandi bantu basanga impamvu zatumye icyo cyaha gikurwaho ku bantu bose, zakoreshwa no kuri Perezida wa Repubulika.

- Incamake y'icyemezo: 1. Bitewe n'ikigamijwe, Umushingamategeko ashobora gufata ibikorwa bimwe akagena ko ari icyaha kandi ko bihanishwa igifungo kabone nubwo byaba bifitanye isano n'amasezerano kandi ibyo ntibibuza abo byangirije kuba bakoresha n'inzira y'imbonezamubano baregera indishyi cyangwa iyubahirizwa ry'amasezerano, bityo kuba icyaha cy'ubusambanyi, ubushoreke, no guta urugo byaba bishingiye ku masezerano, ntabwo ari impamvu yatuma bidakurikiranwa ngo bihanwe nk'ibyaha.
- 2. Ingaruka z'igihano cy'igifungo ku muryango ntizikwiye gushingirwaho havanwaho ingingo ziteganya icyo gihano, kuko igihano cy'igifungo gitangwa hagamijwe gutanga urugero rutuma abantu batishora mu byaha, kigamije guhana, kugorora no kwigisha. Kandi ibihano kuri ibi byaha biri mu rugero, kuko

bidakabije mu buremere ugereranije n'ibyaha bireba (proportionality).

- 3. Ubwisanzure bw'umuryango ntabwo ari ugukora icyo buri wese ashaka ahubwo n'umudendezo n'umutekano w'abagize umuryango kandi ibyo ntibishobora kugerwaho n'umuryango uhora mu makimbirane no kutabana neza bikunze kuba mu ngo zirimwo ibibazo by'ubusambanyi, ubushoreke cyangwa guta urugo, bityo guhana ibi byaha ntabwo ari ugusenya no kubangamira ubwisanzure bw'umuryango ahubwo n'ugukumira icyabuhungabanya.
- 4. Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye kandi kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no kuwakoranye icyaha n'uregwa.
- 5. Mu gukoresha ubwisanzure bw'itangazamakuru n'ubwo kugaragaza ibitekerezo, umuntu ashobora gutanga ibitekerezo ku mihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo ndetse anafite uburenganzira bwo gushaka, kubona no gukwirakwiza amakuru n'ibitekerezo mu ruhame birebana n'imihango y'idini, ibimenyetso, n'ibikoresho by'imihango y'idini akaba yanabinenga, apfa kudakora ibibujijwe n'ingingo ya 38 y'Itegeko Nshinga
- 6. Gutandukanya abantu ubwabyo ntabwo ari ivangura cyangwa kutareshyeshya abantu imbere y'amategeko, bishobora gukorwa iyo hari impamvu igaragara irengera abari mu cyiciro cy'abanyantege nke, iyo mpamvu igomba kuba igaragarira buri wese (objective justification or legitimate objective) kandi bikaba biri mu rugero urebye uburyo bwakoreshejwe mu kugera ku ntego cyangwa ikigamijwe.

- 7. Kugaragaza ibitekerezo no gutangaza amakuru ku bikorwa n'abayobozi, bishimangira ihame rya demokarasi ryo gukorera mu mucyo no kubazwa inshingano ku byo abayobozi bakorera abaturage.
- 8. Amakuru cyangwa ibitekerezo byemewe gutangazwa ntibigomba gusa kuba ari ibishimisha ubuyobozi cyangwa bidafite abo bibangamiye, ahubwo ibitanogeye ubutegetsi na bamwe mu baturage bikwiye kwemerwa kuko iyo ibitekerezo by'ingeri nyinshi, ubworoherane no gutekereza byagutse bidahari, demokarasi iba idashoboka.

Ikirego gifite ishingiro kuri bimwe; Igika cya gatatu cy'ingingo ya 136 gihindutse mu buryo bukurikira: "Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no kuwakoranye icyaha n'uregwa" Ingingo ya 136, igika cya mbere, icya kabiri n'icya gatatu y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ntinyuranyije n'ingingo ya 18 y'Itegeko Nshinga; Igika cya kane n'icya gatanu by'ingingo ya 136 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange bivanyweho; Ingingo ya 138, n'iya 139 z'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ntizinyuranyije n'ingingo ya 18 y'Itegeko Nshinga; Ingingo ya 154 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranije n'ingingo ya 38 y'Itegeko Nshinga, bityo ikaba ivanyweho;

Ingingo ya 233 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranije n'ingingo ya 15 n'iya 38 y'Itegeko Nshinga, bityo iyo ngingo ikaba ivanyweho;

Ingingo ya 236 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ntinyuranyije n'ingingo ya 15 n'iya 38 y'Itegeko Nshinga;

Rutegetse ko uru rubanza rutangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda.

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 4,10,15,17,18,38,41,97,98,108.

Itangazo Mpuzamahanga ku Burenganzira bwa Muntu ryo 1948, ingingo ya 19.

Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki, ingingo ya 19.

Itegeko N° 54/2011 ryo kuwa 14/12/2011 ryerekeye uburenganzira bw'umwana n'uburyo bwo kumurinda no kumurengera

Imanza zifashishijwe:

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- UN Human Rights Committee, Communication N°. 414/1990, Mika Miha v. Equatorial Guinea, Views adopted on 8 July 1994.

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- T. Tridimas, The General principles of EC Law (OUP, 2nd ed, 206).

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Mugisha Richard yatanze ikirego mu Rukiko rw'Ikirenga avuga ko nyuma y'uko hatangajwe mu Igazeti ya Leta Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, yarisomye agasanga ingingo za 136, 138, 139, 154, 233 n'iya 236 z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, zinyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, ryo muri 2003 ryavuguruwe mu mwaka wa 2015.
- Ingingo zisabirwa kuvanwaho kuko zinyuranyije n'Itegeko Nshinga ni esheshatu (6), ziri mu byiciro bibiri: icyiciro cya mbere kigizwe n'ingingo eshatu (3): iya 154, 233 n'iya 236 z'Itegeko N°68/2018 ryavuzwe haruguru. Ingingo ya 154 iteganya ko umuntu wese usebya mu ruhame imihango y'idini, ibimenyetso byaryo n'ibikoresho by'imihango yaryo akoresheje ibikorwa, amagambo, ibimenyetso, inyandiko, amarenga cyangwa ibikangisho abigiriye aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa, aba akoze icyaha. Iya 233 iteganya ko umuntu wese ukoza isoni mu magambo, mu inyandiko bimenvetso cyangwa ibikangisho, ibishushanyo, umwe mu bagize Inteko Ishinga Amategeko mu gihe akora umurimo yatorewe cyangwa biturutse kuri uwo murimo, umwe mu bagize Guverinoma, abashinzwe umutekano cyangwa undi wese ushinzwe umurimo rusange w'igihugu mu gihe akora umurimo ashinzwe cyangwa ari wo biturutseho, aba akoze icyaha. Naho iya 236 igateganya ko umuntu wese utuka cyangwa usebya Perezida wa Repubulika, aba akoze icyaha. Izi ngingo zinateganya ibihano kuri buri cyaha.

- [3] Mugisha Richard avuga ko izo ngingo zinyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda, kuko zirengera ababarirwa mu byiciro bimwe hashingiwe ku mirimo bakora, kandi abantu bose bareshya imbere y'amategeko¹. Anavuga ko izo ngingo zibangamiye ubwisanzure bw'Itangazamakuru, ryaba iryandika, ryaba irikoresha ibishushanyo ndetse n'amagambo, buteganywa n'ingingo ya 38 y'Itegeko Nshinga², kuko hashingiwe ku biteganywa n'izo ngingo, Itangazamakuru ritemerewe kugira icyo ritangaza kuri ibyo byiciro by'abayobozi cyangwa amadini mu buryo bwo kunenga ibi n'ibi, kandi iyo ngingo iteganya ko ubwisanzure bw'Itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe kandi bwubahirizwa na Leta.
- [4] Icyiciro cya kabiri kigizwe n'ingingo eshatu (3): iya 136 iteganya ko umuntu wese washyingiwe ukorana imibonano mpuzabitsina n'uwo batashyingiranywe, aba akoze icyaha. Iya 138 iteganya ko umuntu ubana nk'umugabo n'umugore n'uwo batashyingiranywe umwe muri bo cyangwa bombi bafite uwo bashyingiranywe, aba akoze icyaha. Naho iya 139 iteganya ko umwe mu bashyingiranywe uta urugo rwe mu gihe kirenze amezi abiri (2) nta mpamvu zikomeye akihunza ibyo ategetswe, aba akoze icyaha. Mugisha Richard asanga izi ngingo zinyuranye

¹ Ingingo ya 15 iteganya ko: "Abantu bose barareshya imbere y'amategeko. Itegeko ribarengera ku buryo bumwe".

² Ingingo ya 38 iteganya ko: "Ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buremewe kandi bwubahirizwa na Leta. Ubwisanzure bwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ntibugomba kubangamira ituze rusange rya rubanda n'imyifatire mbonezabupfura, ukurengera urubyiruko n'abana, n'uburenganzira bw'umwenegihugu bwo kugira icyubahiro n'agaciro, ubwo kutagira uwivanga mu mibereho ye bwite n'iy'umuryango we. Uko ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo biteganywa n'amategeko".

n'ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko Leta ifite inshingano yo gushyiraho amategeko n'inzego bishinzwe kurengera umuryango kugira ngo ugire ubwisanzure, nyamara ingingo za 136, 138 n'iya 139 zikaba ziteganya igihano cy'igifungo kuri umwe mu bashakanye kandi umuryango udashobora kurengerwa cyangwa ngo ugire ubwisanzure mu gihe umwe mu bawugize yaba afunzwe.

- [5] Intumwa ya Leta Me Kabibi Speçiose yatanze inzitizi yo kutakira ikirego cyatanzwe na Mugisha Richard ku mpamvu z'uko nta nyungu afite zo kugitanga. Ku wa 18/03/2018, Urukiko rwafashe icyemezo kuri iyo nzitizi, rwemeza ko Mugisha Richard afite inyungu yo gutanga ikirego gisaba kwemeza ko ingingo z'itegeko zinyuranyije n'Itegeko Nshinga.
- [6] Urukiko kandi rwemeje ko, kubera uburemere bw'ibibazo bizasuzumwa muri uru rubanza ruburanishwa mu mizi, abantu n'ibigo cyangwa imiryango itegamiye kuri Leta bifuza gutanga ibitekerezo muri uru rubanza nk'inshuti z'urukiko (*Amicus Curiae*) kandi babifitiye ubumenyi, babisaba binyujijwe ku Bwanditsi bw'Urukiko rw'Ikirenga bitarenze tariki ya 8/02/2019, bakanatanga inyandiko bifuza kugeza ku Rukiko bitarenze tariki ya 28/02/2019.
- [7] Nyuma yo kubona inyandiko zinyuranye z'abashaka kuba muri uru rubanza nk'inshuti z'urukiko (Amicus Curiae) mu rwego rwo gutanga ibitekerezo, Urukiko rwarazisesenguye maze rwemeza ko aba bakurikira aribo bujuje ibisabwa akaba aribo bagomba kwitaba urukiko mu iburanisha ry'uru rubanza nk'inshuti z'urukiko (Amicus Curiae), aribo: ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda), Impuzamiryango PRO-FEMMES / TWESE hamwe n' Ishuli ry'Amategeko rya Kaminuza y'u Rwanda (School of Law),

maze bakora imyanzuro bagaragaza ibitekerezo ku kirego cya Mugisha Richard.

[8] Urubanza rwaburanishijwe ku wa 18/03/2019, Mugisha Richard yunganiwe na Me Kabasinga Floride na Me Nkundabarashi Moise, Leta ihagarariwe na Me Kabibi Speçiose, PRO FEMME TWESE HAMWE ihagarariwe na Kanakuze Jeanne d'Arc yunganiwe na Me Munyankindi Monique, ARJ ihagarariwe na Me Gakunzi Musore Valery, naho ishuri ry'amategeko muri Kaminuza y'u Rwanda rihagarariwe na Denis Bikesha, Alphonse Muleefu, Yves Sezirahiga, Etienne Ruvebana.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

- i. Kumenya niba ingingo ya 136, 138 n'iya 139 z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zinyuranyije n'ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda.
- [9] Mugisha Richard avuga ko yatanze ikirego agamije kugaragaza ko ingingo ya 136, 138 n'iya 139 z'Itegeko N° 68/2018 ryavuzwe haruguru zinyuranyije n'ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda, kuko ziteganya igihano cy'igifungo kuri umwe mu bashakanye, wahamijwe icyaha cy'ubusambanyi, ubushoreke cyangwa se guta urugo, kandi umuryango udashobora kurengerwa cyangwa ngo ugire ubwisanzure, umwe mu bawugize afunze. Icyakora ko atatanze icyo kirego nk'ushyigikiye imyitwarire ivugwa muri izo ngingo ahubwo ko yagitanze asaba ko harebwa niba iyo myitwarire mibi

mu kuyikumira byari bikwiye ko ishyirwa mu mategeko ahana ibyaha.

- [10] Avuga ko ibiteganywa mu ngingo ya 136, 138 n'iya 139 z'Itegeko N° 68/2018 ryavuzwe haruguru, bibangamiye umubano w'abagiranye amasezerano yo gushyingirwa uko ari babiri, kuko baba barayakoze bashingiye ku rukundo bafitanye ndetse bakabyara abana, ku buryo inshingano ya mbere yo kubaka ari iya ba nyiri ubwite, kandi igituma bakomeza kubana mu mahoro bisaba ko uwakoshereje undi amusaba imbabazi, bakababarirana bakiyunga.
- [11] Mugisha Richard akomeza avuga ko ingingo zihana icyaha cy'ubusambanyi, ubushoreke no guta urugo zinyuranyije n'ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko umuryango ariwo shingiro kamere y'imbaga y'abanyarwanda, urengerwa na Leta, ko ingingo yaregeye ziteganya igihano cy'igifungo kuri umwe mu bashyingiranywe uhamijwe icyaha, mu gihe umuryango udashobora kurengerwa umwe mu bawugize afunzwe.
- [12] Akomeza avuga ko ingingo ya 18 y'Itegeko Nshinga igaragaza ko Leta ishyiraho amategeko n'inzego bikwiye mu kurengera umuryango, ariyo mpamvu basanga ibikorwa by'ubusambanyi, ubushoreke no guta urugo kuba byarashyizwe mu mategeko ahana atari uburyo bukwiye mu rwego rwo kurengera umuryango, kuko bifunga iyo nzira yo gusabana imbabazi no kwiyunga, bityo ntibyubake umuryango ahubwo bigatera ingaruka zitari nziza ku muryango.
- [13] Me Kabasinga Florida avuga ko usibye no kuba ingingo ya 136, 138 n'iya 139 z'Itegeko N° 68/2018 ryavuzwe haruguru, zinyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda,

zinanyuranyije n'amahame mpuzamahanga ndetse n'imanza zaciwe n'inkiko mpuzamahanga. Asobanura ko koko imyitwarire ivugwa muri izo ngingo atari myiza, ariko bikagengwa n'andi mategeko kuko abahanga mu by'amategeko bavuga ko amategeko mpanabyaha atari igikoresho cyo gukoresha ahantu hose ku muntu ukoze ikibi

[14] Avuga ko kuba ubusambanyi, ubushoreke no guta urugo bidahungabanya rubanda ahubwo bikorerwa uwashakanye n'undi gusa, nta wundi muntu bigiraho ingaruka, dore ko n'itegeko riteganya ko bihanwa ari uko umwe mu bashakanye areze mugenzi we, ko iyo nta kibazo byamuteye nta wundi muntu ukwiye kubigiraho ikibazo, bikaba bidakwiye ko bishyirwa mu mategeko mpanabyaha. Atanga urugero rw'urubanza rwaciwe n'Urukiko rw'Ikirenga rwa India³, ko muri urwo rubanza hasobanuwe ko kugira ngo igikorwa cyitwe icyaha kigomba kuba kibangamiye rubanda cyangwa sosiyete, kandi ko kugira ngo hashyirweho ibihano mpanabyaha byanze bikunze icyo gikorwa gihanwa gikwiye kuba hari aho cyangiriza rubanda; ariyo mpamvu asanga ibyaha bigaragara mu ngingo ya 136, 138 n'iya 139 z'Itegeko N° 68/2018 ryavuzwe haruguru, kuba ntaho bihuriye na rubanda, ari impamvu ikomeye ituma iyo myitwarire idakwiye kugengwa n'amategeko ahana ibyaha.

[15] Me Nkundabarashi Moïse avuga ko ibiteganywa mu ngingo ya 136, 138 n'iya 139 z'Itegeko N° 68/2018 ryavuzwe haruguru, byagombye kuba mu mategeko mbonezamubano, kuko ingingo ya 2 agace ka 1 y'iryo tegeko rivuzwe, iteganya ko icyaha ari igihungabanya umutekano w'abantu, mu gihe ibiteganywa n'izo ngingo uko ari eshatu bishingiye ku masezerano y'abantu 2 hagati yabo kuko umwe muri bo ariwe wemerewe gutanga

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³ PETITION (CRIMINAL) N° 194 OF 2017, Joseph Shine v. Union of India

ikirego, kandi ko ingingo ya 18 y'Itegeko Nshinga ivuga ko ubwisanzure bw'umuryango bugomba kurengerwa, kandi bukaba butarengerwa umwe mu bawugize afunzwe, cyane cyane ko nta bushakashatsi bwakozwe ngo bugaragaze ko ufunguwe kubera kimwe muri ibyo byaha abana neza n'uwari wamureze, ahubwo ko ikigaragara ari uko amakimbirane yiyongera.

- [16] Akomeza avuga ko kuba ibyo byaha bikomoka ku masezerano yo gushyingirwa, kandi ikirego kikaba kidashobora kwakirwa kidatanzwe n'umwe mu bashakanye, kuko undi wese utari uwo mu bashakanye wavuga ko yabonye umuntu wataye urugo cyangwa yibereye mu nshoreke adashobora gutanga ikirego ngo cyakirwe, ndetse na police ikaba itemerewe, bikaba byumvikanisha ko biba bitakorewe sosiyete, ko bitari mu nyungu rusange.
- [17] Me Kabibi Speçiose, Intumwa ya Leta avuga ko ibyo Mugisha n'abamwunganira bavuga ko ibyo byaha bishingiye ku masezerano bidakwiye kwitwa ibyaha atari byo kuko hari ibikorwa byinshi bifatwa ko ari ibyaha ku isi kandi bishingiye ku masezerano, atanga urugero rw'icyaha cyo kwaka ikitari bwishyurwe, kuko iki cyaha nacyo gishingiye ku masezerano y'ugura n'ugurisha, ubuhemu n'ibindi.
- [18] Avuga ko ibyaha by'ubusambanyi, ubushoreke no guta urugo ari ibikorwa bibi bishobora kugira ingaruka (harmful consequences) kuri rubanda nyamwinshi (public harm), ku gaciro ka muntu, ku ndangagaciro z'igihugu n'abenegihugu bagenderaho; ko ari imyitwarire itandukanye n'imyitwarire myiza, n'imyifatire mbonezabupfura bitesha umuntu agaciro, ariyo mpamvu Leta iba igomba kubyinjiramo mu rwego rwo kubihana no kubikumira

- [19] Kanakuze Jeanne d'Arc mu izina ry'Impuzamiryango PRO-FEMMES / TWESE HAMWE, avuga ko ingingo ya 136, iya 138 n'iya 139 z'Itegeko N°68/2018 N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, zitakurwaho, kuko byatuma ubusambanyi, ubushoreke no guta urugo bifatwa nkaho byemewe kandi byagira ingaruka zikomeye zisenya umuryango nyarwanda ku buryo nta muryango utekanye wakongera kubaho, kuko uba wavukijwe umudendezo.
- [20] Me Munyankindi Monique wunganira PRO-FEMMES / TWESE HAMWE avuga ko ingingo ya 18 y'Itegeko Nshinga iha Leta inshingano yo kurengera umuryango kuko ariwo shingiro kamere ry'imbaga y'abanyarwanda, ku buryo biri mu nshingano zayo gushyiraho amategeko ahana uwakora ibikorwa bihungabanya umuryango mu buryo ubwo ari bwo bwose, ariyo mpamvu izo ngingo zashyiriweho kubungabunga ubusugire n'ubwisanzure bw'umuryango kuko bimwe mu bikorwa izo ngingo zihana bishobora gukurura amakimbirane mu muryango bikanaganisha ku isenyuka ryawo ndetse n'impfu za hato na hato.
- [21] Denis Bikesha, Alphonse Muleefu na Yves Sezirahiga, mu izina ry'Ishuli ry'amategeko rya Kaminuza y'u Rwanda, bavuga ko icyaha nk'uko ingingo ya 2 agace ka 1 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, ari igikorwa kibujijwe n'itegeko cyangwa kwanga gukora igiteganywa n'itegeko, ku buryo bihungabanya umutekano mu bantu (ordre public). Bavuga ko kuba igikorwa kiba kibangamiye umutekano w'abantu ariyo mpamvu Leta ifata iya mbere mu gukurikirana uwabikoze, kuko icyo gikorwa kiba cyahungabanyije inyungu rusange (general interest). Basobanura ko Ubutegetsi Nshingamategeko bugomba kwirinda kurengera mu kugena imyitwarire runaka nk'ihanwa n'amategeko

nshinjabyaha mu gihe iyo myitwarire itujuje ibisabwa ngo ibe icyaha; ibyo akaba ari byo byitwa 'overcriminalisation', bishobora kubera umutego abaturage mu gihe bakabaye barengerwa n'Itegeko.

- [22] Bavuga ko kuba ishyingirwa rishingiye ku bushake bukomoka ku rukundo, bugamije gushinga urugo, mu gihe ubwo bushake cyangwa urukundo bitagihari kugeza aho umwe mu bashakanye afata icyemezo cyo kutubahiriza isezerano yahaye mugenzi we, inkiko nshinjabyaha atarizo zagakwiye gukemura icyo kibazo ahubwo ko cyagakemuwe n'inkiko mbonezamubano kuko ari nazo zahawe inshingano yo kuburanisha cyangwa gukemura ibibazo by'umuryango.
- [23] Bavuga kandi ko guteganya igihano cy'igifungo ku busambanyi, ubushoreke no guta urugo, bituma abagize umuryango batumvikana, ntibite ku nshingano zo kurera abana no kubishyurira amashuli, ku buryo bigera aho uwahemukiwe ahatirwa gutanga imbabazi. Ko rero ibyo bigaragaza ko umuryango utaba urengewe dore ko kugeza ubu nta kigaragaza ko hari uwafunguwe ngo abane neza n'uwo bashyingiranywe. Bavuga ko ibyo bitaba bibaye umwihariko w'u Rwanda, kuko mu bihugu byateye imbere nko mu Buhindi, mu Bwongereza, muri Koreye y'Amajyepfo, Afurika y'epfo, Nigeria na Ghana, ndetse no mu bihugu bya Asia, ubusambanyi bwahoze ari icyaha ubu butakiri cyo ahubwo bufatwa nk'ikosa risanzwe rishobora kuba impamvu y'ubutane n'indishyi z'akababaro.

UKO URUKIKO RUBIBONA

[24] Ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe mu mwaka wa 2015 iteganya ko: "Umuryango, ari wo shingiro kamere ry'imbaga y'Abanyarwanda, urengerwa na Leta. Ababyeyi bombi bafite uburenganzira n'inshingano zo kurera abana babo. Leta ishyiraho amategeko n'inzego bikwiye bishinzwe kurengera umuryango, by'umwihariko umwana na nyina, kugira ngo umuryango ugire ubwisanzure."

- [25] Ingingo ya 18 imaze kuvugwa mu gika kibanziriza iki, ikubiyemo ibitekerezo bitatu aribyo kugaragaza umuryango nk'ishingiro ry'umuryango nyarwanda ; uburenganzira n'inshingano by'ababyeyi bijyanye no kurera abana, ndetse n'inshingano ya Leta yo kurengera umuryango n'abawugize.
- [26] Ingingo z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zisabirwa kuvanwaho na Mugisha Richard kuko zaba zinyuranye n'ingingo ya 18 y'Itegeko Nshinga, ni iya 136 iteganya icyaha cy'ubusambanyi, iya 138 iteganya icyaha cy'ubushoreke, n'iya 139 iteganya icyaha cyo guta urugo.
- [27] Ingingo ya 136 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko : Umuntu wese washyingiwe ukorana imibonano mpuzabitsina n'uwo batashyingiranywe, aba akoze icyaha. Iyo abihamijwe n'urukiko ahanishwa igifungo kitari munsi y'amezi atandatu (6) ariko kitarenze umwaka umwe (1). Gukurikirana icyaha cy'ubusambanyi ntibishobora kuba hatareze uwahemukiwe mu bashyingiranywe ku buryo bwemewe n'amategeko. Muri icyo gihe hakurikiranwa uwarezwe n'uwakoranye icyaha na we. Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Icyakora, iyo dosiye yarangije kuregerwa urukiko cyangwa gufatwaho icyemezo, kwisubiraho ntibihita bihagarika

isuzumwa ry'urubanza cyangwa irangiza ryarwo. Umucamanza arabisuzuma akaba yabyemera cyangwa akabyanga akanasobanura impamvu. Iyo umucamanza yemeye ukwisubiraho k'uwahemukiwe, kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no kuwakoranye icyaha n'uregwa".

Ingingo ya 138 y'Itegeko N°68/2018 ryavuzwe mu gika kibanziriza iki iteganya ko: "umuntu ubana nk'umugabo n'umugore n'uwo batashyingiranywe umwe muri bo cyangwa bombi bafite uwo bashyingiranywe, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kirenze umwaka umwe (1) ariko kitarenze imyaka ibiri (2)". Iya 139 igateganya ko: "Umwe mu bashyingiranywe uta urugo rwe mu gihe kirenze amezi abiri (2) nta mpamvu zikomeye akihunza ibyo ategetswe, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari munsi y'amezi atatu (3) ariko kitarenze amezi atandatu (6). Ibihano bivugwa mu gika cya 2 cy'iyi ngingo nibyo bihabwa umugabo utaye umugore we ku bushake, nta mpamvu ikomeye, mu gihe kirenze ukwezi kumwe (1) azi ko atwite. Icyakora, kutabana bitewe n'uko umwe mu bashyingiranywe afashwe nabi ntabwo byitwa guta urugo mu gihe yagiye abimenyesheje ubuyobozi bumwegereye bigakorerwa inyandiko."

[29] Mugisha Richard afata ingingo ziteganya icyaha cy'ubusambanyi, ubushoreke no guta urugo, nk'izinyuranye n'Itegeko Nshinga kuko asanga gukurikirana no guhana ibyo byaha, bisenya umuryango aho kuwubaka kuko umwe mu bawugize aba afunzwe, ko zibangamira ubwisanzure bw'umuryango, ko ibyo byaha bishingiye ku masezerano aba yakozwe n'abantu babiri, bikaba bibangamiye ubwiyunge no kubabarirana hagati y'abashakanye.

- a. Kuba icyaha cy'ubusambanyi, ubushoreke, guta urugo byaba bishingiye ku masezerano, bikaba bidakwiye kuba ibyaha ahubwo bikaba amakosa mbonezamubano.
- [30] Mugisha Richard asaba ko ingingo ya 136 iteganya icyaha cy'ubusambanyi, iya 138 iteganya icyaha cy'ubushoreke, n'iya 139 iteganya icyaha cyo guta urugo zavaho kuko asanga zishingiye ku masezerano mbonezamubano ibyo bikorwa bikaba ahubwo bikwiye kugengwa n'amategeko mbonezamubano.
- [31] Bitewe n'ikigamijwe, Umushingamategeko ashobora gufata ibikorwa bimwe akagena ko ari icyaha kandi ko bihanishwa igifungo kabone nubwo byaba bifitanye isano n'amasezerano. Ubusambanyi, ubushoreke no guta urugo biba ibyaha kuko umwe mu babikoze aba afitanye n'undi amasezerano yo gushyingirwa, ariko ibyo ntibyaba impamvu yo ko binyuranye n'Itegeko Nshinga kuko biteganyijwe mu mategeko ko igikorwa gishingiye masezerano kitaba icyaha. Icyo izo ngingo zihana ni ubusambanyi, ubushoreke no guta urugo, ntabwo hahanwa igikorwa cyo kwica amasezerano yo gushyingirwa. Ibyo Itegeko Nshinga ritemera mu ngingo yaryo ya 29, 70, ni uko hari uwafungwa bitewe gusa no kutagira ubushobozi bwo kubahiriza inshingano ituruka ku masezerano, kandi siko bimeze ku bikorwa by'ubusambanyi, ubushoreke no guta urugo.
- [32] Ibikorwa bitandukanye bifite aho bihurira n'amasezerano itegeko rishobora kugena ko bigize icyaha, rikabigenera igihano cy'igifungo. Urugero ni icyaha cy'ubuhemu giteganywa n'ingingo ya 176, icyaha cyo kurigisa ibyafatiriwe bikozwe n'umuntu ushinzwe kubirinda (ingingo ya 248), kurigisa cyangwa kwangiza ibyatanzweho ingwate (ingingo ya 178) n'ibindi. Kuri ibi bikorwa, itegeko rigena ko bikurikiranwa

nk'ibyaha. Ibyo kandi ntibibuza abo byangirije kuba bakoresha n'inzira y'imbonezamubano baregera indishyi cyangwa iyubahirizwa ry'amasezerano. Icyangombwa n'uko ibyo byaha byose bifite aho bibangamira inyungu rusange, zikaba zigomba kurengerwa n'itegeko.

- [33] Urukiko rusanga kandi amasezerano y'ubushyingiranwe atari amasezerano asanzwe. Ni amasezerano afite umwihariko, akeneye kurindwa na Leta nkuko biteganywa mu ngingo ya 18 v'Itegeko Nshinga. Niyo mpamvu itegeko rishyiraho uburyo bwemewe bwo gushyingiranwa, Leta ikaba ifite n'uruhare mu mihango ikurikizwa kugira ngo habeho ubushyingiranwe bwemewe n'amategeko. Urukiko rusanga kandi gukurikirana imibanire y'abashyingiranywe bigamije inyungu zigaragara. Uretse gukumira icyahungabanya umutekano n'umudendezo w'abagize umuryango, amategeko ubusambanyi, ubushoreke no guta urugo arengera umutekano n'imibereho myiza y'abana. Nkuko Itegeko Nshinga ribivuga mu ngingo ya 18, ababyeyi bombi bafite inshingano zo kurera abana babo, iya 19 ikavuga ko umwana wese afite uburenganzira bwo kurengerwa ku buryo bwihariye n'umuryango we, abandi banyarwanda na Leta. Mu gihe rero umwe mu bashyingiranywe ahugiye mu busambanyi, afite inshoreke agomba kwitaho cyangwa agata urugo, byaba bigoye kubahiriza izo nshingano zo kurera abana be uko bikwiye.
- [34] Ibivuzwe mu gika kibanziriza iki bijyanye kandi n'ikibazo cyo gusesagura umutungo w'urugo ukaba wakoreshwa mu nyungu zitari iz'umuryango, ujya mu kwinezeza no kunezeza uwo bafatanije mu bikorwa by'ubusambanyi n'ubushoreke ndetse no kubatunga aho bibaye ngombwa. Ibi ntibitanga ubwisanzure, umudendezo n'iterambere ry'umuryango; kandi

iyo umuryango utamerewe neza, bigira ingaruka ku iterambere ry'Igihugu. Umutungo usesagurwa wakabaye ushorwa mu bikorwa bifitiye umuryango akamaro.

- [35] Ku bivugwa na Mugisha Richard ko ingingo z'Itegeko zihana icyaha cy'ubusambanyi, ubushoreke no guta urugo zitageze ku ntego yatumye zishyirwaho bitewe nuko ubutane bushingiye kuri ibyo bikorwa bugenda bwiyongera, ko ndetse ingengo y'imari ikoreshwa mu gukurikirana ibyo byaha yakoreshwa mu bindi bikorwa biteza imbere ubutabera, uru Rukiko rurasanga izi nenge zidafite ishingiro kuko atagaragaza ko ubusambanyi, ubushoreke no guta urugo bidakumirwa uko bikwiye. Nkuko bisanzwe bizwi kandi muri politiki yo guhana, gukumira icyaha (deterrence) ni imwe mu ntego zo guhana ariko ntabwo ariyo yonyine kuko hari n'izindi ntego nko kubuza kwihorera, no kugorora uwakoze icyaha. Icyakorwa ni ukongera imbaraga mu ngamba zo gukumira ntabwo ari ukuvanaho itegeko.
- [36] Ku bijyanye no kuba hari ibihugu binyuranye byakuyeho icyaha cy'ubusambanyi hakaba hari byinshi aho ubushoreke no guta urugo bitigeze biba icyaha, Urukiko rusanga ibyo bitaba impamvu yo gukura ibyo byaha mw'itegeko rihana ibyaha mu Rwanda. Hari nk'igihugu cy'Ubuhinde, South Korea, Ghana n'ibindi bidahana ubusambanyi ariko hakaba n'ibindi byinshi bibuhana. Buri gihugu kigira umuco n'indangagaciro byacyo cyimakaza, hakaba n'izindi kitemera. Mu Rwanda ubusambanyi, ubushoreke no guta urugo ntabwo ari imico cyangwa indangagaciro zaruranze kuva kera. Ahubwo n'ababikora babikora rwihishwa kuko bazi ko umuryango nyarwanda utabishyigikiye.

[37] Habagaho kwahukana kw'umugore agataha iwabo aho avuka kugaragaza ko hari ibitagenda iwe, ko umugabo atamufashe neza bikazarangira umugabo aje kumucyura agatanga inka yo kwemererwa kumucyura. Ntibyafatwaga nko guta urugo ahubwo byabaga uburyo bwo kugarura imibanire myiza mu rugo. Ni nayo mpamvu mu itegeko hari "exception" ku cyaha cyo guta urugo aho ingingo ya 139 agace ka 4 ivuga ngo: "Icyakora kutabana bitewe n'uko umwe mu bashyingiranywe afashwe nabi ntabwo byitwa guta urugo mu gihe yagiye abimenyesheje ubuyobozi bumwegereye bigakorerwa invandiko."

Indi mpamvu ituma u Rwanda rutakwihutira guhindura itegeko kuri ibi byaha, n'uko nta mahame mpuzamahanga rinyuranije nayo. Mu mwaka wa 2012, Itsinda⁴ ry'Akanama k'Umuryango w'Abibumye gashinzwe iby'Uburenganzira bwa Muntu, ryasabye ibihugu kudafata ubusambanyi nk'icyaha kuko risanga bibangamiye uburenganzira bw'abagore. Mu bisobanuro byatanzwe n'iryo tsinda risaba ibyo, nuko amategeko yo mu bihugu byinshi ateganya icyaha cy'ubusambanyi ku bagore gusa, ko nta mugabo ukora icyaha cy'ubusambanyi, ndetse ahandi hahanwa abagore gusa abagabo ntibahanwe cyangwa amategeko agateganya ibihano bitandukanye. Urukiko rurasanga icyo kibazo kitari mu Rwanda kuko umugabo cyangwa umugore, buri wese ashobora gukurikiranwaho icyaha cy'ubusambanyi n'igihano kuri icyo cyaha, ni kimwe hatitawe ku gitsina cy'ugomba guhanwa, bivuze ko nta vangura riri mu mategeko akoreshwa mu gukurikirana no guhana icyaha cy'ubusambanyi, ubushoreke no guta urugo.

⁴ UN Working Group on Women's Human Rights: Report (18 October, 2012), available at: http://news archive.ohchr.org /EN/ News Events/Pages/Display News. aspx? News ID = 12672&Lang.

zatanzwe n'Akanama [39] k'Umuryango Impamvu w'Abibumbye wavuzwe mu gika kibanziriza iki ni zimwe mu mpamvu zashingiweho mu rubanza rwa Joseph Shine V. Union of India rwaciwe n'Urukiko rw'Ikirenga rwo mu Buhinde, Mugisha asaba ko rwaba ikitegererezo, rugashingirwaho havanwaho ingingo ihana ubusambanyi nkuko byakozwe muri urwo rubanza. Ingingo ya 497 y'Itegeko rihana ibyaha mu gihugu cy'u Buhinde yahanaga icyaha cy'ubusambanyi ku mugabo wahamijwe kuba yaragize imibonano mpuzabitsina n'umugore washyingiwe (married woman). Umugore ntiyashoboraga guhanwa nk'uwakoze icyaha cyangwa nk'umufatanya cyaha. Umugabo wahemukiwe niwe wenyine washoboraga gutanga ikirego, umugore wahemukiwe nta burenganzira vari afite bwo kurega. Urukiko rurasanga koko muri urwo rubanza ingingo ihana icyaha cy'ubusambanyi yaravanyweho, ariko ku mpamvu zitandukanye n'izishingirwaho na Mugisha. Urukiko rw'Ikirenga rwo muri icyo gihugu rwasanze itareshyeshya abantu imbere y'amategeko, igaragaramo ivangura rishingiye ku gitsina kandi ibangamiye ubwisanzure bwa muntu, bikaba byari binyuranije n'ingingo za 14, 15 na 21 z'Itegeko Nshinga ryo mu Buhinde n'amahame mpuzamahanga ku burenganzira bwa muntu.⁵ Izo mpamvu ntaho zihuriye n'izitangwa na Mugisha asaba ko Urukiko rwakuraho icyaha cy'ubusambanyi.

[40] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga kuba icyaha cy'ubusambanyi, ubushoreke, no guta urugo byaba bishingiye ku masezerano, atari impamvu yatuma bidakurikiranwa ngo bihanwe nk'ibyaha.

⁵ Joseph Shine v Union of India 2018 SCC Online SC1676 delivered on 27 September, 2018.

b. Gusenya umuryango no kubangamira ubwisanzure bwawo mu mwanya wo kuwurengera.

- [41] Ingingo ya 23 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ivuga ko : "Ibihano by'iremezo bihabwa abantu ku giti cyabo ni ibi bikurikira: igifungo [...]". Iyi ngingo igaragaza igifungo nka kimwe mu bihano byemewe mu mategeko y'u Rwanda.
- [42] Umwe mu bagize umuryango (umugabo cyangwa umugore) wahamwa n'icyaha cy'ubusambanyi, icyaha cy'ubushoreke cyangwa icyaha cyo guta urugo, ashobora guhanishwa igifungo. Nkuko Mugisha abivuga, gufunga umwe mu bagize umuryango bishobora kuwugiraho ingaruka zitandukanye. Urukiko rusanga ariko, uko gufungwa k'umwe mu bagize umuryango wahamwe na kimwe mu byaha byavuzwe haruguru, byafatwa nk'igihano ku cyaha cyakozwe, igifungo kikaba cyemewe nka kimwe mu bihano byemewe mu mategeko y'u Rwanda nkuko byasobanuwe mu gika kibanziriza iki.
- Muri rusange, igihano cy'igifungo kigira ingaruka [43] k'uwagihawe no ku muryango we. Urukiko rusanga ariko, nta ku muryango w'uwahamwe mwihariko uhari cy'ubusambanyi, ubushoreke no guta urugo agahanishwa gufungwa kuburyo byaba impamvu yo kuvanaho ingingo z'itegeko ziteganya ibyo byaha. Ingaruka z'igifungo ku muryango ni zimwe hatitawe ku cyaha cyatumye gitangwa. Ndetse na Mugisha watanze ikirego, akaba atarigeze agaragaza cyangwa ngo avuge ko ingaruka zituruka ku gifungo gihanishwa uwahamwe n'icyaha cy'ubusambanyi, ubushoreke no guta urugo zitandukanye, n'izaterwa n'uwahamwe n'ibindi nk'ubujura, ubwicanyi, gusambanya abana n'ibindi.

Urukiko rusanga ruramutse rwemeje ko ingingo [44] ziteganya icyaha cy'ubusambanyi, ubushoreke no guta urugo zinyuranye n'Itegeko Nshinga kuko umwe mu bagize umuryango ahanishwa igifungo iyo yahamwe nibyo byaha, byaba bivuze ko n'izindi ngingo ziteganya igihano cy'igifungo hatitawe ku cyaha, zavaho kuko nkuko byavuzwe harugu, igihano cy'igifungo kigira ingaruka zitandukanye ku muryango w'uwahamwe n'icyaha (nko kuba ari we watangaga ibitunga umuryango, igisebo ku bana, igisebo kuwo bashakanye, n'izindi). Ingaruka z'igihano cy'igifungo ku muryango ntizikwiye gushingirwaho havanwaho ingingo ziteganya icyo gihano, kuko igihano cy'igifungo gitangwa hagamijwe gutanga urugero rutuma abantu batishora mu byaha, kigamije guhana, kugorora no kwigisha. Urukiko kandi rusanga ibihano kuri ibi byaha biri mu rugero, kuko bidakabije buremere ugereranije n'ibyaha mu (proportionality).

Ikindi kibazo cyavuzweho mw'iburanisha rubanza, n'icyo ubwisanzure bw'umuryango mu ngingo ya 18 y'Itegeko Nshinga bishatse kuvuga. Mugisha n'abamwunganira bavuga ko umuryango utagira ubwisanzure igihe umwe mu bashakanye afunze kubera icyaha cy'ubusambanyi, ubushoreke cyangwa guta urugo. Ubwisanzure ntabwo ari ugukora icyo buri wese ashaka. Ingingo ya 18 ivuga ko "Leta ishyiraho amategeko bikwiye bishinzwe kurengera by'umwihariko umwana na nyina, kugira ngo umuryango ugire ubwisanzure." Amagambo "kugira ngo umuryango ugire byumvikanisha umudendezo n'umutekano ubwisanzure" w'abagize umuryango. Mu cyongereza amagambo akoreshwa ni "to flourish" bisobanuye kugera ku ntego yiyemeje (to succeed), kwiteza imbere (to prosper, to grow). Ibi byose ntibishobora kugerwaho n'umuryango uhora mu makimbirane no kutabana neza bikunze kuba mu ngo zirimwo ibibazo by'ubusambanyi, ubushoreke cyangwa guta urugo. Ariko no mu kinyarwanda gisanzwe niko bishobora kumvikana. Inkoranyamagambo y'Ikinyarwanda ivuga ko 'kwisanzura' ari 'kuba uri ahantu umerewe neza nta mbogamizi'. Ahari amakimbirane mu rugo, kurwana no gushyamirana bitewe no gucana inyuma cyangwa guta urugo, nta bwisanzure bwaharangwa.

[46] Nkuko PRO FEMME/TWESE HAMWE ibivuga, ubusambanyi, ubushoreke no guta urugo bitera umwuka mubi mu rugo bishobora kuvamo n'impfu za hato na hato. Hanatanzwe ingero z'impfu zatewe n'ubusambanyi, ubushoreke no guta urugo zirimwo abishe abo bashakanye n'abiyahuye kubera kutihanganira iyo imyitwarire inyuranyije n'amategeko, ikaba inanyuranyije n'umuco nyarwanda harimwo kubana mu mahoro mu muryango. Urukiko rusanga guhana ibi byaha atari ugusenya no kubangamira ubwisanzure bw'umuryango ahubwo ari ugukumira icyabuhungabanya.

[47] Ubusambanyi n'ubushoreke bishobora kuvamo kubyara abana hanze y'ubushyingiranwe bigatera amakimbirane hagati y'abashakanye, hagati y'abahemukiwe n'ababahemukiye batari abo bashakanye, ndetse no hagati y'abana bavukiye mu bushyingiranwe n'abavukiye hanze yabwo. Ibi binyuranije na politiki y'Igihugu cy'u Rwanda yo kuboneza urubyaro bikaba bitanahuje n'Itegeko Nshinga mu ngingo yaryo ya 17, igika cya kabiri, iteganya ko ugushyingiranwa k'umugabo umwe n'umugore umwe gukorewe mu butegetsi bwa Leta ari ko kwemewe. Biri mu nyungu rusange ko haba amategeko akumira

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⁶ Bizimana Simon na Kayumba Charles, Inkoranyamagambo Iciriritse, 2010 p. 410.

bene uko kubyara hagati y'abatarashyingiranywe, akanakumira ingaruka zabyo.

[48] Nkuko bisobanuwe mu bika bibanziriza iki, kuba Itegeko N°68/2018 ryo ku wa 30/08/2018 rifata ubusambanyi, ubushoreke no guta urugo nk'ibyaha ndetse rikanagena igihano cy'igifungo kuri buri cyaha, ntibikwiye gufatwa nkaho ari ugusenya umuryango kuko igihano cy'igifungo giteganyijwe ku byaha bivugwa muri iyi ngingo, ndetse no ku bindi byaha, cyemewe n'amategeko kandi gitangwa hagamijwe guhana no gukumira. Kuba ubusambanyi, ubushoreke no guta urugo byaragizwe ibyaha, ntibigomba gufatwa nk'ibibangamiye ubwisanzure bw'umuryango, kuko nkuko byasobanuwe, kuba uhamwe n'icyo cyaha ashobora guhanishwa igifungo, bizitira ubwisanzure bwe ariko ku mpamvu zumvikana kandi bigamije gukumira ihungabanya ry'umuryango.

c. Kubangamira ubwiyunge no kubabarirana hagati y'abashakanye

- [49] Indi impamvu itangwa na Mugisha Richard asaba ko ingingo ya 136 iteganya icyaha cy'ubusambanyi, iya 138 iteganya icyaha cy'ubushoreke, n'iya 139 iteganya icyaha cyo guta urugo zivaho, nuko asanga zibangamira ubwiyunge no kubabarirana hagati y'abashakanye.
- [50] Ingingo ya 136 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, iteganya ko gukurikirana ibyaha byavuzwe mu gika kibanziriza iki, bidashobora kuba hatareze uwahemukiwe mu bashyingiranywe. Kuba gukurikirana ibi byaha bigomba kubanzirizwa nuko uwahemukiwe atanga ikirego, Urukiko rusanga bitanga umwanya wo kuba abashyingiranywe bakwiyunga, cyangwa se

uwakorewe icyaha akababarira uwakimukoreye, icyo gihe ntihabeho ikurikiranacyaha.

- [51] Uretse no kuba ibyo byaha bikurikiranwa aruko yabanje gutanga ikirego, uwahemukiwe amategeko amwemerera gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Ibi bigaragaza ko inzira y'ubwiyunge no kubabarirana yagutse hagati y'uwakorewe icyaha n'uregwa kugikora kuko niba batiyunze cyangwa batababariranye mbere y'ikurikiranacyaha, bemerewe kubikora n'urubanza rwaratangiye. Kuba urubanza rushobora gukomeza kugeza no guhanwa k'umwe mu bashyingiranywe, byerekana ko ubwiyunge no kubabarirana hagati yabo biba byanze biturutse ku zindi mpamvu zitandukanye, ariko urubuga rwo kubikora amategeko yararuteganyije.
- Ku bindi byaha byinshi, nta bubasha uwakorewe icyaha agira bwo gutangiza ikurikiranacyaha no guhagarikisha urubanza aho rwaba rugeze hose. Ndetse n'ubwiyunge no kubabarirana hagati y'uwakoze icyaha n'uwagikorewe, iyo byabayeho ntibihagarika ikurikiranacyaha, urugero gufata ku ngufu cyangwa ihohotera ry'umwana rishingiye ku gitsina. Urukiko rurasanga Itegeko riteganya gukurikirana ahubwo uko cy'ubusambanyi, icyaha cy'ubushoreke, n'icyo guta urugo bitanyuranije no kubabarirana mu muryango. Icyakora, Urukiko rusanga hari ibika by'ingingo ya 136, iya 138 n'iya 139 bibangamiye ubwiyunge no kubabarirana hagati y'abashakanye. bijyanye n'ikurikirana rusanga Urukiko ku cy'ubusambanyi, icy'ubushoreke n'icyo guta urugo, hariho ibice bibiri binyuranye bishobora no kuvuguruzanya.
- [53] Nkuko biteganywa n'ingingo ya 136 n'iya 140 z'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano

rusange, gukurikirana icyaha cy'ubusambanyi, muri icy'ubushoreke n'icyo guta urugo ntibishobora kuba hatareze uwahemukiwe mu bashyingiranywe. Izo ngingo ziha ububasha kandi uwahemukiwe bwo gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Nubwo izi ngingo zemerera uwahemukiwe guhagarika urubanza aho rwaba rugeze hose, iyo dosiye yarangije kuregerwa urukiko cyangwa gufatwaho agifite ububasha busesuve uwahemukiwe ntaba guhagarikisha urubanza.

- [54] Nkuko biteganywa n'ingingo ya 136, igika cya kane y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iyo dosiye yarangije kuregerwa urukiko cyangwa gufatwaho icyemezo, kwisubiraho ntibihita bihagarika isuzumwa ry'urubanza cyangwa irangiza ryarwo. Umucamanza arabisuzuma akaba yabyemera cyangwa akanasobanura impamvu. Ibikubiye mu gika cya kane cy'ingingo ya 136, bisa neza n'ibikubiye mu gika cya nyuma cy'ingingo ya 140 irebana n'ikurikirana ry'icyaha cy'ubushoreke n'icyo guta urugo. Muri ibi bika byombi, bigaragara ko umucamanza ashobora kwanga guhagarikisha urubanza bisabwe n'uwahemukiwe.
- [55] Igice cya mbere giha uburenganzira busesuye uwahemukiwe mu bashyingiranywe ushaka guhagarikisha ikurikiranacyaha, igice cya kabiri cyimurira ubwo bubasha ku mucamanza ushobora no kubyanga nkuko itegeko ribimuhera ububasha. Urukiko rurasanga ariko icyo gice cya kabiri kibangamiye uburenganzira bw'uwahemukiwe mu bashakanye ushaka guhagarika ikurikirana ry'urubanza ku mpamvu we yihitiyemo. Bityo, icyo gika cya kane cy'ingingo ya 136,

y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, kikaba kigomba kuvaho kuko nta mpamvu yo kubaho kwacyo. Niba uwahemukiwe yarahawe ububasha bwo guhagarika ikurikiracyaha, yabikora mu bwisanzure nta kimuzitira. Igika cya gatanu cy'iyo ngingo nacyo kigaruka ku birebana no kuba Umucamanza yakwemerera uwahemukiwe ko yahagarika ikurikirana ry'urubanza, cyavaho kuko gishingiye ku gika cya kane cyavanyweho. Ibirebana no kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no ku wakoranye icyaha n'uregwa, bikajya ku gika cya gatatu, mu rwego rwo kugira ngo hadasigara icyuho mu itegeko.

- rw'Ikirenga, rushingiye [56] Urukiko ku bisobanuro byatanzwe mu bika bibanza, rusanga ingingo ya 136, 138, 139 z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, zitanyuranye n'ingingo ya 18 y'Itegeko Nshinga. Nkuko byasobanuwe, zifata ubusambanyi, ubushoreke, no guta urugo nk'ibyaha bihanishwa igifungo, ariko bikaba bitabangamiye ubwisanzure bw'umuryango, nta n'ubwo bigira ingaruka kuwusenya. Uburyo kandi ibyo ZO bikurikiranwamo, ntibubangamiye ubwiyunge no gusabana imbabazi hagati y'abashakanye uretse mu gace ka kane n'aka gatanu tw'ingingo ya 136. Urukiko rusanga izi ngingo zishyira mu bikorwa inshingano ya Leta yo kurengera umuryango.
- ii. Kumenya niba ingingo ya 154 y'Itegeko riteganya ibyaha n'ibihano muri rusange iteganya icyaha cyo gusebya mu ruhame imihango y'idini, inyuranyije n'ingingo ya 38 y'Itegeko Nshinga yerekeye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru

- [57] Mugisha Richard avuga ko ingingo ya 154, iteganya ko umuntu wese usebya mu ruhame imihango y'idini, ibimenyetso byaryo n'ibikoresho by'imihango yaryo akoresheje ibikorwa, amagambo, ibimenyetso, inyandiko, amarenga cyangwa ibikangisho abigiriye aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa, aba akoze icyaha. Ko rero ibiteganywa n'iyi ngingo bidasobanutse neza ku buryo ishobora gukoreshwa nabi mu gukurikirana uwakoze ibyo bikorwa kandi ko bibangamira uburenganzira bw'itangazamakuru no kugaragaza ibitekerezo.
- [58] Me Nkundabarashi Moïse na Me Kabasinga Florida, bunganira Mugisha Richard, bavuga ko ingingo ya 154 ishobora kubangamira ubwisanzure bw'itangazamakuru, no gutanga ibitekerezo ku madini n'imikorere yayo, abanyamakuru bagatinya kugira icyo bavuga ku madini kugirango badakurikiranwa.
- [59] Me Kabibi Speçiose nk'Intumwa ya Leta, avuga ko kuba bimwe mu biri mu ngingo ya 154 bidasobanutse atari impamvu yatuma itegeko cyangwa iyo ngingo yose ivaho, ahubwo ko ryasobanurwa (interpretation), kandi ko ibyaha bivugwa muri iyo ngingo bitareba abanyamakuru gusa, kuko itegeko rivuga "... umuntu wese...".
- [60] Me Musore Gakunzi Valery uhagarariye ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda) avuga ko ingingo ya 154, yirengagiza uburenganzira bw'abantu ku myemerere yabo, ku buryo ibyo iteganya byatuma abantu badatanga ibitekerezo ku myemerere y'abantu. Avuga ko hari abumva ubwisanzure bwo kugaragaza ibitekerezo bugomba gutezwa imbere kubera ko ari ishingiro rya demokarasi, ariko hakaba n'abandi bumva ko n'ubwisanzure mu myemerere

bugomba kurindwa mu buryo bwihariye butavogerwa n'ubwisanzure bwo kugaragaza ibitekerezo.

- Akomeza avuga ko gusebya imihango y'idini bireba idini muri rusange n'imyizerere yaryo, ko atari ugusebya umuntu ku giti cye mu cyubahiro cye, bityo, kubera ko uburenganzira n'ubwisanzure ari iby'umuntu atari iby'idini, akaba nta mpamvu yatuma gusebya mu ruhame imihango y'idini biba icyaha mu gihe hubahirijwe ishvirwa mu bikorwa ry'ubwisanzure mu kugaragaza ibitekerezo. Avuga ko gushyiraho amategeko ahana ku munyamakuru watangaje inkuru cyangwa wagaragaje ibitekerezo bye byubaka, byaba ari ukwivanga mu mikorere y'itangazamakuru muri rusange, kandi ibyo binyuranyije n'ingingo ya 38 y'Itegeko Nshinga rya Repubulika y'u Rwanda, ahubwo ko umuntu cyangwa umuryango ufite ubuzima gatozi, ko itangazamakuru cyangwa umunyamakuru wakumva yamuharabitse, yakwiyambaza inzira y'imbonezamubano kugira ngo arenganurwe ahabwa indishyi.
- [62] Denis Bikesha, Ruvebana na Yves Sezirahiga, mu izina ry'Ishuli ryigisha amategeko muri Kaminuza y'u Rwanda, bavuga ko ibiteganywa n'ingingo ya 154 bidasobanutse neza, kuko iyo ngingo idasobanura idini icyo aricyo ndetse n'aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa aho ariho, bikumvikanisha ko abantu barengana mu gihe iyi ngingo yaguma uko iri ubu, kuko hagombye gusobanurwa icyo idini aricyo kugira ngo n'imihango yaryo ibe yasobanuka. Ko rero iyo ibigize icyaha bidasobanutse igikorwa gifatwa nk'aho atari icyaha, ihame rya 'legal certainty' rikubiye mu ihame ry'uko ntawe uhanirwa igikorwa kitari icyaha rikaba rigomba kubahirizwa.

- [63] Ingingo ya 38 y'Itegeko Nshinga igira iti: "ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buremewe kandi bwubahirizwa na Leta. Ubwisanzure bwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ntibugomba kubangamira ituze rusange rya rubanda n'imyifatire mbonezabupfura, ukurengera urubyiruko n'abana, n'uburenganzira bw'umwenegihugu bwo kugira icyubahiro n'agaciro, ubwo kutagira uwivanga mu mibereho ye bwite n'iy'umuryango we. Uko ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo biteganywa n'amategeko".
- [64] Ingingo ya 154 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "umuntu wese usebya mu ruhame imihango y'idini, ibimenyetso byaryo n'ibikoresho by'imihango yaryo akoresheje ibikorwa, amagambo, ibimenyetso, inyandiko, amarenga cyangwa ibikangisho abigiriye aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa, aba akoze icyaha.Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari munsi y'iminsi cumi n'itanu (15) ariko kitageze ku mezi atatu (3) n'ihazabu y'amafaranga y'u Rwanda atari munsi y'ibihumbi ijana (100.000 Frw) ariko atarenze ibihumbi magana abiri (200.000 Frw) cyangwa kimwe gusa muri ibyo bihano".
- [65] Ingingo ya 38 y'Itegeko Nshinga yavuzwe haruguru ishyiraho ihame ryuko ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe kandi bwubahirizwa na Leta. Ishyiraho nirindi hame ry'uko ubwo bwisanzure hari ibyo butagomba kubangamira. Ibigize ihame ry'ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bigaragara mu ngingo ya 19 y'Itangazo Mpuzamahanga ku Burenganzira bwa Muntu ryo

1948 (Universal Declaration of Human Rights)⁷, iyo ngingo iteganya ibi bikurikira: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". Bivuze ko ubwisanzure bwo kugaragaza ibitekerezo bugizwe no gutanga ibitekerezo ntacyo umuntu yikanga, n'uburenganzira bwo gushaka, kubona no gukwirakwiza amakuru n'ibitekerezo aho ariho hose. Ibi bihura kandi n'ibivugwa n'ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki⁸. Bitewe n'uko ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe n'Itegeko Nshinga, icyo aricyo cyose harimo n'itegeko cyangwa ingingo yaryo, cyabubangamira kiba kinyuranyije naryo.

[66] Mu gukoresha uburenganzira buvuzwe mu gika kibanziriza iki, umuntu ashobora gutanga ibitekerezo ku mihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo. Ndetse umuntu akaba anafite uburenganzira bwo gushaka, kubona no gukwirakwiza amakuru n'ibitekerezo mu ruhame birebana n'imihango y'idini, ibimenyetso, n'ibikoresho by'imihango y'idini akaba yanabinenga mu buryo bushobora kudashimisha ababishinzwe, ntacyo yikanga, apfa kudakora ibibujijwe n'ingingo ya 38 y'Itegeko Nshinga yavuzwe haruguru.

[67] Itegeko N°68/2018 ryo ku wa 30/08/2018 mu ngingo yaryo ya 154, rihana igikorwa cyo gusebya mu ruhame imihango

⁷ U Rwanda rwayashyizeho umukono kandi ruyemeza ku wa 18/09/1962.

⁸ International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. U Rwanda ruyemeza ku wa 12/02/1975 (reba Itegeko Teka N°8/75 ryo ku wa 12/02/1975, Igazeti ya LETA N°5 of 01/03/1975.

y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo. Rinavuga ko gusebanya bishobora kuba byabaye mu bikorwa, mu magambo, ryokoresheje ibimenyetso, inyandiko n'amarenga. Urukiko rukurikije ibyanditswe mu ngingo ya 154, rusanga bibangamira uburenganzira bwo gushaka, kubona gukwirakwiza amakuru, kugaragaza no gutanga ibitekerezo mu ruhame birebana n'imihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo kuko uwashaka kubikora, yakwikanga ko yakurikiranwaho icyaha cyo gusebya giteganywa n'ingingo ya kandi nkuko byibukijwe heiuru ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe n'Itegeko Nshinga, ntibugomba kubangamirwa n'icyo aricyo cyose.

- [68] Ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ku birebana n'imihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo, ntibugomba kuzitirwa no gukurikirana ushatse kugira icyo avuga ku idini. Ibi kandi ninabyo byasabwe n'Akanama k'Uburenganzira bwa Muntu mu Muryango w'Abibumbye, (*UN Human Rights Committee*) muri 2011, kasobanuye ibirebana n'ubwisanzure bwo kugaragaza ibitekerezo, kageze ku birebana n'amadini, kavuga ko bidakwiye kubuza cyangwa guhana abanenga abayobozi b'amadini cyangwa abanenga imyizerere y'idini.
- [69] Ako kanama kabivuze muri aya magambo: "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as

well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith".9

[70] Mu rwego rwo gusigasira uburenganzira bw'itangazamakuru n'ubwo guhabwa amakuru, mu mwaka wa 2007 Inteko Ishinga Amategeko y'Umuryango w'Ibihugu by'Iburayi (Parliamentary Assembly of the Council of Europe) yatoye umwanzuro usaba ko guhana uwagize icyo avuga, uwanenze ku buryo bifatwa nko gutuka ibishingiye ku mvizerere y'abantu (*blasphemy*) byayanwa mu mategeko ahana y'ibihugu bigize uwo muryango. Uwo mwanzuro ugira uti: "The Assembly recommends that the Committee of Ministers ensure that national law and practice are reviewed in order to decriminalise blasphemy as an insult to a religion [...]"¹⁰.

[71] Ibihugu byinshi byo muri uwo Muryango¹¹ bimaze kuvana mu mategeko ahana yabyo, ingingo ihana gutuka cyangwa kunenga ibishingiye ku myizerere n'idini. Uretse ibihugu byo kuri uwo mugabane, n'ibyo mu yindi migabane nabyo byagiye bivanaho bene izo ngingo. Nko muri Amerika ya ruguru, Canada yavanyeho iyo ngingo ku mugaragaro mu kwa 12

⁹ UN Human Rights Committee, General Comment 34 on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression. Paragraph 48. July 2011.

¹⁰ Recommendation 1805 (2007) of the Parliamentary Assembly of the Council of Europe.

¹¹ Sweden muri 1970, Norway muri 2015, Netherlands muri2014, Iceland muri 2015, Malta muri 2016, n'ibindi.

kwa 2018, naho muri Leta Zunze Ubumwe z'Amerika gutuka no kunenga ibishingiye ku myizerere n'idini ntibyigeze bifatwa nk'icyaha gihanwa n'amategeko muri icyo gihugu. Urukiko rurasanga kuvanaho ingingo zihana gusebya no kunenga birebana n'idini mu bihugu bitandukanye byanashoboka mu Rwanda narwo rukavana ingingo nkiyo mu itegeko rihana, mu rwego rwo kurengera uburenganzira ku mitekerereze, ubw'itangazamakuru no guhabwa amakuru. Guhana igikorwa gisebya cyangwa kinenga ibirebana n'idini byiganje cyane cyane mu bihugu bifite Leta ishingiye ku idini (*State religion*) kandi Leta y'u Rwanda ntishingiye ku idini nkuko biteganywa n'ingingo ya 4 y'Itegeko Nshinga rya Repubulika y'u Rwanda¹².

[72] Leta ntiyarikwiye kuba ishyiraho amategeko ahana abashebeje imyizerere y'idini kuko muri rusange nta nyungu bifitiye rubanda uretse gusa kuri ayo madini. Ubifiteho ikibazo yabikurikirana mu rubanza mbonezamubano. Nkuko byemejwe mu rubanza *Joseph Burstyn, Inc. v. Wilson*, rwaciwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika, Leta ntifite inshingano zo kurinda ibyabangamira imyemerere y'amadini binyuze mu byatangajwe ku mugaragaro, mu mvugo cyangwa mu mashusho. Rwabisobanuye muri aya magambo: "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches or motion pictures"¹³.

[73] Urukiko rw'Ikirenga ruhereye ku bisobanuro bitanzwe mu bika bibanziriza iki, rusanga ingingo ya 154 y'Itegeko

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¹² Iyo ngingo ivuga ko: "Leta y'u Rwanda ni Repubulika yigenga, ifite ubusugire, ishingiye kuri demokarasi, igamije guteza imbere Abanyarwanda kandi ntishingiye ku idini [...]".

¹³ U.S. Supreme Court, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)

riteganya ibyaha n'ibihano muri rusange ifata gusebya mu ruhame imihango y'idini, inyuranyije n'ingingo ya 38 y'Itegeko Nshinga kuko ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

iii Kumenya niba ingingo ya 233 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 15 n'iya 38 z'Itegeko Nshinga rya Repubulika y'u Rwanda

- [74] Mugisha Richard avuga ko ingingo ya 233 inyuranyije n'Itegeko Nshinga mu ngingo zaryo za 15 na 38 kuko ivangura harebwe abo irengera kandi ko ibangamiye ubwisanzure bwo gutangaza amakuru, kuyatara no gutanga ibitekerezo. Avuga kandi ko adashyigikiye gusebanya cyangwa gukoza isoni umuntu uwo ariwe wese, ahubwo ko icyo yifuza aruko byavanwa mu mategeko nshinjabyaha kuko hari izindi nzira zo kurenganura uwasebejwe cyangwa uwatutswe ziri mu mategeko arengera abanyamakuru, aho uwarenganyijwe ashobora kuregera inkiko z'imbonezamubano asaba indishyi.
- [75] Me Nkundabarashi Moïse na Me Kabasinga Florida, bunganira Mugisha Richard, bavuga ko hari amasezerano atandukanye u Rwanda rwasinye avuga ko umuntu wese afite uburenganzira bwo gutanga ibitekerezo uko bimeze kose mu gihe atabangamiye isura nziza y'abandi. Bavuga ko hari ibyazitira uburenganzira bwo gutanga ibitekerezo no gutara amakuru, ariko ko ingingo ya 233 ntaho ihurira nibyo byo kuzitira uburenganzira biteganyijwe mu masezerano mpuzamahanga kuko ubona muri rusange ibuza abaturage ndetse n'itangazamakuru gutanga ibitekerezo binenga abayobozi bavugwa muri iyo ngingo.

- [76] Me Kabibi Speçiose, Intumwa ya Leta, avuga ko ibiteganywa n'ingingo ya 233 bitabangamiye ubwisanzure n'uburenganzira bw'abanyamakuru kuko ubwisanzure bwabo budakwiye kubangamira undi munyarwanda. Avuga ko ingingo ya 15 y'Itegeko Nshinga ivuga ibintu 2 aribyo kureshya imbere y'amategeko (*equality before the law*) no kurengerwa n'amategeko mu buryo bungana (*equal protection of the law*), bivuze ko abantu bagomba gufatwa kimwe iyo bari mu bihe bimwe, ariyo mpamvu hari abarengerwa kubera ko bari mu mirimo runaka cyangwa inzego runaka, ko rero ibyo bitavuze ko batarengerwa kimwe n'abandi, cyane cyane ko ikirengerwa ari umurimo cyangwa urwego atari umuntu, kuko iyo avuye kuri uwo murimo, uwugiyeho arengerwa nk'uwari uwuriho.
- [77] Asobanura ko kuba abantu bafatwa mu buryo ubu n'ubu kubera ibyiciro barimo bitavuga ko bibangamiye ihame ry'uko abantu bareshya imbere y'amategeko, ahubwo ko ikibazo cyaba ari uko hari abari mu cyiciro kimwe batarengerwa kimwe cyangwa ntibafatwe kimwe kandi mu buryo bumwe. Ko rero kuba hari ibyiciro by'abantu cyangwa abakozi bitandukanye hagomba kuba n'amategeko agenga ibyo byiciro mu buryo bwihariye agenga imiterere n'imigendekere ya buri cyiciro.
- [78] Me Musore Gakunzi Valery uhagarariye ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda) avuga ko mu mategeko agenga itangazamakuru harimo ingingo ziteganya uburyo uburenganzira bukoreshwa, uburyo abanyamakuru bagenzurwa hagendewe kugira ngo icubahiro cy'umuntu kitangizwa, ndetse n'umunyamakuru wabirenzeho akaba yashyikirizwa inkiko mbonezamubano.
- [79] Asobanura ko ingingo ya 233 ibuza ubwisanzure bw'Itangazamakuru n'ubwo gutanga ibitekerezo kubera ko ituma

umunyamakuru wakwandika inkuru ku miyoborere itari myiza ku muyobozi cyangwa undi wese ushinzwe umurimo rusange byakwitwa icyaha. Avuga ko umuntu ufite umurimo rusange ntacyo yikeka, atareka kwandikwaho niba Itangazamakuru mu rwego rwo kurwanya ikoreshwa nabi ry'umutungo wa Leta nta kundi byakorwa hatabayeho kuvuga amakuru aba yabonetse mu buryo amategeko yemera n'ubwo byaba bibangamiye inyungu bwite z'abanditsweho. Avuga ko ingingo ya 233 ituma abantu baba bakekwaho imyitwarire mibi idakwiye kuranga abakozi ba Leta cyangwa abashinzwe bavugwaho cyangwa rusange, batagira icvo umurimo bandikwaho

- [80] Asobanura ko ingingo ya 233 igaruka ku kintu gikomeye cyane cy'ibishushanyo, kuko gushushanya umuntu ubwabyo atari ikibazo kandi ko bikorwa mu nyungu rusange, ku buryo uwakumva yasebejwe yabiregera mu nkiko mbonezamubano asaba indishyi z'akababaro, kuko gufunga umuntu ngo yasebeje undi icyubahiro cye aba atagisubijwe, ahubwo ko yagisubizwa aregeye indishyi ku makosa yakorewe (action civile).
- [81] Denis Bikesha, Ruvebana na Yves Sezirahiga, bavuga ko ingingo ya 233 idasobanura itandukaniro hagati y'igihe umwe mu bavugwa muri iyo ngingo akora umurimo rusange n'igihe biturutse kuri uwo murimo, ko kandi idasobanura niba abarindwa muri iyo ngingo ari abakozi ba Leta bose aho bava bakagera, ndetse ko itanasobanura icyo gukoza isoni bisobanuye, ariyo mpamvu bavuga ko iyi ngingo inyuranya n'ihame ry'uko amategeko ahana agomba kuba asobanutse (principle of legal certainty).
- [82] Bavuga ko iyi ngingo iteje urujijo kuko mu bantu irengera harimo "umuntu wese ushinzwe umurimo rusange w'Igihugu",

kandi kumenya uyu muntu uwo ariwe bigoye kuko abakozi bose ba Leta badashinzwe umurimo rusange dore ko no mu bikorera harimo abakora imirimo ifitiye abaturage akamaro. Bavuga kandi ko itegeko rivuga igihe umuntu ari mu kazi, hakibazwa mu gihe yaba ari mu nzira agiye gukorera kure ariko ataragera ku kazi umuntu akamukoza isoni byaba byo bitari mu byo itegeko rihana, hakibazwa kandi n'ukuntu umuntu yakozwa isoni n'umurimo ashinzwe. Ndetse ko n'igikorwa cyo gukoza isoni ubwacyo kigove gusobanura kuko gishingiye ahanini uwagikorewe agifata-niba kimukoza isoni cyangwa kitazimukoza (subjectively determined). Bityo kuba iyi ngingo idasobanutse kandi ihame ari uko amategeko ahana agomba kuba asobanutse, ikaba ifatwa nk'aho itariho mu mategeko ahana, cyane cyane ko ibangamiye ihame ryo kwishyira no kwizana mu gutanga ibitekerezo (freedom of expression).

[83] Bakomeza bavuga ko ibiteganyijwe muri iyi ngingo bigaragaza ko igamije kurengera igice kimwe cy'abantu bakora mu nzego za Leta, ibyo bikaba binyuranye n'ihame ry'uko abantu bose bangana imbere y'amategeko kandi itegeko rigomba kubarengera kimwe. Basobanura ko iyo bayisesenguye basanga irengera igice kimwe cy'abantu, abakozi ba Leta bari mu mirimo yabo, ariko abandi bari mu mirimo yabo bwite, nk'abayobozi bibigo byigenga, ntibarengere. Bavuga ko kuba ivuga gusa abayobozi, abashinzwe umutekano cyangwa undi wese ushinzwe umurimo rusange w'Igihugu, bivuze ko undi wese utari muri abo (abakozi bikorera), igikorwa gikoza isoni kimukorewe atari icyaha, ariyo mpamvu bavuga ko inyuranyije n'ihame ry'uko abantu bareshya imbere y'amategeko kandi barengerwa ku buryo bumwe, bikumvikanisha ko hari ukuvangura abantu hashingiwe ku cyo bakora.

UKO URUKIKO RUBIBONA

- a) Kuba ingingo ya 233 yaba itarengera abantu mu buryo bumwe
- [84] Ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko: "Abantu bose barareshya imbere y'amategeko. Itegeko ribarengera ku buryo bumwe".
- [85] Ingingo ya 233 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "Umuntu wese ukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, umwe mu bagize Inteko Ishinga Amategeko mu gihe akora umurimo yatorewe cyangwa biturutse kuri uwo murimo, umwe mu bagize Guverinoma, abashinzwe umutekano cyangwa undi wese ushinzwe umurimo rusange w'igihugu mu gihe akora umurimo ashinzwe cyangwa ari wo biturutseho, aba akoze icyaha [...]".
- [86] Mugisha Richard asaba ko ingingo ya 233 yavaho kuko asanga idafata abantu ku buryo bumwe, kandi ko irengera abantu bamwe babarizwa mu mirimo ya Leta, bityo ko inyuranye n'Itegeko Nshinga mu ngingo yaryo ya 15. Asanga kandi ingingo ya 233 inyuranye n'ingingo 38 y'Itegeko Nshinga kuko yaba ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.
- [87] Umutwe w'ingingo ya 233 wanditse mu buryo bukurikira : "Gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu". Nkuko byanditse muri uyu mutwe, iyi ngingo igamije guhana abakoza isoni abari mu cyiciro cy'abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu, ikaba ntacyo iyuga ku gukoza isoni abatari muri ibyo

byiciro. Bivuze ko undi muntu utari muri iki cyiciro, aramutse akojejwe isoni, adashobora kurengerwa binyuze mu nzira y'amategeko mpanabyaha kuko gukoza isoni biba icyaha mu mategeko y'u Rwanda, bishingiye gusa ku kuba uwakorewe icyaha ari mu cyiciro cy'abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu.

[88] Ingingo ya 233 igaragara nk'ishingiye ku cyiciro cy'abantu bitewe n'umurimo bakora. Urukiko rurasanga ariko nta mpamvu yo gushyiraho ingingo nk'iyi yatuma igikorwa kimwe kiba icyaha ku bantu bamwe bitewe nuko cyakorewe abari mu mirimo iyi n'iyi, nyamara ntikibe icyaha ku bandi. Iryo tandukaniro ntabwo ari ngombwa, cyane ko nubwo umuntu yaba abarizwa mu bakozi bavugwa mu ngingo ya 233, hari n'abandi iyo ngingo itavuga baba abikorera, abakorera ibigo n'imiryango bidashamikiye kuri Leta, nabo bashobora gukozwa isoni bikangiza icyubahiro cyabo bitewe n'imyanya barimo, ariko ababikoze ntibakurikiranwe bitewe n'imiterere y'itegeko.

[89] Gutandukanya abantu ubwabyo ntabwo ari ivangura cyangwa kutareshyeshya abantu imbere y'amategeko. Bishobora gukorwa iyo hari impamvu igaragara irengera abari mu cyiciro cy'abanyantege nke. Niyo impamvu akenshi amategeko arengera mu buryo bwihariye abagore n'abana. Impamvu yabyo igomba kuba igaragarira buri wese (objective justification or legitimate objective) kandi bikaba biri mu rugero urebye uburyo bwakoreshejwe kugera ku ntego cyangwa ikigamijwe.

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¹⁴ Urugero n'itegeko N°54/2011 ryo kuwa 14/12/2011 ryerekeye uburenganzira bw'umwana n'uburyo bwo kumurinda no kumurengera. N'ingingo ya 10 agace ka 4 y'Itegeko Nshinga iteganya ko "abagore bagira nibura mirongo itatu ku ijana (30%) by'inyanya mu nzego zifatirwamo ibyemezo".

[90] Intumwa ya Leta ivuga ko icyo ingingo ya 15 y'Itegeko Nshinga ishatse kuvuga ari uko abantu bagomba gufatwa kimwe iyo bari mu bihe bimwe ko ariko iyo batari mu bihe bimwe hari impamvu badafatwa kimwe. Ibyo nibyo, nyamara ku bijyanye n'uru rubanza ntihagaragajwe impamvu ifatika kandi ya ngombwa ituma ibyiciro by'imirimo ya Leta bivugwa bikwiye kurengerwa mu buryo bwihariye. Icyo Me Kabibi Speçiose avuga n'uko ngo abayobozi n'abandi bavugwa mu ngingo ya 233 bafite umwihariko nka 'vulnerable group' ariko akaba atashoboye gusobanura neza uburyo bari 'vulnerable'.

Ikindi kigaragara, nkuko byavuzwe n'Inshuti y'Urukiko, [91] Kaminuza y'Urwanda Ishami ry'amategeko, n'uko ingingo ya 233 idasobanura neza urebwa navo ; niba ari abakorera Leta bose cyangwa ari abakozi bo mu nzego zo hejuru gusa. Ingingo ivuga umwe mu bagize Inteko Ishinga Amategeko, umwe mu bagize Guverinoma, abashinzwe umutekano ikongeraho "undi wese ushinzwe umurimo rusange w'Igihugu". Ibi bikaba bisa n'aho bishatse kuvuga abakora imirimo ya Leta bose, akaba ari nta mwihariko watuma barengerwa kuruta abandi bantu badakorera Leta. Ntibinasobanutse icyo gukoza isoni umuntu mu kazi ke cyangwa bishingiye ku kazi akora bishatse kuvuga. Ibi byatera urujijo abantu ntibamenye neza igihe bashobora kugwa muri icyo cyaha. Bene ayo mategeko anyuranije n'ihame ry'uko amategeko ahana agomba kuba asobanutse, n'ibikorwa bigize icyaha bikaba bisobanutse (principle of legal certainty). Ibi bisobanurwa neza n'umuhanga mu by'amategeko Tridimas aho avuga ati: "the principle of legal certainty and legitimate expectation provides an important assertion of the rule of law that those subject to the law must know what the law is so as to plan their action accordingly." 15

¹⁵ T. Tridimas, The General principles of EC Law (OUP, 2nd ed, 206)

[92] Urukiko rushingiye ku bisobanuro bitanzwe mu bika bibanziriza iki, rusanga ingingo ya 233 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 15 iteganya ko abantu bose bareshya imbere y'amategeko, ko itegeko ribarengera ku buryo bumwe, kuko iyo ngingo ya 233 ifata abantu mu buryo butandukanye kandi ikaba itabarengera ku buryo bumwe nkuko byasobanuwe hejuru.

b) Kuba ingingo ya 233 yaba ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru

[93] Nkuko biteganywa n'ingingo ya 38 y'Itegeko Nshinga, ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buremewe kandi bwubahirizwa na Leta. Ku rundi ruhande, ingingo ya 233 y'itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, iteganya ko umuntu wese ukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu bavugwa muri iyo ngingo aba akoze icyaha.

[94] Ingingo ya 19 y'Itangazo Mpuzamahanga ku Burenganzira bwa Muntu (*Universal Declaration of Human Rights*)¹⁶, isobanura ibigize uburenganzira ku gutanga ibitekerezo n'uburenganzira ku makuru. Ibivuga muri aya magambo: "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

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¹⁶ U Rwanda rwashyize umukono kuri ayo masezerano ku wa 18/09/1963.

[95] Ibirebana n'ubwo burenganzira biteganywa kandi n'ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki 1717. Iyo ngingo ibivuga mu buryo bukurikira:

Everyone shall have the right to hold opinions without interference

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a). For respect of the rights or reputations of others;
- b). For the protection of national security or of public order (ordre public), or of public health or morals.

[96] Nkuko biri mu ngingo za 19 z'Amasezerano yavuzwe mu bika bibiri bibanziriza iki, umuntu wese afite uburenganzira bwo kugaragaza ibitekerezo ntacyo yikanga. Ubwisanzure bwo kugaragaza ibitekerezo bugizwe no gushaka no guhabwa amakuru, kugaragaza ibitekerezo byose nta nkomyi binyuze mu bitangazamakuru bikoresha amajwi, ibyandika n'ibikoresha

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¹⁷ International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. U Rwanda ruyemeza ku wa 12/02/1975 (reba Itegeko Teka N°8/75 ryo ku wa 12/02/1975, Igazeti ya Leta N°5 of 01/03/1975.

ubundi buryo bwose. Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki, yo yongeraho ko ubwo burenganzira buzitirwa no kubahiriza uburenganzira bw'abandi, n'umutekano w'igihugu n'ituze rya rubanda.

Urukiko rusanga, ingingo ihana gukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, ibangamiye ubwo bwisanzure kuko hari uwatinya ko aramutse agaragaje ibitekerezo uko abyumva cyangwa agatangaza amakuru ku bikorwa n'abagize Inteko Amategeko, abagize Guverinoma, abashinzwe umutekano cyangwa undi wese ushinzwe umurimo rusange w'Igihugu, yakurikiranwaho icyaha cyo gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu baramutse batishimiye ibyo bitekerezo cyangwa amakuru. Ubwisanzure bwo kugaragaza ibitekerezo, ubwo gutangaza no guhabwa amakuru ku bikorwa n'abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu bavugwa mu ngingo ya 233, ntibukwiye kubangamirwa no kwikanga ko ibyo umuntu yabavugaho cyangwa yabatangazaho byafatwa nko kubakoza isoni

[98] Ubwisanzure mu kugaragaza ibitekerezo no gutangaza amakuru ku bikorwa n'abayobozi, bushimangira ihame rya demokarasi ryo gukorera mu mucyo no kubazwa inshingano ku byo abayobozi bakorera abaturage. Ibi biri mu byavuzwe n'Akanama k'Umuryango w'Abibumbye gashinzwe uburenganzira bwa Muntu. Ako kanama kabivuze muri aya magambo: "freedom of expression is a necessary condition for the realization of the principles of transparency and

accountability that are, in turn, essential for the promotion and protection of human rights" ¹⁸.

Ingingo ya 4 y'Itegeko Nshinga iteganya ko Leta y'u [99] Rwanda ari Repubulika yigenga, ifite ubusugire, ishingiye kuri demokarasi igamije guteza imbere Abanyarwanda kandi ntishingiye ku idini. Iyo ngingo ikomeza ivuga ko ihame shingiro Repubulika y'u Rwanda ari: «Ubutegetsi bw'Abanyarwanda,butangwa n'Abanyarwanda kandi bukorera Abanyarwanda ». Ubwisanzure bwo kugaragaza ibitekerezo ni rimwe mu mahame ya Leta igendera kuri demokarasi. Ubwisanzure bwo kugaragaza ibitekerezo ntibugomba kugira abo bugarukiraho. Ibi bihura kandi n'ibyavuzwe n'Urukiko rushinzwe Uburenganzira bwa Muntu mu muryango w'Ibihugu by'Uburayi (European Court of Human Rights) mu rubanza Handyside v. United Kingdom muri ava magambo: "Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" 19. Ibi bivuze ko amakuru cyangwa ibitekerezo bitagomba kuba ari ibishimisha ubuyobozi cyangwa bidafite abo bibangamiye; ahubwo ibitanogeye

 ¹⁸ United Nations ("UN") Human Rights Committee, General Comment N°34,
 Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (12
 September 2011) ("General Comment No. 34"), par. 3.

¹⁹ European Court of Human Rights, Handyside v. United Kingdom, Judgment of 7 Dec. 1976, Series A N°.24

ubutegetsi na bamwe mu baturage bikwiye kwemerwa. Iyo ibitekerezo by'ingeri nyinshi, ubworoherane no gutekereza byagutse bidahari, demokarasi iba idashoboka. Niyo mpamvu ingingo ihana gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu, igomba gufatwa ko ibangamiye iryo hame ry'ubwisanzure bwo gutanga ibitekerezo mu gihugu kiyemeje kugendera kuri demokarasi.

[100] Ubwisanzure mu kugaragaza ibitekerezo, gutara no gutangaza amakuru, bugomba gukoreshwa nta bikangisho, nta gutoteza. Akanama gashinzwe uburenzira bwa Muntu (United Nations Human Rights Committee) [UNHRC] kemeje ko gutesha umutwe, gukanga, gufunga, gucira urubanza nogufunga umuntu azira ibitekerezo afite, binyuranyije n'ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira by'Imbonezamubano na Politiki yavuzwe haruguru. Kabivuze muri ava magambo: "The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 1920. Urukiko rusanga kuba ingingo ya 233 iteganya igihano cy'igifungo k'uwakoza isoni abayobozi b'Igihugu, abashinzwe umutekano n'abashinzwe umurimo rusange w'Igihugu bavugwa muri iyo ngingo, byatuma abantu badatanga ibitekerezo mu bwisanzure kandi bibangamira uburenganzira bwo gusesengura no gutangaza amakuru ku bikorwa n'abo bayobozi.

[101] Urukiko ruhereye ku bisobanuro bitanzwe mu bika bibanziriza iki, rurasanga ingingo ya 233 y'itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange,

 $^{^{20}}$ Communication $N^o414/1990,\ Mika\ Miha\ v.$ Equatorial Guinea, Views adopted on $8\ July\ 1994$

iteganya ko umuntu wese ukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu bavugwa muri iyo ngingo, inyuranyije n'ingingo ya 38 y'Itegeko Nshinga iteganya ko ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe kandi bwubahirizwa na Leta. Kuko nkuko byasobanuwe, ingingo ya 233 ituma abantu badakoresha ubwo bwisanzure kuko baba batinya ko mu gihe hari icyo bavuga cyangwa batangaza ku bantu bavugwa mu ngingo ya 233, bakurikiranwaho icyaha cyo gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange.

- c) Kumenya niba ingingo ya 236 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 15 n'iya 38 z'Itegeko Nshinga rya Repubulika y'u Rwanda.
- [102] Mugisha Richard avuga ko ingingo ya 236 igateganya ko umuntu wese utuka cyangwa usebya Perezida wa Repubulika, aba akoze icyaha, mu gihe icyo cyaha gishobora kuba urwitwazo mu kubangamira ubwisanzure bw'abanyamakuru, cyane cyane ko icyaha cyo gusebanya kidasobanutse neza. Anavuga ko ingingo ya 236 inyuranye n'ingingo ya 15 y'Itegeko Nshinga kuko itarengera abantu mu buryo bumwe kuko ihana abatuka cyangwa bagasebya umuntu umwe gusa.
- [103] Me Kabibi Speçiose nk'Intumwa ya Leta, avuga ko ingingo ya 236 idateganya ibyaha byakorwa n'abanyamakuru ahubwo ko ivuga ibyaha bishobora gukorwa n'umuntu uwariwe wese, ko muri iyo ngingo ntaho bavuga ko bireba umunyamakuru. Avuga ko ubwisanzure bw'umunyamakuru bugomba kugarukira aho icyubahiro cy'umuyobozi gitangirira,

n'umutekano we, kandi ko ingingo ya 236 itabuza kwandika kuri Perezida wa Repubulika ahubwo ibuza kumusebya cyangwa kumutuka.

[104] Me Musore Gakunzi Valery uhagarariye ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda) avuga ko nabo bemera ko Perezida wa Repubulika kubera inshingano agira agomba kugira imyitwarire irenze abantu bose, ariko ko icyamwandikwaho kitagombye kuba icyaha mu rwego rwo kubahiriza ihame rya 'accountability'. Ko rero kuba icyaha cyo gusebanya cyaravuye mu mategeko ahana, kitagombye kugaruka kuri Perezida wa Repubulika gusa, kuko ingingo ya 161 ihana umuntu wese utuka undi, ko rero kuvuga ko umunyamakuru yanditse kuri Perezida wa Repubulika amusebya, byaba ari nko kuvuga ko ntawemerewe kumwandikaho.

[105] Denis Bikesha, Ruvebana na Yves Sezirahiga, bavuga ko ingingo ya 236 irebana n'icyaha cyo gutuka cyangwa gusebya Perezida wa Repubulika, iyo ibiyivugwamo bihujwe n'ibiteganywa n'ingingo ya 161 ihana icyaha cyo gutukana, usanga icyaha cyo gutukana gihanwa iyo gikozwe mu ruhame, mu gihe ku birebana n'ingingo ya 236 yumvikanisha ko aho icyo cyaha cyakorerwa hose, bivuze ko niyo abantu 2 baba biherereye, umwe atukana n'undi, yamubeshyera ko yakoze icyo cyaha akagikurikiranwaho.

[106] Basobanura ko ingingo ya 236 irebana n'icyaha cyo gusebya Perezida wa Repubulika kandi icyaha cyo gusebya cyaravanywe mu mategeko ahana ku bandi bantu, ariyo mpamvu basanga impamvu zatumye icyo cyaha gikurwaho ku bantu bose, zakoreshwa no kuri Perezida wa Repubulika kugira ngo hubahirizwe ihame ryo kwishyira no kwizana mu gutanga ibitekerezo harimo n'ubwisanzure bw'Itangazamakuru, cyane

cyane ko icyo cyaha cyavanywemo kubera ko gusebya bitari bisobanutse neza. Ko rero ibiteganywa n'ingingo ya 236 binyuranye n'ihame riteganywa ningingo ya 15 y'Itegeko Nshinga iteganya ko abantu bagomba kurengerwa n'itegeko ku buryo bumwe.

UKO URUKIKO RUBIBONA

[107] Ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u iteganya ko: "Abantu bose barareshya imbere y'amategeko. Itegeko ribarengera ku buryo bumwe". Iya 38 yaryo igateganya ibi bikurikira: "Ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buremewe kandi bwubahirizwa na Leta. Ubwisanzure bwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ntibugomba kubangamira ituze rusange rya rubanda n'imvifatire mbonezabupfura, ukurengera urubyiruko n'abana, n'uburenganzira bw'umwenegihugu bwo kugira icvubahiro n'agaciro, ubwo kutagira uwivanga mu mibereho ye bwite n'iy'umuryango we. Uko ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo biteganywa n'amategeko".

[108] Iya 236 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "Umuntu wese utuka cyangwa usebya Perezida wa Repubulika, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari munsi y'imyaka itanu (5) ariko itarenze imyaka irindwi (7) n'ihazabu y'amafaranga y'u Rwanda arenze miliyoni eshanu (5.000.000 FRW) ariko atarenze miliyoni zirindwi (7.000.000 FRW)".

a) Kuba ingingo ya 236 yaba itarengera abantu ku buryo bumwe

[109] Ingingo ya 236 iteganya ko gutuka cyangwa gusebya Perezida wa Repubulika ari icyaha, uwo gihamye ahanishwa igifungo kitari munsi y'imyaka itanu (5) ariko itarenze imyaka irindwi (7) n'ihazabu y'amafaranga y'u Rwanda arenze miliyoni eshanu (5.000.000 FRW) ariko atarenze miliyoni zirindwi (7.000.000 FRW). Nubwo iyi ngingo ihana uwatutse Perezida wa Repubulika, hari n'indi ngingo y'Itegeko N° 68/2018 ryo ku wa 30/08/2018, ihana umuntu wese utuka undi mu ruhame.

[110] Ingingo ya 161 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 iteganya ko: "Umuntu wese utuka undi mu ruhame aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari munsi y'iminsi cumi n'itanu (15) ariko kitarenze amezi abiri (2); ihazabu y'amafaranga y'u Rwanda atari munsi y'ibihumbi ijana (100.000 FRW) ariko atarenze ibihumbi magana abiri (200.000 FRW); imirimo y'inyungu rusange mu gihe kitarenze iminsi cumi n'itanu (15) cyangwa kimwe gusa muri ibyo bihano. [...]". Ingingo ya 161 n'iya 236, zavuzwe mu bika bibanziriza iki, zombi zifata gutukana nk'icyaha. Urukiko rusanga ibyo Mugisha Richard avuga ko ingingo ya 236 irengera Perezida wa Repubulika gusa, ataribyo kuko nkuko bigaragara mu ngingo ya 161, umuntu wese utuka undi mu ruhame aba akoze icyaha. Muri rusange, gutukana ni icyaha hatitawe ku wabikorewe.

[111] Urukiko rurasanga ariko hari itandukaniro rishingiye ku bihano hagati y'ingingo zivuga ko gutukana ari icyaha. Utuka undi mu ruhame ahanishwa igifungo kitari munsi y'iminsi cumi n'itanu (15) ariko kitarenze amezi abiri (2); ihazabu y'amafaranga y'u Rwanda atari munsi y'ibihumbi ijana (100.000

FRW) ariko atarenze ibihumbi magana abiri (200.000 FRW); utuka Perezida wa Repubulika ahanishwa igifungo kitari munsi y'imyaka itanu (5) ariko itarenze imyaka irindwi (7) n'ihazabu y'amafaranga y'u Rwanda arenze miliyoni eshanu (5.000.000 FRW) ariko atarenze miliyoni zirindwi (7.000.000 FRW).

[112] Ibihano bitangwa ku cyaha cyo gutukana bivugwa mu gika kibanziriza iki, biratandukanye. Umwihariko ku gihano ku cyaha cyo gutuka cyangwa gusebya Perezida wa Repubulika, ni uko ari kinini ugereranije n'ibindi bihano biteganywa ku watutse abandi. Ariko, Urukiko ntirwasuzuma niba ingingo ya 236 yavanwaho bitewe nuko iteganya ibihano bitandukanye n'ibiteganywa n'izindi ngingo zihana gutukana kuko ibyo bitaregewe ndetse ntibyanaburanyweho. Urukiko rusanga ariko iryo tandukaniro ku ngano y'ibihano rigomba kugabanywa, igihano giteganywa ku uwatutse Perezida wa Repubulika kikaba kiri mu gaciro (proportionate). Urukiko rurasaba inzego zibishinzwe kwita kuri iki kibazo.

[113] Ikindi gitandukanya ingingo ya 236 n'iya 161, n'uko ihana usebya Perezida wa Repubulika. Gusebya Perezida wa Repubulika no gusebya abakuru b'ibihugu by'amahanga cyangwa ababihagarariye cyangwa abahagarariye imiryango mpuzamahanga mu Rwanda²¹ nibyo byonyine bihanwa mu Rwanda. Gusebya abandi uretse abo bamaze kuvugwa si icyaha, ahubwo uwasebejwe ashobora gutanga ikirego cyo gusaba indishyi. Urukiko rusanga rero ku birebana n'ingingo ya 236 yaregewe, agace kayo karebana n'icyaha cyo gusebanya, itandukanya gusebya Perezida wa Repubulika n'abandi bantu basigaye. Urukiko rusanga ariko, iryo tandukaniro atari ikibazo,

 $^{^{21}}$ Reba ingingo ya 218 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange

kuko rifite icyo rishingiyeho, aricyo urwego rwa Perezida wa Repubulika.

[114] Nkuko byemejwe n'uru Rukiko, mu rubanza N° RS/INCONST/PEN0005/12/CS rwa Uwinkindi Jean rwaciwe ku wa 22/02/2013, gushyira abantu mu byiciro ntabwo ari ukubavangura cyane cyane iyo ibyo byiciro byashyizweho hagamijwe kugera ku ntego yumvikana, igaragarira buri wese, ishingiye ku mategeko kandi ibyashingiweho bikaba bifite ireme mu nyungu rusange. Uru Rukiko rwibukije ko ibyo byanavuzwe n'Akanama k'Umuryango w'Abibumbye gashinzwe Uburenganganzira bwa Muntu (United Nations Human Rights Committee) mu mwanzuro kafashe mu nama yako ya 37, aho kagize kati: "finally, the committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant "22. Aha, Urukiko ruragaragaza niba hari impamvu zumvikana zatuma gusebya Perezida wa Repubilika byaba icyaha, ariko gusebya abandi ntibibe icyaha.

[115] Itegeko Nshinga rya Repubulika y'u Rwanda rigaragaza ko Perezida wa Repubulika afite inshingano zitandukanye, iz'ingenzi muri zo ni izi zikurikira:

Ni we Mukuru w'Igihugu (ingingo ya 98)

Ashinzwe kurinda Itegeko Nshinga no kubumbatira ubumwe bw'Abanyarwanda (ingingo ya 98)

²² Human Rights Committee, General Comment XVIII, Non-discrimination (1989), www.unhcr.org/refworld/type

Yishingira ko Leta ikomeza kubaho, ubwigenge n'ubusugire bw'Igihugu no kubahiriza amasezerano mpuzamahanga (ingingo ya 98)

Ashinzwe Ubutegetsi Nyubahirizategeko (ingingo ya 97)

Ni Umugaba w'Ikirenga w'Ingabo z'u Rwanda (ingingo ya 108)

Ahagararira u Rwanda mu mibanire yarwo n'amahanga (ingingo ya 111)

Afite uruhare mu ishyirwaho ry'amategeko (legislative role). Ashyira umukono ku mategeko kandi akaba anafite ububasha bwo gushyiraho Itegeko Teka, n'Iteka rya Perezida

[116] Nk'Umukuru w'Igihugu, Perezida wa Repubulika niwe wishingira, agasigasira ubumwe bw'abenegihugu, akaba n'ishusho (symbol) yabwo; kumusebya byagira ingaruka kuri ubwo bumwe, kuko bishobora gutuma abantu bacikamo ibice biturutse ku byamutangajweho bidafite ukuri. Ushaka kugira icyo atangaza cyangwa anenga kirebana na Perezida wa Repubulika, agomba kwitonda kugirango adatangaza ibimusebya bishobora kuyobya rubanda.

[117] Ishyirwaho rye, ivanwaho rye, uko ashobora gukurikiranwa aramutse akoze icyaha, ubudahangarwa afite nkuko biteganywa n'Itegeko Nshinga bitandukanye n'iby'abandi bayobozi mu Gihugu baba abatorwa cyangwa abashyirwaho. Ibi, byiyongereyeho inshingano afite nkuko zavuzwe mu gika kibanziriza iki, Urukiko rusanga Perezida wa Repubulika yihariye, ku buryo no gushyiraho amategeko yihariye kuri we, yaba amurengera cyangwa amugenga atandukanye n'areba abandi, byumvikana kandi bifite ishingiro. Bityo rero, kuba

ingingo ya 236 ifata gusebya Perezida wa Repubulika nk'icyaha, ariko ntibibe icyaha ku wasebya undi muntu, Urukiko rusanga bishingiye ku mwihariko w'inshingano afite kandi bifite ireme.

b) Kuba ingingo 236 yaba izitira ubwisanzure bw' itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

[118] Nkuko byavuzwe mu bika byo hejuru hasesengurwa niba guhana gukoza isoni abayobozi b'igihugu n'abashinzwe bibangamiye ubwisanzure umurimo rusange bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru, kugaragaza ibitekerezo, guhabwa no gutangaza amakuru ntibikwiye kubangamirwa n'icyo ari cyo cyose. Ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buteganywa n'ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki (ICCPR). Mu mwanzuro wako ibijyanye ngingo, wa 34 usobanura n'iyo Akanama k'Umuryango w'Abibumbye gashinzwe Uburenganzira bwa Muntu, kasabye ibihugu byasinye ayo masezerano ko gusebya bitaba icyaha, kanavuga ko n'igihano cyo gufungwa kitajyanye n'icyo cyaha. Kabivuze muri aya magambo : "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.²³ Ni ukuvuga ko kuvanaho icyaha cyo kusebya umukuru w'igihugu bitaraba ihame ku rwego mpuzamahanga. Nkuko byasabwe n'Akanama kavugwa muri iki gika, amategeko ahana gusebya yavaho, ariko igihe agikoreshwa akaba yakoreshwa ku bihe bikomeye (serious cases) kandi bikaba bigomba kwitonderwa.

[119] Urukiko rusanga hari itandukaniro ku gusebya Perezida wa Repubulika no gusebya abandi bantu. Ndetse n'ingaruka byagira kuri ibyo byiciro byombi ziratandukanye. Gusebya iyo byakorewe abandi bantu, abo byakorewe bashobora kwifashisha inzira v'imbonezamubano bakaregera guhabwa indishvi. Ubwinshi n'uburemere bw'inshingano za Perezida Repubulika nkuko zavuzwe, butuma hatangwa ibitekerezo byinshi bijyanye n'izo nshingano, ndetse hakabaho no gushaka no gutangaza amakuru ajyanye nazo. Mu gihe gutuka cyangwa gusebya Perezida wa Repubulika, byaba bitabaye icyaha gikurikiranwa n'Ubushinjacyaha, byasaba ko yiyambaza inzira y'imbonezamubano kugirango arenganurwe. Urukiko rusanga ibyo byabangamira akazi ke, n'igitinyiro gikwiriye umukuru w'Igihugu, nko kuba yahugira mu gushaka uko arenganurwa, kandi nkuko byavuzwe, afite inshingano ziremereye zimusaba kwitaho

[120] Gutuka cyangwa gusebya Perezida wa Repubulika kuba ari icyaha, bigomba kureberwa mu kurengera inshingano afite n'abo ahagarariye kurusha kubifata nk'ibyabangamira ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru. Urukiko rusanga buri wese agomba

²³ UN Human Rights Committee, General Comment 34, on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression. Paragraph 47. July 2011.

gushishoza, mu gutanga ibitekerezo, gushaka no gutanganza amakuru, akabikora ntawe atutse cyangwa ashebeje kuko nkuko na Mugisha Richard yabigarutseho, uretse na Perezida wa Repubulika, gutuka no gusebya umuntu wese ntibikwiye. Ariko kandi gukurikirana ukekwaho gusebya Perezida wa Republika ntibikwiye kwihutirwa; bikwiye gusuzumanwa ubushishozi bikagaragara ko ari ibintu bikomeye, 'serious case', mbere y'uko ubushinjacyaha buregera urukiko. Igihe ukekwa ashyikirijwe urukiko, ubushinjacyaha bugomba kugaragaza ko ibigize icyaha byuzuye nta gushidikanya (proof beyond reasonable doubt) nkuko bimeze no mu zindi manza nshinjabyaha.²⁴

[121] Ingingo ya 41 y'Itegeko Nshinga iteganya ko: "mu gukoresha uburenganzira n'ubwisanzure, buri wese azitirwa gusa n'itegeko rigamije kwemera no kubahiriza uburenganzira n'ubwisanzure by'abandi ndetse n'imyitwarire iboneye, ituze rusange rya rubanda n'imibereho myiza muri rusange biranga Igihugu kigendera kuri demokarasi". Nkuko bikubiye muri iyi ngingo, mu gukoresha ubwisanzure buri wese azitirwa n'itegeko rifite icyo rigamije nk'imyitwarire iboneye n'ituze rusange bya rubanda. Urukiko rusanga kuba hari ingingo y'itegeko ihana usebya Perezida wa Repubulika, biri muri uwo murongo wo kurengera ituze rusange hagendewe ku kuba ahagarariye rubanda (abaturage bose).

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²⁴ Aha hakwibutswa ko inshingano yo kugaragaza ibimenyetso mu manza nshinjabyaha itandukanye n'iyo mu manza mbonezamubano. Mu manza nshinjabyaha urugero ruri hejuru ku buryo nta gushidikanya kugaragara, mu manza mbonezamubano urwo rugero rukaba ari ukugaragaza ko ushyize ku munzani ugaragaza ko afite ibimenyetso bigaragaza ukuri kurusha undi ariwe utsinda (on a balance of probabilities).

[122] Kuba gutuka cyangwa gusebya Perezida wa Repubulika ari icyaha, si umwihariko w'u Rwanda. Ibihugu bitandukanye bizwi ko bigendera ku mahame ya demokarasi, bifite mu mategeko yabyo, ingingo zihana utuka cyangwa usebya Perezida, cyangwa undi wese ufatwa nk'Umukuru w'Igihugu, bitewe n'imitegekere ya buri gihugu. Ibyo Bihugu ni nka Germany, Greece, Iceland, Italy, Netherlands, Portugal, Spain, Sweden n'ibindi. Ariko muri ibi bihugu, nkuko bigaragazwa n'inyandiko ya Organization for Security and Cooperation in Europe, ibihano bitoya (minimum) n'ibinini (maximum) ku mukuru w'igihugu biri munsi y'ibiteganywa mu ngingo ya 236.²⁵

[123] Kubera impamvu zisobanuwe mu bika bibanziriza iki, Urukiko rurasanga kugira icyaha gutuka cyangwa gusebya Perezida wa Repubulika, bitabangamira ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru biturutse ku mwihariko w'inshingano afite.

Umwanzuro rusange

[124] Urukiko rw'Ikirenga, ruhereye ku bisobanuro rwatanze kuri buri ngingo, rusanga ingingo ya 136, igika cya mbere, icya kabiri n'icya gatatu y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 18. Nkuko byasobanuwe, guhana ubusambanyi ntibibangamiye ubwisanzure bw'umuryango ahubwo bigamije kuwurengera.

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²⁵ Organization for Security and Cooperation in Europe "Defamation and Insult Laws in the OSCE Region: A comparative Study" March 2017.

- [125] Nkuko byasobanuwe hejuru, ibika bibiri bya nyuma ntibitanga ubwisanzure busesuye kuwakorewe icyaha, bwo guhagarikisha urubanza aho rwaba rugeze Umucamanza ashobora kubyanga. Urukiko rusanga ibyo bika byombi bya nyuma byavaho, ahubwo igika cya gatatu kikuzuzwa, kikandikwa mu buryo bukurikira Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no kuwakoranye icyaha n'uregwa".
- [126] Urukiko rusanga ingingo ya 138 n'iya 139 z'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zitanyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 18. Nkuko byasobanuwe, guhana ibyo byaha ntibibangamiye ubwisanzure bw'umuryango.
- [127] Urukiko rusanga kandi ingingo ya 154 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranije n'ingingo ya 38 y'Itegeko Nshinga kuko ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.
- [128] Urukiko rusanga ingingo ya 233 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15, na 38. Ingingo ya 233, ntirengera abantu mu buryo bumwe kandi ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.
- [129] Urukiko rusanga ingingo ya 236 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange

itanyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15 na 38 nkuko byaregewe, kuko inshingano za Perezida wa Repubulika zimuha umwihariko wo kuba hajyaho amategeko amurengera ku buryo bwihariye. Ariko rusanga ibihano biteganijwe muri iyo ngingo biremereye bikaba bikwiye gusuzumwa n'inzego zibishinzwe.

III. ICYEMEZO CY'URUKIKO

- [130] Rwemeje ko ikirego cyatanzwe na Mugisha Richard gisaba kwemeza ko ingingo za 136, 138, 139, 154, 233, n'iya 236 z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zinyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15, 18 na 38, gifite ishingiro kuri bimwe.
- [131] Rwemeje ko ingingo ya 136, igika cya mbere, icya kabiri n'icya gatatu y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranyije n'ingingo ya 18 y'Itegeko Nshinga.
- [132] Rwemeje ko igika cya gatatu cy'ingingo ya 136 cyandikwa mu buryo bukurikira: "Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no kuwakoranye icyaha n'uregwa".
- [133] Rwemeje ko igika cya kane n'icya gatanu by'ingingo ya 136 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange bivanyweho.

- [134] Rwemeje ko ingingo ya 138, n'iya 139 z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zitanyuranyije n'ingingo ya 18 y'Itegeko Nshinga.
- [135] Rwemeje ko ingingo ya 154 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranije n'ingingo ya 38 y'Itegeko Nshinga, bityo iyo ngingo ikaba iyanyweho.
- [136] Rwemeje ko ingingo ya 233 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranije n'ingingo ya 15 n'iya 38 y'Itegeko Nshinga, bityo iyo ngingo ikaba iyanyweho.
- [137] Rwemeje ko ingingo ya 236 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranije n'ingingo ya 15 n'iya 38 y'Itegeko Nshinga.
- [138] Rutegetse ko uru rubanza rutangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda.

IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA

IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA Z'IMBONEZAMUBANO, IZ'UBUCURUZI, IZ'UMURIMO N'IZ'UBUTEGETSI

NISHIMWE v. MUGENGA N'UNDI

[Rwanda URUKIKO RW'IKIRENGA – RCAA 00031/2016/SC (Mugenzi P.J., Cyanzayire na Nyirinkwaya J.) 09 Ugushyingo 2018]

Amategeko y'imiburanishirize y'imanza mbonezamubano — Ubujurire — Kurega uwo mwari mufatanije urubanza — Kugirango umuntu arege undi mu bujurire, agomba kugaragaza inyungu akurikiranye. bikaba bitashoboka kugira inyungu ukurikirana mu bujurire ku wo mwari mufatanyije urubanza. mu nkiko zibanza.

Amategeko y'imiburanishirize y'imanza mbonezamubano – Ababuranyi benshi basangiye inyungu ku kiburanwa – Igihe hari ababuranyi benshi basangiye inyungu ku kiburanwa, ubujurire bw'umwe bugira ingaruka no ku bandi, n'iyo baba bataje mu rubanza.

Incamake y'ikibazo: Mugenga yagiranye amasezerano y'ubugure bw'inzu na Kabagema, yaje guteshwa agaciro n'Urukiko rwa Mbere rw'Iremezo rwa Kigali, kuko rwasanze Kabagema yaragurishije ibitari ibye kuko byari iby'umuvandimwe we Rwamanywa, yagurishije mu buryo budakurikije amategeko.

Mugenga amaze gusubiza inzu yari yaraguze, yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge, arega Nishimwe na Mashami abazungura ba Rwamanywa, avuga ko yasubije inzu ariko ibikorwa yari amaze kuyikoraho ntiyabyishyurwa, asaba inyungu z'amafaranga yashyize kuri iyo nzu, amafaranga y'ubukode bayibonamo, n' amafaranga aturuka ku guta agaciro

k'ifaranga (inflation). Urwo rukiko rwemeza ko, koko hari ibikorwa Mugenga yakoze kuri iyo nzu, ndetse agira n'ibindi bishya yubaka muri icyo kibanza agomba kubisubirizwa amafaranga yagenwe mu bushishozi bw'Urukiko; Rutegeka abarezwe gusubiza Mugenga amafaranga y'igihembo cya Avoka n'amafaranga y'ikurikirana rubanza.

Mugenga n' abazungura ba Rwamanywa ntibishimiye imikirize y'urubanza, buri ruhande rujuririra mu Rukiko Rukuru, ubujurire bwabo buhurizwa hamwe muri urwo rubanza Urukiko rwemeje ko ubujurire bw' abazungura ba Rwamanywa n'ubwa Mugenga nta shingiro bufite, rwemeza ko imikirize y'urubanza rwajuririwe idahindutse.

Nishimwe yongeye kujuririra urwo rubanza mu Rukiko rw'Ikirenga, avuga ko arega Mugenga na Mashami. Asobanura ko yajuriye kuko habaye kwivuguruza kwatumye Urukiko ruvugisha Itegeko ibyo ritavuga, ko Urukiko rwemeje ko Mugenga asubizwa inyongeragaciro yashyize ku nzu mu gihe ariwe wakoze amakosa, no kuba ibimenyetso byashingiweho mu kugena ibyo yongeye kuri iyo nzu, bishidikanywaho.

Iburanisha ryabaye ku wa 27/03/2018, maze Mugenga azamura inzitizi yo kuba Nishimwe wajuriye yaratsinzwe kabiri ku mpamvu zimwe, n'iyo kuba ikiburanwa ubwacyo kitagejeje kuri 50.000.000Frw, bityo ko ubujurire budakwiye kwakirwa kubera ko butari mu bubasha bw'Urukiko rw'Ikirenga. Ku wa 20/04/2018, Urukiko rwafashe icyemezo mu rubanza rubanziriza urundi, rwemeza ko inzitizi y'iburabubasha yatanzwe na Mugenga nta shingiro ifite.

Mugenga yongeye gutanga iyindi nzitizi avuga ko Nishimwe yahinduye ababuranyi mu rwego rw'ubujurire, kubera ko Mashami aza mu baregwa kandi bari bafatanyije urubanza na

Nishimwe mu Nkiko zibanza. Muri uru rubanza urukiko rwanibajije niba ubujurire bwa Nishimwe butagira ingaruka ku bandi bazungura. Mugenga Joseph avuga ko kuba Mashami Gisèle yari urega kimwe na Nishimwe Claudine mu Rukiko rubanza, bitashoboka ko ahinduka uregwa kimwe nawe mu bujurire, ko rero kuba Nishimwe Claudine yarahinduye ababuranyi, ikirego cye kidakwiye kwakirwa.

Nishimwe avuga ko ababuranye mbere ari abarega ntakibabuza guhinduka abaregwa mu bujurire. Kandi ko kuzana Mashami mu bujurire nk'uregwa ntacyo bitwaye, kuko akomeza kuba umuburanyi nk'uko yariwe mu nkiko zabanje. Naho Mashami we avuga ko nta kibazo kuba yaraje nk'uregwa, kuko yari umuburanyi mu nzego za mbere akaba kandi nawe ari umuzungura wa Rwamanywa.

Ku bijyanye n'ikibazo cyo kumenya niba ubujurire bwa Nishimwe butagira ingaruka ku bandi bazungura, cyazamuwe n'Urukiko, Nishimwe avuga ko yajuriye mu Rukiko rw'Ikirenga ku nyungu ze bwite, ariko ajuririra ibintu bituruka kuri "Succession" Rwamanywa. Avuga ko icyava mu rubanza cyaba kireba abazungura bose.

Mashami avuga ko ikirego gitangwa mu rwego rwa mbere, harezwe "Succession" Rwamanywa, ashimangira ko Nishimwe atajuriye nk'uhagarariye "Succession", ko ahubwo yajuriye ku giti cye. Mugenga avuga mu Rukiko Rwisumbuye uwarezwe ari "Succession" Rwamanywa, aba ari nayo ijurira, bivuze ko imyanzuro yafatiwe kuri iyo "Succession", Avuga ko no mu Rukiko rw'Ikirenga Nishimwe yajuriye nk'uhagarariye "Succession", akaba agomba kwerekana ububasha yahawe n'abazungura ba Rwamanywa, yabubura ubujurire bwe ntibwakirwe.

Incamake y'icyemezo: 1. Kugirango umuntu arege undi mu bujurire, agomba kugaragaza inyungu akurikiranye, bikaba bitashoboka kugira inyungu ukurikirana ku wo mufatanyije urubanza (murega cyangwa muregwa hamwe), mu gihe mu miburanire yanyu ku rwego rubanza nta na kimwe umwe yari akurikiranye ku wundi.

2. Igihe hari ababuranyi benshi basangiye inyungu mu kiburanwa, ubujurire bw'umwe bugira ingaruka no ku bandi, n'iyo baba bataje mu rubanza.

Inzitizi yo kudahindura ababuranyi mu bujurire ifite ishingiro. Rutegetse ko Mashami ahamagarwa mu rubanza, ku ruhande rw'uwajuriye.

Amategeko yashingiweho:

Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, Ingingo ya 9, 147, 153

Nta manza zifashishijwe.

Ibitekerezo by'abahanga byiifashishijwe:

Jacques ENGLEBERT, « <u>Les pièges de la procédure civile</u> », Editions Jeune Barreau, Bruxelles, 2005, pp. 7 à 68

Jean VINCENT et Serge GUINCHARD, <u>Procédure civile</u>, Précis Dalloz, 25ème édition, 1999, p. 140 937,

Hakim BOULARBAH, Olivier CAPRASSE, Georges de LEVAL, Frédéric GEORGES, Pierre MOREAU, Dominique MOUGENOT, Jacques Van COMPERNOLLE, <u>Droit judiciaire</u>, <u>Manuel de procédure civile</u>, T.2, 2015, P. 80

Mélina DOUCHY-OUDOT, <u>Procédure Civile, l'action en</u> justice, le procès, les voies de recours, 2 ème édition, 2007, P. 104

Christophe LHERMITTE, Blog du Cabinet Gauthier & Lhermitte, le 19 Avril 2016

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Mugenga Joseph yaguze na Kabagema Ferdinand inzu mu mwaka wa 1994. Amasezerano y'ubugure bwabo yaje guteshwa agaciro n'Urukiko rwa Mbere rw'Iremezo rwa Kigali, mu rubanza RC36.294/01 rwaciwe ku wa 12/02/2003. Muri urwo rubanza, Urukiko rwasanze Kabagema Ferdinand yaragurishije ibitari ibye kuko byari iby'umuvandimwe we Rwamanywa Jérémie, akabigurisha mu buryo budakurikije amategeko, kubera iyo mpamvu Urukiko rwemeza ko amasezerano y'ubugure yabaye hagati ya Kabagema Ferdinand na Mugenga Joseph avuyeho.
- [2] Mugenga Joseph amaze gusubiza iyo nzu, yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge, arega abazungura ba Rwamanywa Jérémie bagizwe na Nishimwe Claudine na Mashami Gisèle, avuga ko yasubije inzu ariko ibikorwa yari amaze kuyongeraho ntiyabisubizwa, asaba inyungu z'amafaranga yari kubona ku mafaranga yashyize kuri iyo nzu, amafaranga y'ubukode abazungura ba Rwamanywa Jérémie

bayibonamo, n'amafaranga aturuka ku guta agaciro k'ifaranga (inflation), byose bingana na 137.056.112Frw.

- [3] Urukiko Rwisumbuye rwaciye urubanza rwemeza ko, koko hari ibikorwa Mugenga Joseph yakoze kuri iyo nzu, ndetse agira n'ibindi yubaka muri icyo kibanza; Rutegeka "Succession" Rwamanywa Jérémie igizwe na Nishimwe Claudine na Mashami Gisèle gusubiza Mugenga Joseph amafaranga 15.591.362Frw, runabategeka kumuha amafaranga 800.000Frw y'igihembo cya Avoka n'amafaranga 100.000Frw y'ikurikiranarubanza.
- [4] Mugenga Joseph n'abazungura ba Rwamanywa Jérémie ntibishimiye imikirize y'urubanza, buri ruhande rujuririra mu Rukiko Rukuru, ubujurire bwabo buhurizwa hamwe mu rubanza RCA0517/15/HC/KIG -0538/15/HC/KIG, rucibwa ku wa 22/04/2016. Urukiko rwemeje ko ubujurire bw' abazungura ba Rwamanywa Jérémie n'ubwa Mugenga Joseph nta shingiro bufite, rwemeza ko imikirize y'urubanza rwajuririwe idahindutse.
- [5] Nishimwe Claudine yongeye kujuririra urwo rubanza mu Rukiko rw'Ikirenga, urubanza ruhabwa RCAA00031/2016/SC, avuga ko arega Mugenga Joseph na Mashami Gisèle. Asobanura ko yajurijwe no kuba harabaye kwivuguruza bigatuma Urukiko ruvugisha Itegeko ibyo ritavuga, ko Urukiko rwemeje ko Mugenga asubizwa inyongeragaciro yashyize ku nzu mu gihe ariwe wakoze amakosa, no kuba ibimenyetso byashingiweho mu kugena ibyo yongeye kuri iyo nzu, bishidikanywaho.
- [6] Iburanisha ry'urubanza ryabereye mu ruhame ku wa 27/03/2018, Nishimwe Claudine ahagarariwe na Me Rwabukumba Moussa na Me Nsengiyumva Abel, Mashami

Gisèle ahagarariwe na Me Abasa Fazil, naho Mugenga Joseph yunganiwe na Me Nzabahimana Augustin.

- [7] Iburanisha rigitangira, Mugenga Joseph yibukije inzitizi yatanze ishingiye ku kuba Nishimwe Claudine wajuriye yaratsinzwe kabiri ku mpamvu zimwe, n'iyo kuba ikiburanwa ubwacyo kitagejeje kuri 50.000.000Frw, bityo ko hashingiwe ku ngingo ya 28 igika cya 2, agace ka 7° no ku gika cya 5 cy'Itegeko-Ngenga N°03/2012 ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ubujurire budakwiye kwakirwa kubera ko butari mu bubasha bw'Urukiko rw'Ikirenga.
- [8] Ku wa 20/04/2018, Urukiko rwafashe icyemezo mu rubanza rubanziriza urundi, rwemeza ko inzitizi y'iburabubasha yatanzwe na Mugenga Joseph nta shingiro ifite, ko urubanza ruzasubukurwa ku wa 12/06/2018. Kuri iyi tariki ntirwaburanishijwe kubera impinduka mu rwego rw'amategeko, ruburanishwa ku wa 09/10/2018, hitabye Nishimwe Claudine uburanirwa na Me Rwabukumba Moussa na Me Nsengiyumva Abel ; Mugenga Joseph yunganiwe na Me Nzabahimana Augustin, naho Mashami Gisèle aburanirwa na Me Abasa Fazil.
- [9] Mugenga Joseph yongeye gutanga inzitizi avuga ko Nishimwe Claudine yahinduye ababuranyi mu rwego rw'ubujurire, kubera ko Mashami Gisèle aza mu baregwa kandi yari afatanyije urubanza na Nishimwe Claudine mu Nkiko zibanza, icyo kibazo aba ari cyo kigibwa ho impaka, hamwe n'icyo kumenya niba ubujurire bwa Nishimwe Claudine butagira ingaruka ku bandi bazungura cyabyukijwe n'Urukiko.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. Kumenya niba Nishimwe Claudine ashobora kurega mu bujurire Mashami Gisèle bari bafatanyije urubanza mu nzego zibanza.

- [10] Mugenga Joseph avuga ko kuba Mashami Gisèle yari urega kimwe na Nishimwe Claudine mu Rukiko rubanza, bitashoboka ko ahinduka uregwa kimwe nawe mu bujurire, ko rero kuba Nishimwe Claudine yarahinduye ababuranyi, ikirego cye kidakwiye kwakirwa. Akomeza avuga ko Mashami Gisèle yanze gutanga igarama, ko kandi ibyo yakoze bifite ingaruka mu gihe "Succession" Rwamanywa Jérémie yatsindwa ikagira ibyo icibwa, asaba ko urega yakomeza kuba Nishimwe Claudine naho Mashami Gisèle akavanwa muri uru rubanza.
- [11] Me Nzabahimana Augustin wunganira Mugenga Joseph avuga ko ashingiye ku ngingo ya 169 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi¹, ububasha bw'umuburanyi budahinduka mu bujurire.
- [12] Me Rwabukumba Moussa uburanira Nishimwe Claudine avuga ko ababuranye mbere ari abarega ntakibabuza guhinduka abaregwa mu bujurire. Avuga ko Nishimwe Claudine na Mashami Gisèle mu rwego rwa mbere baregaga bakanaregwa, ko impamvu yatumye Mashami Gisèle ahinduka uregwa ari uko hari ubuhamya yatanze Nishimwe Claudine atishimiye; ubwo

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¹ Ubujurire butuma ikibazo gisubira uko cyari kimeze mbere y'uko gicibwaho urubanza rujuririrwa, ariko ku ngingo zajuririwe gusa.

buhamya akaba aribwo bwabaye intandaro yo gutuma Nishimwe Claudine atsindwa akagira ibyo acibwa.

- [13] Me Nsengiyumva Abel nawe wunganira Nishimwe Claudine avuga ko kuzana Mashami Gisèle mu bujurire nk'uregwa ntacyo bitwaye, kuko akomeza kuba umuburanyi nk'uko yariwe mu nkiko zabanje.
- [14] Me Abasa Fazil wunganira Mashami Gisèle we avuga ko nta kibazo kirimo kuba uwo yunganira yaraje nk'uregwa, kuko yari umuburanyi mu nzego za mbere akaba kandi nawe ari umuzungura wa Rwamanywa Jérémie. Avuga kandi ko impamvu yaje mu rubanza nk'uregwa ari uko atatanze igarama, ko ibyo bamurega byose yiteguye kubisubiza. Yongeraho ko iby'uko yarezwe kubera ubuhamya yatanze mu Rukiko Rukuru abyumviye mu Rukiko rw'Ikirenga, ko we icyo yari yiteguye kuburana ari uburenganzira bwa Mashami Gisèle nk'umuzungura wa Rwamanywa Jérémie, ariko bitabuza ko n'ubwo buhamya yiteguye kubwireguraho.

UKO URUKIKO RUBIBONA

[15] Urukiko rurasanga nta ngingo mu mategeko isobanura niba bishoboka cyangwa bidashoboka kurega mu bujurire uwo mwari mufatanyije urubanza mu rwego rubanza (uwo mwaregaga cyangwa mwaregwaga hamwe). Ingingo ya 147 y'Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, mu gika cyayo cya mbere, iteganya gusa ko "Umuntu wabaye umuburanyi mu rubanza ku rwego rwa mbere ashobora kurujuririra iyo abifitemo inyungu, keretse iyo amategeko abigena ukundi".

[16] Ingingo ya 9 y'Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, mu gika cyayo cya mbere, iteganya ko "Umucamanza aca urubanza ashingiye ku ngingo z'amategeko zirebana n'ikirego yaregewe. Iyo nta tegeko rijyanye n'ikiburanwa ashingira ku mategeko asanga yashyiraho mu gihe yaba ashinzwe kuyashyiraho, yifashishije ibyemezo byagiye bifatwa n'inkiko, umuco, amahame rusange agenga amategeko, n'inyandiko z'abahanga mu mategeko".

[17] Umuhanga mu mategeko Jacques Englebert, asobanura ko mu bisabwa kugirango umuntu ajurire harimo :

Kuba yarabaye umuburanyi mu rubanza rujuririrwa;

Kuba uwo arega mu bujurire yarabaye mu rubanza rujuririrwa;

Kuba mu rukiko rubanza hari icyaburanwaga (un lien d'instance) hagati ye n'uwo arega mu bujurire².

Avuga kandi ko kugirango umuntu aregwe mu bujurire, agomba kuba hari icyo yaburanaga (lien d'instance) n'uwajuriye, mu rubanza rwajuririwe³.

-diriger son appel contre une partie qui était elle-même à la cause [......]

² « Pour pouvoir interjeter appel principal, il faut :

⁻avoir été partie au procès en première instance ;

⁻avoir eu un "lien d'instance", devant le premier juge, entre la partie qui interjette appel et la partie contre laquelle l'appel est interjeté "; Jacques ENGLEBERT, Les pièges de la procédure civile, Editions Jeune Barreau, Bruxelles, 2005, pp. 7 à 68

³ « Pour être valablement intimé, il faut avoir eu avec l'appelant au principal un lien d'instance dans le cadre de la procédure ayant donné lieu au jugement dont appel » ; Ibidem

[18] Uyu muhanga avuga ko, ihame ari uko ubujurire bureba uwo mwari mushyamiranye (adversaire) mu rwego rubanza, akanasobanura ko abashyamiranye(adversaires) mu rwego rubanza bivuga kuba hari icyo umwe yaregaga undi, cyangwa kuba hari icyo yireguragaho⁴. Ahereye ku rubanza rwaciwe n'Urukiko Rusesa Imanza rwo mu Bubiligi ku wa 10/10/2002, avuga ko bihagije kuba hari icyo umwe yaregaga undi mu rwego rubanza, bakaba bari bashyamiranye ku ngingo imwe cyangwa nyinshi z'ibyaburanwaga⁵.

[19] Ibivugwa n'uyu muhanga mu mategeko bishimangirwa no kuba, kugirango umuntu arege undi mu bujurire, agomba kugaragaza inyungu akurikiranye, nk'uko byumvikana mu ngingo ya 147 y'Itegeko N°22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru, bikaba bitashoboka kugira inyungu ukurikirana ku wo mufatanyije urubanza (murega cyangwa muregwa hamwe), mu gihe mu miburanire yanyu ku rwego rubanza nta na kimwe umwe yari akurikiranye ku wundi.

[20] Abahanga mu mategeko bayobowe na Georges de Leval, basobanura ko, inyungu bivuga icyo urega ashobora kuvana mu

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⁴ « On enseigne traditionnellement que le recours ne peut, en principe, être dirigé que contre une partie dont on est l'adversaire en première instance, et en la qualité en laquelle elle avait été mise à la cause". « Avoir été adversaires en première instance, c'est avoir conclu l'un contre l'autre ou encore avoir développé des prétentions à l'encontre d'une partie défenderesse ou avoir opposé des défenses à l'égard d'une partie demanderesse » ; Ibidem

⁵ "il suffit [...] que ces parties aient pris des conclusions l'une contre l'autre en première instance et aient été, ainsi, l'adversaire l'une de l'autre à propos d'un ou de plusieurs points litigieux. L'existence d'un lien d'instance est rencontrée par l'existence, au premier degré de juridiction, d'une contestation sous-jacente entre les parties concernées qui a été exprimée dans les conclusions"; Ibidem

rubanza mu buryo bufatika, igihe atanga ikirego⁶. Abahanga mu mategeko Jean Vincent na Serge Guinchard⁷, kimwe n'undi muhanga mu mategeko Mélina Douchy-Oudot⁸, nabo basobanura ko urega agomba kugaragaza ko azagira icyo avana mu kirego atanze.

[21] Muri uru rubanza, Nishimwe Claudine na Mashami Gisèle bari bafatanyije urubanza mu nkiko zibanza, ndetse basangiye inyungu nk'abazungura ba Rwamanywa Jérémie, ntawe ugira icyo arega undi. Hakurikijwe ibisobanuro byatanzwe, ntabwo Nishimwe Claudine yahindukira ngo arege Mashami Gisèle mu bujurire, cyane ko mu nyandiko itanga ikirego cy'ubujurire mu Rukiko rw'Ikirenga, ndetse no mu myanzuro ye atagaragaza icyo amurega. Mu iburanisha ry'urubanza ryo ku wa 09/10/1018, nibwo Me Nsengiyunva Abel wunganira Nishimwe Claudine yabwiye Urukiko ko impamvu uwo yunganira yareze Mashami Gisèle, ari uko yatanze ubuhamya atishimiye, nyamara atari yarigeze abimurega ngo bisuzumwe mu rubanza rwabanje.

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⁶ « L'intérêt consiste en tout avantage matériel ou moral - effectif mais non théorique- que le demandeur peut retirer de la demande au moment où il la forme » ; Hakim BOULARBAH, Olivier CAPRASSE, Georges de LEVAL, Frédéric GEORGES, Pierre MOREAU, Dominique MOUGENOT, Jacques Van COMPERNOLLE, Droit judiciaire, Manuel de procédure civile, T.2, 2015, P. 80

^{7 «} Celui qui agit doit justifier que l'action qu'il exerce est succeptible de lui procurer un avantage » ; Jean VINCENT et Serge GUINCHARD, Procédure Civile, Précis Dalloz, 25ème édition, 1999, p. 140

⁸ « La personne doit justifier que la saisine de la juridiction est faite en vue de l'obtention d'un avantage » ; Mélina DOUCHY-OUDOT, Procédure Civile, l'action en justice, le procès, les voies de recours, 2 ème édition, 2007, P. 104

[22] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rusanga ikirego cy'ubujurire cya Nishimwe Claudine ku bireba Mashami Gisèle kidakwiye kwakirwa ngo gisuzumwe.

B. Kumenya ingaruka ubujurire bwa Nishimwe Claudine bwagira ku bandi bazungura barezwe hamwe mu rwego rubanza kandi basangiye inyungu mu kiburanwa

- [23] Me Rwabukumba Moussa uburanira Nishimwe Claudine avuga ko uwo yunganira yajuriye mu Rukiko rw'Ikirenga yivugira, ariko ajuririra ibintu bituruka kuri "Succession" Rwamanywa Jérémie. Avuga ko icyava mu rubanza cyaba kireba "Succession" yose. Yongeraho ko mu Rukiko Rwisumbuye, umucamanza yafashe icyemezo kuri "Succession" yose mu gihe buri wese mu bayigize yari yarezwe ku giti cye, akaba asanga iyo ari inenge kuko buri wese yagombaga gutegekwa ibyo acibwa ku giti cye, n'ubwo icyaburanwaga gihuriweho n'abazungura ba Rwamanywa Jérémie bose.
- [24] Me Abasa Fazil wunganira Mashami Gisèle avuga ko ikirego gitangwa mu rwego rwa mbere, harezwe "Succession" Rwamanywa Jérémie. Avuga ko mu Rukiko rw'Ikirenga hajuriye Nishimwe Claudine wenyine nk'umwe mu bagize "Succession" kandi uyifitemo inyungu. Ashimangira ko Nishimwe Claudine atajuriye nk'uhagarariye "Succession", ko ahubwo yajuriye nkawe ku giti cye.
- [25] Mugenga Joseph avuga ko mu kuburana bwa mbere mu Rukiko Rwisumbuye uwarezwe ari "Succession" Rwamanywa Jérémie, aba ari nayo ijurira, bivuze ko imyanzuro yafashwe yafatiwe kuri iyo "Succession". Avuga ko no mu Rukiko rw'Ikirenga Nishimwe Claudine yajuriye nk'uhagarariye "Succession", akaba agomba kwerekana ububasha yahawe

n'abazungura ba Rwamanywa Jérémie, yabubura ubujurire bwe ntibwakirwe.

UKO URUKIKO RUBIBONA

[26] Ingingo ya 153 y'itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi igira iti : "Iyo bamwe mu baburanyi bajuriye abandi ntibajurire, ntibibuza ko bose bahamagarwa mu rubanza rw'ubujurire. Muri icyo gihe, abatarezwe⁹ mu bujurire bashobora gusaba ijambo bagamije kurengera inyungu zabo. Bashobora kandi kuririra ku bujurire bakagira ibyo basaba kimwe n'uko bashobora gutakaza bimwe mu byo bari baragenewe mu rubanza rwajuririwe".

[27] Muri uru rubanza, ikiburanwa ari nacyo cyajuririwe mu Rukiko rw'Ikirenga, gishingiye ku nzu yasizwe na Rwamanywa Jérémie, igurishwa na Kabagema Ferdinand, ikaba ihuriweho na Nishimwe Claudine na Mashami Gisèle nk'abazungura ba Rwamanywa Jérémie.

[28] Urubanza rutangira mu Rukiko Rwisumbuye, haregwaga "Succession" Rwamanywa Jérémie, igizwe na Mashami Gisèle na Nishimwe Claudine. Ibyemezo byafashwe n'Urukiko byarebaga iyo "Succession". Mu Rukiko Rukuru, bigaragara ko buri wese mu bagize "Succession" Rwamanywa Jérémie, yajuriye ku giti cye. Ubujurire bwabo ntibwahawe ishingiro, hagumaho imikirize y'Urukiko Rwisumbuye.

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⁹ Mu zindi ndimi havugwa abatareze, bigaragara ko habaye kwibeshya mu myandikire

[29] Mu Rukiko rw'Ikirenga, nk'uko bigaragara mu nyandiko zigize dosiye zatanzwe hifashishijwe urubuga rutangirwaho ibirego (www.iecms.gov.rw), Nishimwe Claudine yajuriye ku giti cye, adahagarariye "Succession" Rwamanywa Jérémie, ariko akavuga ko ibyo aburana abihuriyeho n'abandi bazungura. Urukiko rusanga ibyemezo byafatwa, hashingiwe ku kiburanwa, bitaba bireba Nishimwe Claudine wenyine wajuriye, ahubwo byagira ingaruka no ku bandi bazungura bahuriye ku kiburanwa.

[30] Abahanga mu mategeko Jean Vincent na Serge Guinchard, basobanura ko igihe hari ababuranyi benshi basangiye inyungu mu kiburanwa, ubujurire bw'umwe bugira ingaruka no ku bandi, n'iyo baba bataje mu rubanza. ¹⁰ Ibyo babishingira ku ngingo iri mu gitabo cy'amategeko agenga imiburanishirize y'imanza mbonezamubano mu Bufaransa (ingingo ya 553).

[31] Mu nyandiko yakozwe na Christophe Lhermitte ku wa 19/04/2016, ahereye ku bisobanuro byatanzwe n'Urukiko Rusesa Imanza rwo mu Bufaransa¹¹, asobanura ko gusangira inyungu mu kiburanwa (indivisibilité) ari igihe bidashoboka kurangiza urubanza mu buryo butandukanye kuri buri muburanyi¹². Hakurikijwe ibyo bisobanuro, Urukiko rusanga Nishimwe Claudine na Mashami Gisèle nk'abagize "Succession"

¹⁰ « En cas d'indivisibilité entre plusieurs parties, l'appel de l'une produit effet à l'égard des autres, même si celles-ci ne se sont pas jointes à l'instance » ; Jean VINCENT et Serge GUINCHARD, Procédure civile, 25ème édition, 1999, p. 937

¹¹ Cass. civ.2e, 7 avril 2016, n°15-10126

Rwamanywa Jérémie, basangiye inyungu mu rubanza ku buryo ibyemezo byarufatwamo bitashobora gushyirwa mu bikorwa mu buryo butandukanye kuri buri wese.

[32] Ibi bisobanuro by'abahanga, birunganira mu gusobanura ibiteganyijwe n'ingingo ya 153 y'Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi yavuzwe haruguru, kuko iyi ngingo iteganya muri rusange uko bigenda iyo hari ababuranyi benshi, bamwe bakajurira abandi ntibajurire, igasobanura ko bitabuza ko n'abandi bahamagarwa mu rubanza, n'ubwo itabigira itegeko.

Ibisobanuro by'abahanga mu mategeko, nk'uko byibukijwe haruguru, bigaragaza by'umwihariko ko igihe ababuranyi basangiye inyungu, icyemezo cyafatwa kuri umwe kigira ingaruka ku basangiye inyungu bose. Muri icyo gihe, ibiteganywa n'ingingo ya 153 yavuzwe haruguru ntibyaba guhitamo, ahubwo ni ngombwa ko ababuranyi basangiye inyungu bose bahamagarwa mu rubanza, kugirango icyemezo kizafatwa kizashobore gushyirwa mu bikorwa.

[33] Hashingiwe ku biteganywa mu ngingo ya 153 y'itegeko N°22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru, bigahuzwa n'ibisobanuro by'abahanga mu mategeko byagaragajwe mu bika bibanza; hashingiwe kandi ku kuba nishimwe Claudine na Mashami Gisèle basangiye inyungu mu kiburanwa nk'abazungura ba Rwamanywa Jérémie, ku buryo icyemezo cyafatwa cyabagiraho ingaruka bose, Urukiko rusanga Mashami Gisèle akwiye kuza mu rubanza n'ubwo atajuriye.

III. ICYEMEZO CY'URUKIKO

- [34] Rwemeje ko ikirego cy'ubujurire cyatanzwe na Nishimwe Claudine ku bireba Mashami Gisèle kitagomba kwakirwa ngo gisuzumwe ;
- [35] Rwemeje ko Mashami Gisèle nk'uregwa, akuwe mu rubanza;
- [36] Rutegetse ko Mashami Gisèle ahamagarwa muri uru rubanza, ku ruhande rwa Nishimwe Claudine wajuriye;
- [37] Rutegetse ko iburanisha ry'uru rubanza rizakomeza ku wa 08/01/2019 ;
- [38] Rutegetse ko amagarama y'urubanza asubitswe.



URUBANZA RW'IMBONEZAMUBANO

MUKARWEGO N'ABANDI v. NGIRIYABANDI

[Rwanda URUKIKO RW'IKIRENGA – RS/REV/INJUST/CIV0009/14/CS, (Rugege P.J., Kayitesi R. na Mutashya, J.) 14 Nzeli 2018]

Amategeko agenga ibimenyetso — Inyandiko ihinnye y'urubanza - Inyandiko ihinnye y'urubanza si incarubanza, ariko ni ikimenyetso kidashidikanywaho ko habaye urubanza hagati y'ababuranyi kandi yerekana icyemezo cyarufashwemo.

Amategeko agenga imiburanishirize y'imanza mboneza mubano – Urubanza rwabaye ntakuka - Guca Urubanza ku kiburanwa cyamaze gufatwaho icyemezo mu rubanza rwabaye ntakuka n'ikosa, rikosorwa nuko urwo rubanza rukurwaho.

Incamake y'Ikibazo :Ngiriyabandi yareze Nyiringango mu Rukiko rwa Kanto ya Nyaruguru ko yamutwariye isambu yitwaje impapuro z'impimbano zerekana ko bayiburanye mu Rukiko rwa Mbere rw'Iremezo rwa Gikongoro, kandi batarayiburanye, maze Urukiko rwa Kanto ya Nyaruguru rwemeza ko isambu iburanwa ikomoka kuri Sekidende wayiraze Ngiriyabandi, akaba afite uburenganzira bwo kuyituramo no kuyibyaza umusaruro, Gumiriza na Nyiringango bakaba bagomba kuyivamo kuko bayigiyemo ku ngufu; runategeka Nyiringango guha Ngiriyabandi indishyi.

Nyiringango yajuririye Urukiko rw'Intara ya Gikongoro, avuga ko isambu ari iya Sekidende wayiraze umwana we Gumiriza bakaba barahamwubakiye muri 1960, ko kandi iyo sambu yayiburanye na Ngiriyabandi akayimutsindira mu Rukiko rwa

Mbere rw'Iremezo rwa Gikongoro, uretse ko adafite incarubanza. Urukiko rwaciye urubanza, rwemeza ko ubujurire bwa Nyiringango nta shingiro bufite, rumutegeka guha Ngiriyabandi indishyi.

Nyiringango yajuririye Urukiko Rukuru, Urugereko rwa Nyanza, uru Rukiko rufata icyemezo cyo gusiba urubanza kubera ko Nyiringango atitabye, rwemeza ko harangizwa urubanza rwajuririwe, kabone n'iyo habaho kurubyutsa.

Nyiringango yaje kwitaba Imana, hanyuma abana he bahagarariwe na Mukarwego Josepha, batanze ikirego cyo gusubirishamo ingingo nshya urubanza mu Rukiko Rwisumbuye rwa Nyamagabe, bagaragaza inyandukuro ihinnye y'urubanza RCA5799/13 nk'ikimenyetso cy'uko Nyiringango yaraburanye isambu na Ngiriyabandi akamutsinda, bayuga ko vaburanaga, iyo nyandukuro itashoboraga igihe kuboneka.Urukiko Rwisumbuye rwa Nyamagabe rwaciye urubanza, rwemeza ko inyandiko igaragazwa n'abareze atari ingingo nshya rwanzura ruvuga ko urubanza rutasubirwamo kuko inyandiko yatanzwe n'abarega nk'ikimenyestso gishya ntaho ihuriye n'urubanza rusabirwa gusubirishwamo.

Mukarwego amaze kubona iki cyemezo, yandikiye Urwego rw'Umuvunyi asaba ko urubanza rwaciwe n'Urukiko rwisumbuye rwa Nyamagabe rusubirwamo kubera ko rurimo akarengane, maze Umuvunyi Mukuru yandikira Perezida w'Urukiko rw'Ikirenga asaba ko urubanza yagejejweho na Mukarwego, rwasubirwamo ku mpamvu z'akarengane zigaragara muri urwo rubanza zishingiye ku cyemezo cy'Urukiko Rwisumbuye rwa Nyamagabe rwanze guha agaciro inyandukuro ihinnye y'urubanza RCA5799/13 rwaciwe ku wa 27/07/1983 n'Urukiko rwa Mbere rw'Iremezo rwa Gikongoro, yatanzwe n'Umwanditsi w'Urukiko Rwisumbuye rwa Nyamagabe ku wa

20/10/2011, nyamara iyo nyandukuro ari ikimenyetso cy'uko isambu Ngiriyabandi André aburana, ari iyo yari yaratsindiwe muri 1983. Akomeza avuga ko kuba Urukiko Rwisumbuye rwa Nyamagabe rwarayirengagije, ari akarengane.

Iburanisha mu Rukiko rw'Ikirenga ryabanje gukemura impaka zerekeranye no kumenya niba inyandukuro ihinnye y'urubanza RCA 5799/13 yari gufatwa nk'ingingo nshya mu rubanza rwo mu rukiko rw'Isumbuye. Urukiko rw'Ikirenga rwaciye urubanza rubanziriza urundi rwemeza ko inyandukuro ihinnye y'urubanza RCA 5799/13 rwaciwe ku wa 27/07/1983 hagati ya Nyiringango na Ngiriyabandi, ikomoka ku rubanza rwabayeho koko.

Urubanza rwakomeje haburanwa akarengane kagaragara mu manza RC135/3 rwaciwe n'Urukiko rwa Kanto ya Nyaruguru ku wa 11/03/2004, n'urubanza RCA0275/05/TP/GIRO-RCA 2880/7/04 rwaciwe n'Urukiko Rwisumbuye rwa Nyamagabe ku wa 05/05/2005, abarega bavuga ko Ngiriyabandi atagombaga kuregera isambu yamaze kuburanwa kuko urubanza rwamaze kuba itegeko, uregwa we avuga ko, kuba ikimenyetso gishya cyarakiriwe igisigaye ari ukumenya ishingiro ryacyo bihujwe n'amategeko.

Incamake y'icyemezo: 1. Inyandiko ihinnye y'urubanza si incarubanza, ariko ni ikimenyetso kidashidikanywaho ko habaye urubanza hagati y'ababuranyi kandi yerekana icyemezo cyarufashwemo.

2. Guca Urubanza ku kiburanwa cyamaze gufatwaho icyemezo mu rubanza rwabaye ntakuka n'ikosa, rikosorwa nuko urwo rubanza rukurwaho.

Ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane, gifite ishingiro;

Amategeko yashingiweho:

- Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, Ingingo ya 14.
- Itegeko-Ngenga N°03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, Ingingo ya 81.
- Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, Ingingo ya 3.
- Itegeko N°18/2004 ryo ku wa 20/6/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi Ingingo ya 360.
- Iteka rya minisitiri w'Ubutabera N°002 ryo ku wa 06/01/2005 rigena amagarama y'urukiko mu manza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, Ingingo ya 2.

Nta manza zifashishijwe.

Inyandiko z'abahanga zifashishijwe:

Serge GUINCHARD, <u>Droit et Pratique de la Procédure Civile</u>, p. 1225

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Uru rubanza rwatangiriye mu Rukiko rwa Kanto ya Nyaruguru kuri RC135/3, Ngiriyabandi André arega Nyiringango Faustin ko yamutwariye isambu yitwaje impapuro z'impimbano zerekana ko bayiburanye mu Rukiko rwa Mbere rw'Iremezo rwa Gikongoro, kandi batarayiburanye, maze ku wa 11/03/2004, Urukiko rwa Kanto ya Nyaruguru ruca urubanza rwemeza ko isambu iburanwa ikomoka kuri Sekidende wayiraze Ngiriyabandi André akiri umwana, akaba afite uburenganzira bwo kuyituramo no kuyibyaza umusaruro, Gumiriza na Nyiringango Faustin bakaba bagomba kuyivamo kuko byagaragaye ko bayigiyemo ku ngufu; rutegeka Nyiringango Faustin guha Ngiriyabandi André indishyi zingana na 25.000Frw kubera kumurushya no kumukerereza amuvana mu bye.
- [2] Nyiringango Faustin yajuririye Urukiko rw'Intara ya Gikongoro, ikirego cye gihabwa N°RCA0275/05/TP/GIRO-RCA 2880/7/04, avuga ko isambu ari iya Sekidende wayiraze umwana we Gumiriza bakaba barahamwubakiye muri 1960, ko kandi iyo sambu yayiburanye na Ngiriyabandi André akayimutsindira mu Rukiko rwa Mbere rw'Iremezo rwa Gikongoro, uretse ko adafite incarubanza. Ku itariki ya 05/05/2005, uru Rukiko rwaciye urubanza, rwemeza ko ubujurire bwa Nyiringango Faustin nta shingiro bufite, rumutegeka guha Ngiriyabandi André indishyi zingana n'ibihumbi icumi (10.000Frw) kubera ko yamuruhije akanamukura mu isambu ye.
- [3] Nyiringango Faustin yajuririye Urukiko Rukuru, Urugereko rwa Nyanza, ikirego cye gihabwa N°

RCAA0725/05/HC/NYA, ku itariki ya 04/06/2008 uru Rukiko rufata icyemezo cyo gusiba urubanza kubera ko Nyiringango Faustin atari yitabye, rwemeza ko harangizwa mu ngingo zarwo zose, urubanza rwajuririwe arirwo RCA0275/05/TP/GIRO-RCA 2880/7/04 rwaciwe n'Urukiko rw'Intara ya Gikongoro ku wa 05/05/2005, kabone n'iyo habaho kurubyutsa.

- Nyuma y'aho Nyiringango Faustin apfiriye, abana be Donatha, Nyirabutoragurwa Médiatrice Mukamana Mukarwego Josepha, bahagarariwe na Mukarwego Josepha, batanze ikirego cyo gusubirishamo ingingo nshya urubanza RCA0275/05/TP/GIRO RCA2880/7/04 _ mu Rukiko Rwisumbuye rwa Nyamagabe, bagaragaza inyandukuro ihinnye y'urubanza RCA5799/13 nk'ikimenyetso cy'uko Nyiringango Faustin yari yaraburanye isambu na Ngiriyabandi André akamutsinda, bavuga ko igihe se ubabyara yaburanaga, iyo nyandukuro itashoboraga kuboneka, basaba ko yaba ingingo nshya ituma urubanza rusubirwamo, ikirego cyandikwa kuri N° RCA0261/11/TGI/NYBE
- [5] Ku itariki ya 16/03/2012, Urukiko Rwisumbuye rwa Nyamagabe rwaciye urubanza, rwemeza ko inyandiko igaragazwa n'abareze atari ingingo nshya nk'uko babivuga, kubera ko ivuga ku byerekeye amafaranga, hakaba ntaho igaragaza uwatsindiye isambu kandi ari yo iburanwa mu rubanza rusubirishwamo, ko kandi iyo nyandiko itakwitwa urubanza ahubwo ari inyandiko ihinnye yerekana ko hakemuwe ikibazo cy'amafaranga hagati ya Nyiringango Faustin na Ngiriyabandi André, rwanzura ruvuga ko urubanza RCA0275/05/TP/GIRO-RCA2880/7/04 rutasubirwamo kuko inyandiko yatanzwe n'abarega ntaho ihuriye n'urubanza rusabirwa gusubirishwamo.

- Mukarwego Josepha amaze kubona icyi cyemezo, yitabaje Urwego rw'Umuvunyi asaba ko urubanza RCA0261/11/TGI/NYBE rusubirwamo kubera ko rurimo akarengane, maze ku wa 27/03/2013, Umuvunyi Mukuru yandikira Perezida w'Urukiko rw'Ikirenga asaba ko urubanza vageieiweho Mukarwego Josepha, unahagarariye na abavandimwe be Mukamana Donatha na Nyirabutoragurwa Médiatrice, rwasubirwamo.
- [7] Umuvunyi Mukuru avuga ko impamvu z'akarengane zigaragara muri urwo rubanza zishingiye ku cyemezo cy'Urukiko Rwisumbuye rwa Nyamagabe rwanze guha agaciro inyandukuro ihinnye y'urubanza RCA5799/13 rwaciwe ku wa 27/07/1983 n'Urukiko rwa Mbere rw'Iremezo rwa Gikongoro, yatanzwe n'urwo Rukiko ku wa 20/10/2011, nyamara iyo nyandukuro ari ikimenyetso cy'uko isambu Ngiriyabandi André aburana, ari iyo yari yaratsindiwe muri 1983, avuga ko iyi nyandukuro igize ikimenyetso kamarampaka nk'uko biteganywa mu ngingo ya 184,3° y'Itegeko N°18/2004 ryo ku wa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ko kuba Urukiko Rwisumbuye rwa Nyamagabe rwarayirengagije, ari akarengane.
- [8] Avuga nanone ko Urukiko Rwisumbuye rwa Nyamagabe rwibeshye, aho rwavuze ko inyandiko yatanzwe na Mukarwego Josepha itakwitwa urubanza, ahubwo ko ari inyandiko ihinnye yerekana ko hakemuwe ikibazo cy'amafaranga hagati ya Nyiringango Faustin na Ngiriyabandi André, nyamara muri iyo nyandiko, nta kibazo cy'amafaranga cyaburanywe, ahubwo haburanwaga isambu nkuko bigaragara mu kiburanwa kiri ku nyandukuro ihinnye.

- [9] Iburanisha ry'urubanza ryabaye mu ruhame ku wa 18/12/2017, Mukamana Donatha na Nyirabutoragurwa Médiatrice bahagarariwe na Mukarwego Josepha, nawe yunganiwe na Me Kayirangwa Marie Grâce, Ngiriyabandi André ahagarariwe na Me Sindayigaya Abson, uwo munsi hagibwa impaka zerekeranye no kumenya niba inyandukuro ihinnye y'urubanza RCA5799/13 yari gufatwa nk'ingingo nshya mu rubanza RCA0261/11/TGI/NYBE, rwemeza ko icyemezo kizafatwa ku wa 19/01/2018.
- [10] Ku wa 19/01/2018, Urukiko rw'Ikirenga rwemeje ko mbere y'uko hafatwa icyemezo kuri iyo nzitizi, ari ngombwa gukora iperereza mu Rukiko Rwisumbuye rwa Nyamagabe, n'ahahoze ari Urukiko rwa Kanto ya Nyaruguru, rukirebera niba koko urubanza RCA5799/13 rwarabayeho.
- [11] Iperereza ryabaye ku itariki ya 02/03/2018, Urukiko rumaze kureba mu gitabo cy'ibirego cyanditsemo urubanza RCA5799/13 kiri mu Rukiko Rwisumbuye rwa Nyamagabe rwasanze ibikubiyemo bihuye neza n'inyandiko ihinnye yakozwe n'Umwanditsi Mukuru w'urwo Rukiko ku itariki ya 20/10/2011.
- [12] Urukiko rwageze kandi ku Rukiko rw'Ibanze rwa Nyaruguru kugira ngo rurebe niba hari urubanza rwaciriwe muri urwo Rukiko hagati ya Nyiringango Faustin na Ngiriyabandi André muri 1983, rusanga urubanza ruhari ari urufite N° RC135/3 rwaciwe ku itariki ya 11/03/2004 gusa, naho urwa mbere ya Jenoside ntirwaboneka, abakozi bo mu Rukiko rw'Ibanze babwira abakora iperereza ko ibitabo by'icyo gihe bidashobora kuboneka kuko byahiye ibindi birononwa.
- [13] Urukiko rwemeje ko iburanisha rizongera gupfundurwa ku wa 22/05/2018, ababuranyi bakagira icyo bavuga ku byavuye

mu iperereza, uwo munsi ababuranyi baritabye iburanisha riraba, bagira icyo bavuga ku byavuye mu iperereza mu Rukiko Rwisumbuye rwa Nyamagabe no mu cyahoze ari Urukiko rwa Kanto ya Nyaruguru, birangiye, Urukiko rwemeza ko icyemezo ku bijyanye no kumenya niba koko urubanza RCA5799/13 rwarabayeho, kizasomwa ku wa 18/06/2018.

- [14] Kuri uwo munsi, Urukiko rw'Ikirenga rwaciye urubanza rubanziriza urundi rwemeza ko inyandukuro ihinnye y'urubanza RCA5799/13 rwaciwe ku wa 27/07/1983 hagati ya Nyiringango Faustin na Ngiriyabandi André, ikomoka ku rubanza rwabayeho koko, ko rero yagombaga kwakirwa nk'ingingo nshya mu rubanza RCA0261/11/TGI/NYBE igashingirwaho mu gusubiramo urubanza RCA0275/05/TP/GIRO-RCA2880/7/04 Nyiringango Faustin yaburanye na Ngiriyabandi André.
- Muri urwo rubanza rubanziriza urundi, Urukiko rw'Ikirenga rwemeje ko urubanza RCA0261/11/TGI/NYBE rwaciwe n'Urukiko Rwisumbuye rwa Nyamagabe ku wa 16/03/2012 rwanze ugusubirishamo ingingo nshya urubanza RCA0275/05/TP/GIRO-RCA2880/7/04 rwaciwe n'Urukiko Rwisumbuye rwa Nyamagabe ku wa 05/05/2005, ruhindutse mu ngingo zarwo zose, rwemeza ko iburanisha rizakomeza ku munsi ababuranyi bazamenyeshwa haburanwa ku bijyanye n'akarengane kagaragara mu manza RC135/3 n'Urukiko rwa Kanto ya Nyaruguru ku wa 11/03/2004, n'urubanza RCA0275/05/TP/GIRO - RCA2880/7/04 rwaciwe n'Urukiko Rwisumbuye rwa Nyamagabe ku wa 05/05/2005.
- [16] Iburanisha ry'urubanza ryongeye gusubukurwa ku wa 24/07/2018, ribera mu ruhame hitabye Mukarwego Josepha anahagarariye abavandimwe be Mukamana Donatha na Nyirabutoragurwa Médiatrice yunganiwe na Me Kayirangwa

Marie Grâce, Ngiriyabandi André nawe yitabye yunganiwe na Me Sindayigaya Abson.

[17] Me Kayirangwa Marie Grâce uburanira Mukarwego Josepha na bagenzi be, akaba anavuga ko Ngiriyabandi André atagombaga kuregera isambu yamaze kuburanwa kuko urubanza rwamaze kuba itegeko, ko kuba Urukiko Rwisumbuye rwa Nyamagabe rwarirengagije inyandukuro y'urubanza, ari akarengane kuko rwirengagije ko nyuma ya Jenoside inyandiko nyinshi zabuze, Me Sindayigaya Abson we avuga ko, kuba ikimenyetso gishya cyarakiriwe igisigaye ari ukumeya ishingiro ryacyo bihujwe n'amategeko.

II. IKIBAZO KIRI MU RUBANZA N'ISESENGURA RYACYO

Kumenya niba isambu yaburanywe mu rubanza RCA0275/05/TP/GIRO - RCA2880/7/04 rwaciwe ku wa 05/05/2005 yari yaraburanyweho mbere urubanza rukaba rwarabaye itegeko.

[18] Me Kayirangwa Marie Grâce uburanira Mukarwego Josepha uyu akaba ahagarariye abavandimwe be Mukamana Donatha na Nyirabutoragurwa Médiatrice, avuga ko isambu Ngiriyabandi André yaregeye mu Rukiko rw'icyahoze ari Kanto ya Nyaruguru, yari yarayiburanye na Nyiringango Faustin arayitsindirwa, ayijuririra mu Rukiko rwa Mbere rw'Iremezo rwa Gikongoro, nabwo aratsindwa mu rubanza RCA5799/13 rwaciwe ku wa 27/07/1983, ariko nyuma ya Jenoside yakorewe Abatutsi muri 1994, arongera ajya kuyiregera mu Rukiko rwa Kanto ya Nyaruguru, no mu Rukiko Rwisumbuye rwa Nyamagabe kubera ko yari azi ko impapuro zose zabuze.

- [19] Avuga ko ashimangira ko impine y'icyemezo cy'Urukiko Rwisumbuye rwa Nyamagabe mu rubanza RCA5799/13 rwaciwe ku wa 27/07/1983 yagaragaye mu bitabo by'Urukiko, ikwiye guhabwa agaciro Urukiko rukemeza ko isambu iburanwa yafashweho icyemezo mu rubanza rwabaye ntakuka rwaburanwe hagati ya Nyiringango Faustin na Ngiriyabandi André, ko rero itagombye kongera kugarurwa mu nkiko, naho Mukarwego Donatha uhagarariye abavandimwe be Mukamana Donatha na Nyirabutoragurwa Médiatrice, avuga ko asaba kurenganurwa.
- [20] Ngiriyabandi André uregwa avuga ko inyandiko bavuga ko zabuze atari byo, kuko atigeze aburana na Nyiringango Faustin, ahubwo yaburanye na Ruboneza wari warayimwambuye ari umusirikare, ko isambu ari iya Se wabo atari kuyiburana na Nyiringango Faustin kandi ntacyo bapfana, ko rero atagomba kurengana hagendewe ku nyandiko ihinnye yatanzwe n'Urukiko Rwisumbuye rwa Nyamagabe mu buryo atazi.
- [21] Me Sindayigaya Abson wunganira Ngiriyabandi avuga ko urubanza ruburanwa rushingiye ku nyandiko mpine yatanzwe n'Urukiko Rwisumbuye rwa Nyamagabe Urukiko rw'Ikirenga rwamaze kwemeza ko ikwiye kwakirwa mu rubanza rubanziriza urundi, ko kuri we asanga igisigaye ari ugusuzuma iyo nyandiko igahuzwa n'amategeko hakarebwa ishingiro ryayo.

UKO URUKIKO RUBIBONA

[22] Ingingo ya 81,2° y'Itegeko-Ngenga N°03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya ko: "Urubanza rwaciwe ku rwego rwa nyuma rushobora gusubirwamo ku mpamvu z'akarengane kubera impamvu zikurikira: (...) Iyo mu icibwa

ry'urubanza hirengagijwe amategeko n'ibimenyetso bigaragarira buri wese".

- [23] Ingingo ya 14 y'Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko "Urubanza rwaciwe ku rwego rwa nyuma ntirushobora kongera kuburanishwa bundi bushya ku mpamvu zimwe no ku kiburanwa kimwe hagati y'ababuranyi bamwe baburana ikirego kimwe".
- [24] Ingingo ya 3 y'Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko "Buri muburanyi agomba kugaragaza ibimenyetso bw'ibyo aburana".
- Ku bijyanye n'uru rubanza, Urukiko rw'Ikirenga rurasanga inyandukuro ihinnye y'urubanza yatanzwe na Mukarwego Josepha mu rubanza RCA0261/11/TGI/NYBE, igaragaza ko Urukiko rwa Mbere rw'Iremezo rwa Gikongoro rwakijije mu bujurire urubanza RCA5799/13 ku wa 27/07/1983 haburana Nyiringango Faustin na Ngiriyabandi André, ikiburanwa ari isambu, urwo Rukiko rukaba rwaremeje ko Ngiriyabandi André atsinzwe, ko hatsinze Gumiriza uburanira Nyiringango Faustin, Ngiriyabandi André ategekwa gutanga amafaranga atandukanye harimo amagarama, indishyi n'umusogongero wa Leta, iyo nyandiko ihinnye ikaba varatanzwe n'Umwanditsi w'Urukiko Rwisumbuve Nyamagabe ku wa 20/10/2011, abyandukuye mu gitabo cya 13 cy'ibirego.
- [26] Urukiko rurasanga iyi nyandukuro ihinnye, igaragaza nta gushidikanya ko habayeho urubanza rw'isambu hagati ya Nyiringango Faustin na Ngiriyabandi André nk'uko Mukarwego

Josepha n'abavandimwe be babivugaga, kikaba ari ikimenyetso gihamya ko aba baburanyi bombi bigeze kuburana isambu mbere mu Rukiko rwa mbere rw'Iremezo rwa Gikongoro, hagacibwa urubanza RCA5799/13 ku wa 27/07/1983, bityo hakaba nta rundi rubanza rwagombaga gucibwa kuri iyo sambu hashingiwe ku ihame ry'ubudahangarwa bw'urubanza rwabaye ndakuka, nk'uko biteganyijwe mu ngingo ya 14 y'Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ryavuzwe haruguru.

[27] Urukiko rurasanga kandi, kuba haratanzwe inyandiko ihinnye mu mwanya w'urubanza, ari uko urubanza ubwarwo rutashoboraga kuboneka nk'uko Urukiko rw'Ikirenga rwabyiboneye mu iperereza ryo ku wa 02/03/2018 aho Umwanditsi Mukuru w'Urukiko Rwisumbuye rwa Nyamagabe yemeje ko nta nyandiko y'incarubanza ishobora kuboneka, uretse igitabo N°13 cyabonetse ari naho yandukuye icyemezo cyafashwe mu rubanza RCA5799/13, ariko akemeza ko urubanza rwose rudashobora kuboneka¹, kubera ko imanza n'ibitabo bimwe bya mbere ya Jenoside yakorewe Abatutsi muri 1994 byabuze, ibyo kandi bikaba ari nabyo byari byemejwe muri iryo perereza n'Umwanditsi Mukuru w'Urukiko rw'Ibanze rwa Kibeho rwimuriwemo imanza n'ibitabo byose byahoze ari iby'Urukiko rwa Kanto ya Nyaruguru nyuma y'ivugurura ry'ubucamanza.

 $^{^{\}rm 1}$ Reba inyandikomvugo y'iperereza yakozwe ku wa 02/03/2018 ku rupapuro rwa 2 kugeza ku rwa 3 mu nyandiko zigize urubanza.

[28] Urukiko rurasanga ibivugwa n'uburanira Ngiriyabandi André ko iyi nyandiko ihinnye atari urubanza kuko itagaragaza nyir'isambu, nta shingiro bifite kuko n'ubwo atari incarubanza, ariko ni ikimenyetso kidashidikanywaho ko habaye urubanza hagati y'aba baburanyi bombi cyatanzwe n'urwego rubifitiye ububasha ndetse cyerekana icyemezo cyarufashwemo, iyo nyandiko ihinnnye kandi, ikaba ifite agaciro kayo, kuko ari imwe mu nyandiko zari ziteganyijwe mu zitangwa n'Urukiko nk'uko Iteka rya minisitiri N°002 ryo ku wa 06/01/2005 rigena amagarama v'urukiko mu manza z'imbonezamubano. iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ryayishyiraga mu nyandiko zitangwa n'Umwanditsi w'Urukiko mu ngingo yaryo ya 2 agace kayo ka 6², iyo nyandiko kandi ikaba inateganyijwe mu ngingo ya 360 y'Itegeko N°18/2004 ryo ku wa 20/6/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ryakoreshwaga igihe iyo nyandiko ihinnye yatangwaga, aho iyi ngingo ivuga ko iyo nyandiko ishobora gutangwa nko mu gihe Perezida w'Urukiko asanze uyisaba ari umutindi udashobora kubona amafaranga yo kuvigura³.

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² Igiciro cy'amafaranga y'u Rwanda yakwa ku nyandiko z'ibyakozwe mu mihango y'urubanza mu byerekeye ikirego mbonezamubano, icy'ubucuruzi, icy'umurimo n'icy'ubutegetsi, agenwe ku buryo bukurikira:

[.] Inyandiko iriho itegeko mpuruza, imyandukuro irambuye, ingingo z'ingenzi z'urubanza (extrait du jugement) cyangwa inyandukuro y'indi nyandiko iyo ariyo yose ikozwe n'umwanditsi w'urukiko :

⁻ Impapuro ebyiri za mbere

⁻ Buri rupapuro rwiyongereyeho

³ Igihe Perezida w'urukiko rwaciye urubanza asanze umuburanyi ari umutindi nyakujya, ategeka ko bamuha matolewo, inyandiko ihinnye y'urubanza cyangwa kopi y'urubanza atishyuye. Munsi y'urwo rupapuro rutanzwe, bandikaho ko rutangiwe ubuntu.

[29] Rurasanga kuba Ngiriyabandi André avuga ko inyandiko ihinnye itagaragaza niba isambu yaburanywe muri urwo rubanza RCA5799/13, ari navo iburanwa mu rubanza RC135/3 rwaciwe Kanto Nyaruguru n'urubanza n'Urukiko ya RCA0275/05/TP/GIRO- RCA2880/7/04 rwaciwe n'Urukiko Rwisumbuye rwa Nyamagabe, nta shingiro bifite kubera ko atagaragaza ibimenyetso by'uko iyo sambu itandukanye n'iyaburanywe mu rubanza RCA5799/13 mu gihe urwo rubanza rugaragaza ko icyaburanywe ari isambu kandi iburanwa hagati ya Nyiringango Faustin na Ngiriyabandi André, bityo akaba atsindwa no kubura ibimenyetso by'ibyo aburanisha nk'uko ingingo ya 3 y'Itegeko ryerekeye ibimenyetso mu manza n'itangwa ryabyo, yavuzwe haruguru ibiteganya.

[30] Urukiko rurasanga rero, kuba Urukiko rw'icyahoze ari Kanto ya Nyaruguru n'Urukiko rw'icyahoze ari Intara ya Gikongoro zaraciye urubanza ku isambu yari yaramaze gufatwaho icyemezo mu rubanza rwabaye ntakuka, ari ikosa izo nkiko zakoze, ingaruka zikaba ari uko izo manza zikwiye gukurwaho. Ibyo kandi bikaba ari nabyo bivugwa mu nyandiko y'umuhanga mu mategeko Serge Guinchard mu gitabo cyitwa Droit et Pratique de la Procédure Civile ku rupapuro rwa 1225, igika cya 3⁴, aho asobanura ko imwe mu ngaruka zishoboka mu gihe haciwe urubanza ku kintu hirengagijwe ko cyari cyarafashweho icyemezo mu rubanza rwabaye ndakuka, ari uko urwo rubanza ruciwe rukurwaho

⁴Le prononcé d'un jugement auquel est conferée l'autorité de la chose jugée entraîne deux séries d'effets : d'une part, le juge est dessaisi et ne peut plus revenir sur sa décision, d'autre part, s'il arrive qu'un autre juge rende une décision méconnaissant la chose précédemment jugée, une sanction pourrait être prononcée tendant à l'annulation de cette decision

III. ICYEMEZO CY'URUKIKO

- [31] Rwemeje ko ikirego gisaba gusubirishamo urubanza RCA0261/11/TGI/NYBE rwaciwe n'Urukiko Rwisumbuye rwa Nyamagabe ku wa 16/03/2012 ku mpamvu z'akarengane, gifite ishingiro;
- [32] Rwemeje ko urubanza RC135/3 rwaciwe n'Urukiko rw'icyahoze ari Kanto ya Nyaruguru ku wa 11/03/2004, n'urubanza RCA0275/05/TP/GIRO- RCA2880/7/04 rwaciwe n'Urukiko Rwisumbuye rwa Nyamagabe ku wa 05/05/2005, zikuweho;
- [33] Rwemeje ko hagumaho imikirize y'urubanza RCA5799/13 rwaciwe n'Urukiko rwa mbere rw'Iremezo rwa Gikongoro ku wa 27/07/1983.

IMANZA Z'UBUCURUZI

ARLCOM Ltd N'UNDIV. ECOBANK RWANDA Ltd

[Rwanda URUKIKO RW'IKIRENGA – RCOMAA0020/15/CS (Mukamulisa, P.J., Hitiyaremye na Karimunda, J.) 21 Gicurasi 2018]

Amategeko agenga Amasezerano – Amasezerano y'inguzanyo – Inyungu – Inyungu zisanzwe n'iz'ubukererwe – Mu gihe uwahawe inguzanyo atabashije kwishyura kandi yaratanze ingwate yishingira inguzanyo, inyungu zisanzwe n'iz'ubukererwe ntizikwiye gukomeza kubarwa.

Incamake y'ikibazo: Sosiyete Arlcom Ltd yahawe inguzanyo na Ecobank Rwanda Ltd, iyo nguzanyo yishingirwa n'Uwamahoro ari nawe muyobozi wayo maze anatanga ingwate, Uwo mwenda ukaba waravuguruwe inshuro eshatu (restructuration). Nyuma yaho, sosiyete ntiyabasha kwishyura iyo nguzanyo, maze Ecobank Rwanda Ltd isesa amasezerano y'inguzanyo (denonciation de credit), bityo irega iyi sosiyete hamwe n'umwishingizi wayo mu Rukiko rw'Ubucuruzi rwa Nyarugenge isaba kwishyurwa umwenda bayibereyemo, inyungu zisanzwe n'iz'ubukererwe ndetse n'amafaranga y'ikurikiranarubanza. Urukiko rwemeza ko ikirego gifite ishingiro, maze rutegeka abarezwe kwishyura umwenda n'indishyi.

Iyi Sosiyete Arlcom Ltd n'umwishingizi wayo, bajuririye Urukiko Rukuru rw'Ubucuruzi, rwemeza ko ubwo bujurire nta shingiro bufite, rwemeza kandi ko imikirize y'urubanza rwaciwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge idahindutse uretse ku bijyanye n'ingano y'umwenda, rutegeka Arlcom Ltd

n'umwishingizi wayo gufatanya kwishyura Ecobank Rwanda Ltd umwenda bayibereyemo, amafaranga yishyuwe inzobere mu ibaruramari (expert), hamwe n'amagarama y'urubanza.

Barongeye bajuririra Urukiko rw'Ikirenga bavuga ko Uwamahoro atagombaga kuregwa hamwe na sosiyete kuko ntaho ahuriye n'umwenda yishyuzwa usibye kuba yaratanze ingwate kandi atarigeze awutambamira.

Ecobank yisobanura ivuga ko impamvu Uwamahoro asabwa gufatanya na Arlcom Ltd kwishyura ari uko yasinye inyandiko ebyiri zigaragaza ko yemeye umwenda, imwe yitwa "joint guarantee" ivuga ko sosiyete nitishyura, azagurisha ingwate akishyura, indi yitwa "attestation de consentement" ivuga ko niba sosiyete inaniwe kwishyura azishyura nk'umwishingizi wayo.

Kubirebana no kumenya ingano y'umwenda n'inyungu uwahawe inguzanyo agomba kwishyura , Uwamahoro avuga ko atemeye ibyagaragaye muri raporo y'umuhanga washyizweho n'urukiko kuko asanga ifite inenge nyinshi kubirebana n'amavugururwa y'imyenda yagiye akorwa kandi ko ku wa 24/10/2012 banki yandikiye sosiyete isesa amasezerano ibimenyesha RDB, bivuze ko yari itangiye imihango yo guteza cyamunara ariko nyamara ntiyabikomeza, ibyo byayigizeho ingaruka kuko banki yari kwishyurwa amafaranga make ugereranyije nayo banki imwishyuza ubu

Ku mwenda nyirizina yishyuza, banki ivuga ko imyenda yatanze yavuguruwe inshuro eshatu yumvikanyeho n'impande zombi, kuburyo umwenda wa nyuma wavuguruwe ku itariki ya 14/06/2012 uhwanye na 611.893.224Frw, ariko ukaba warakomeje kubyara inyungu zisanzwe n'iz'ubukererwe kugeza ubu.

Incamake y'icyemezo: 1. Mu gihe uwahawe inguzanyo atabashije kwishyura kandi yaratanze ingwate yishingira inguzanyo, inyungu zisanzwe n'iz'ubukererwe ntizikwiye gukomeza kubarwa kuko ingwate yashoboraga kugurishwa umwenda ukishyurwa.

Ubujurire bufite ishingiro kuri bimwe. Ubujurire bwuririye kubundi bufite ishingiro kuri bimwe. Amagarama yatanzwe n'abajuriye ahwanye n'ibyakozwe mu rubanza.

Amategeko yashingiweho:

Itegeko-Teka ryo ku wa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 33 iya 552 n'iva 560.

Nta manza zifashishijwe.

Urubanza

LIMITERERE Y'URUBANZA

- [1] Uru rubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, Ecobank Rwanda Ltd, irega Uwamahoro Florent de la Paix na Arlcom Ltd, isaba ko Urukiko rwabategeka kwishyura umwenda bayibereyemo n'inyungu zawo ndetse n'amafaranga y'ikurikiranarubanza.
- Urwo Rukiko rwaciye urubanza RCO0164/13/TC/NYGE rwemeza ko ikirego cya Ecobank Rwanda Ltd gifite ishingiro,

rutegeka abarezwe kwishyura umwenda n'indishyi z'ikurikiranarubanza.

- [3] Arlcom Ltd na Uwamahoro Florent de la Paix ntibishimiye iyi mikirize y'urubanza, bajuririra Urukiko Rukuru rw'Ubucuruzi, ruca urubanza RCOMA0213/14/HCC, rwemeza ko ubwo bujurire nta shingiro bufite, ko imikirize y'urubanza RCOM0164/13/TC/Nyge, rwaciwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge idahindutse uretse ku bijyanye n'ingano y'umwenda. Rwategetse Arlcom Ltd na Uwamahoro Florent de la Paix gufatanya kwishyura Ecobank Rwanda Ltd umwenda bayibereyemo ungana na 786.356.789Frw, kuyishyura amafaranga yishyuwe inzobere mu ibaruramari (expert) angana na 2.600.000Frw, no kwishyura amagarama y'urubanza.
- [4] Arlcom Ltd na Uwamahoro Florent de la Paix bajuririye Urukiko rw'Ikirenga, barusaba kwemeza ko Ecobank Rwanda Ltd nta bubasha n'inyungu yari ifite byo kurega Uwamahoro Florent de la Paix hamwe na Arlcom Ltd kubera ko uruhare rwa Uwamahoro ari uko gusa yatanze ingwate yishingira umwenda. Banenze kandi Urukiko Rukuru rw'Ubucuruzi kuba rwarashingiye kuri expertise nyamara yari irimo ibintu bidasobanutse.
- [5] Uru rubanza rwaburanishijwe mu ruhame ku wa 24/11/2015, uwo munsi Ecobank Rwanda Ltd itanga inzitizi yo kutakira ikirego cy'ubujurire cyatanzwe na Uwamahoro Florent de la Paix na Arlcom Ltd ivuga ko abajuriye batsinzwe ku mpamvu zimwe mu Nkiko zombi zibanza. Ku wa 21/01/2016, Urukiko rwaciye urubanza rubanziriza urundi, rwemeza ko inzitizi yatanzwe na Ecobank Rwanda Ltd nta shingiro ifite, rutegeka ko iburanisha rizakomeza ku wa 03/05/2016, ariko rigenda risubikwa kenshi bitewe cyane cyane n'uko Uwamahoro

Florent de la Paix yari hanze y'Igihugu kandi yarasabye kuba mu rubanza rwe kubera ko hari byinshi aruziho, Avoka we akaba yari afite ububasha bwo kumwunganira gusa.

- Iburanisha rya nyuma ryabaye ku itariki ya 13/06/2017, [6] Uwamahoro Florent de la Paix na Arlcom Ltd bahagarariwe na Me Kazeneza Théophile, Ecobank Rwanda Ltd iburanirwa na Me Kayigirwa Télesphore, nyuma y'iburanisha Urukiko ruvuga ko ruzafata icyemezo ku wa 21/07/2017, ariko mbere v'uko ruca urubanza, rwakira ibaruwa ya Uwamahoro Florent de la Paix watanze inzitizi yo kwigarika Me Nkurunziza Francois Xavier wari usanzwe amwunganira akanahagararira Arlcom Ltd. Byatumye iburanisha ryimurirwa ku wa 31/10/2017, kugira ngo Uwamahoro Florent de la Paix abanze ashyikirize Urukiko umwanzuro ukubiyemo ikirego cye cy'ubwigarike, nabwo ntirwaburanishwa kuko bisabwe na Me Kazeneza Théophile, hategerejwe umwanzuro wa Komisiyo y'imyitwarire y'Urugaga rw'Abavoka ku kibazo cy'ubwigarike bwa Me Nkurunziza François Xavier, urubanza ku nzitizi vavuzwe ruburanishwa kuwa 12/12/2017
- [7] Ku wa 12/01/2018, Urukiko rwemeje ko ikirego cyatanzwe na Uwamahoro Florent de la Paix cyo kwigarika Me Nkurunziza François Xavier gifite ishingiro, ko Me Nkurunziza Francois Xavier agomba kumwishyura 500.000Frw y'igihembo cy'Avoka, rutegeka ko iburanisha ry'urubanza mu mizi rizapfundurwa ku wa 27/03/2018. Uwo munsi iburanisha ryabaye hari Me Habinshuti Yves wunganira Uwamahoro Florent de la Paix anahagarariye Arlcom Ltd, naho Ecobank Rwanda Ltd iburanirwa na Me Nkundabarashi Moïse afatanyije na Me Kayigirwa Télésphore.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO

Kumenya niba Uwamahoro Florent de la paix atagomba kuregwa hamwe na Arlcom Ltd mu rubanza

- [8] Uwamahoro Florent de la Paix avuga ko Ecobank yagombye kugaragaza amasezerano y'umwenda yihariye yagiranye nayo kuko we atabona aho ahuriye n'umwenda wishyuzwa usibye kuba yaratanze ingwate kandi akaba atarigeze ayitambamira mu gikorwa cyo kuyigurisha. Anavuga ko mu mwanzuro wakozwe na Avoka wa Ecobank Rwanda Ltd irega ubwo yasabaga ko ikirego cyakirwa, yasabye Uwamahoro Florent de la Paix kuyishyura miliyoni 657, no kumutegeka kwishyura amafaranga y'ikurikiranarubanza, ariko mu gufata icyemezo, Urukiko rutegeka ko Uwamahoro Florent de la Paix afatanya na Arlcom Ltd kandi rutarabisabwe.
- Me Habinshuti Yves avuga ko Uwamahoro Florent de la [9] Paix yatije ingwate Arlcom Ltd, akaba yumva nta kindi akwiye kuryozwa, kuko Ecobank Rwanda Ltd itagaragaza ibimenyetso by'uko yemeye ko yafatanya na Arlcom Ltd kwishyura, ari yo mpamvu akwiye kuvanwa mu rubanza, cyane cyane ko Ecobank Rwanda Ltd mu kurega Uwamahoro Florent de la Paix itagaragaza amakosa yakoze mu kuba Arlcom Ltd itarubahirije amasezerano yagiranye na banki. Anavuga ko Urukiko Rukuru rw'Ubucuruzi rwategetse ko Uwamahoro Florent de la Paix afatanya Arlcom Ltd kwishvura Ecobank, na ntirwagaragaza amafaranga buri wese agomba kwishyura.
- [10] Me Nkundabarashi Moïse uburanira Ecobank asubiza ko impamvu ituma Uwamahoro asabwa gufatanya na Arlcom Ltd kuyishyura, ari uko yasinye inyandiko yitwa "joint guarantee"

yo ku wa 14/12/2009 aho yemeye kwishingira Arlcom Ltd, anasinya "attestation de consentement" ku wa 31/02/2009 nanone yemera umwenda.

- [11] Akomeza avuga ko inyandiko ya mbere ivuga ko Arlcom Ltd nitishyura, Uwamahoro Florent de la Paix azagurisha ingwate akishyura, naho inyandiko ya kabiri yo ikavuga ko Arlcom Ltd nitishyura, Uwamahoro Florent de la Paix azishyura. Akomeza avuga ko indi mpamvu ituma Uwamahoro Florent de la Paix na Arlcom Ltd baregwa hamwe, ari uko hari amasezerano y'inguzanyo yakozwe hagati ya Arlcom Ltd na Ecobank Rwanda Ltd yo ku wa 14/06/2012 akaba ari *restructuration* yakozwe ku myenda Arlcom Ltd na Uwamahoro Florent de la Paix bari barahawe, iyo myenda ikaba ifite agaciro ka 611.893.224Frw, ko rero atumva uburyo Uwamahoro avuga ubu ko ntaho ahuriye n'umwenda Ecobank Rwanda Ltd yishyuza.
- [12] Ku bijyanye na "Joint Guarantee" hamwe na "attestation de consentement" zavuzwe haruguru na Ecobank, Uwamahoro Florent de la Paix avuga ko yazisinye, ko ariko urebye ibizikubiyemo, atari we wari ushinzwe kugurisha ingwate kuko izo nshingano zari iza Ecobank, ko ndetse itagombaga kubanza kumusaba uruhushya rwo kugurisha ingwate.

UKO URUKIKO RUBIBONA

[13] Ingingo ya 552 y'Igitabo cya III cy'urwunge rw'amategeko y'imbonezamubano, iteganya ko"Umuntu wiyemeje kwishingira undi asabwa gusa kubahiriza ibyo yishingiye, iyo uwo yishingiye atubahirije inshingano ze"; naho iya 560 igateganya ko "Umuntu wiyemeje kwishingira undi umwenda we asabwa kwishyura uberewemo umwenda iyo gusa

ugomba kwishyura uwo mwenda wishingiwe atawishyuye, habanje gukoreshwa umutungo we, keretse iyo uwishingiye yerekanye ko azishyura hatabaye izindi mpaka, cyangwa akaba yariyemeje gufatanya kwishyura na nyirumwenda batabatandukanije. Icyo gihe hakurikizwa amahame ajyanye n'imyenda abantu biyemeza kwishyura bafatanije».

- [14] Ingingo ya 33 y'Igitabo cya III cy'urwunge rw'amategeko y'imbonezamubano iteganya ko "Amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayagiranye. Ashobora guseswa ari uko babyumvikanyeho cyangwa ku mpamvu zemewe n'amategeko".
- [15] Ku bijyanye n'uru rubanza, dosiye igaragaza ko kuva mu mwaka wa 2009, Arlcom yagiye ihabwa na Ecobank Rwanda Ltd imyenda itandukanye, nyuma hasinywa amasezerano atatu avugurura iyo myenda "restructuring", akaba yarasinywe ku ruhande rumwe na Ecobank Rwanda Ltd n'umuyobozi wayo, ku rundi ruhande hasinya Uwamahoro Florent de la Paix nka "Managing Director" wa Arlcom Ltd. Nanone muri ayo masezerano, mu gice cyiswe "security/Support", kuri Nº 6, Uwamahoro yongeye kwemera ko abaye umwishingizi ku giti cye w'umwenda wafashwe cyangwa igihombo cyawuturukaho ("Renewal of the Personal Guarantee of promotor Mr Uwamahoro Florent de la Paix with Ecobank listed as loss payee").
- [16] Ikindi kiboneka muri dosiye ni inyandiko yiswe "Convention d'ouverture de crédit avec constitution d'hypothèque" yo ku wa 10/12/2009, yasinywe ku ruhande rumwe na Ecobank, ku rundi ruhande hasinya Uwamahoro Florent de la Paix, nk'umukiriya ukorera imirimo y'ubucuruzi ku

izina rya "Arlcom"11. Muri dosiye harimo kandi "acte notarié" yo ku wa 10/12/2009 yasinywe hagati ya Ecobank Rwanda Ltd na Uwamahoro Florent de la Paix, umugore we witwa Uwamahoro Amina Arlette nawe ayasinya nk'umutangabuhamya, bikaba biboneka ko iyo nyandiko ijyanye n'umwenda uburanwa muri uru rubanza

- [17] Byongeye kandi, Urukiko rurasanga kuba mu nyandiko zitandukanye ziri muri dosiye Ecobank Rwanda yarandikiranaga na Uwamahoro Florent de la Paix, kuva habaye amasezerano yose avugurura umwenda iyo banki yagiranye na Arlcom Ltd, kandi buri gihe iyi ikaba yari ihagarariwe n'Umuyobozi wayo (Managing Director) ari we Uwamahoro Florent de la Paix, bisobanuye ko, mu gihe iyo sosiyete idashoboye kwishyura umwenda wishyuzwa na Ecobank Rwanda Ltd kuko ariyo yawufashe, ugomba kwishyurwa na Uwamahoro Florent de la Paix nk'umwishingizi wayo.
- Nanone mu gihe cy'iburanisha, Uwamahoro Florent de la [18] Paix yemeye ko yanasinye inyandiko zitwa "joint guarantee" na "Acte de consentement" kandi zose zinyajye n'umwenda Ecobank Rwanda Ltd yahaye Arlcom Ltd , aho yemeye ko nutishyurwa azawishyura.
- [19] Nyuma y'ibisobanuro byatanzwe haruguru, Urukiko rusanga ibivugwa na Uwamahoro Florent de la Paix ko Ecobank Rwanda Ltd itagombaga kumukurikirana hamwe na Arlcom Ltd nta shingiro bifite, mu gihe umwenda wahawe iyo sosiyete waba utarishyuwe kandi yarawishingiye.

¹ Uwamahoro Florent de la Paix "opérant ses activités commerciales sous le nom de "Arlcom", ci-après dénommé "Le Client".

Kumenya ingano y'umwenda n'inyungu zawo Uwamahoro Florent de la Paix na Arlcom Ltd bagomba kwishyura Ecobank Rwanda Ltd.

- [20] Uwamahoro Florent de la Paix avuga ko umuhanga washyizweho n'Urukiko, nk'uko biboneka ku rupapuro rwa 45 rwa raporo ye, yasanze muri restructuration ya mbere yakozwe harimo amakosa kuko nta bisobanuro by'umwenda Ecobank Rwanda Ltd yatanze, bigaragaza ko n'izindi restructurations zakukiriye zari zipfuye kuko zashingiye kuri iyo ya mbere yarimo amakosa
- Anavuga ariko ko uwo muhanga anenga kuba umwenda wishyuzwa yarerekanye ko ungana na 408.000.000Frw, kandi wari ukwiye kuba 248.000.000Frw, ko kandi "expertise" irimo n'izindi nenge zirimo kuba umuhanga yarasanze "lettre de crédit" na "ligne de crédit" Ecobank Rwanda Ltd yarabifashe nk'umwenda nyamara ntiyerekana ingaruka byagize. Yongeraho ko kuba imibare Ecobank Rwanda Ltd igenda itanga ipfuye, byagize icyo bimuvutsa ariko Urukiko Rukuru ntirwabisuzuma ngo rumurenganure. Anasanga kuba yarashyize umukono kuri restructuration bidahagije mu kwanzura ko yemera umwenda Ecobank Rwanda Ltd ivuga ko yamuhaye, cyane cyane ko amasezerano asinywa hagati ya banki n'umukiliya wayo aba yateguwe niyo banki (contrat d'adhésion), asaba Urukiko kuzabyitaho rukamurenganura.
- [22] Uwamahoro Florent de la Paix avuga nanone ko muri raporo ye, umuhanga yakoze *tableau* agaragaza ko hagomba kubaho isuzumwa ry'umukono w'uhagarariye Arlcom Ltd, kugira ngo byemerwe ko *opérations* zakozwe kuri konti yayo ari izayo koko, ko muri urwo rwego, kuri *opérations* 252 zabaye, nta sinyatire ya Arlcom iriho, nyamara ibyo Urukiko ntirwabiha

agaciro. Asanga ibisobanuro byatanzwe n'Urukiko Rukuru rw'Ubucuruzi bidahwitse, ari nayo mpamvu asaba ko hashyirwaho undi muhanga, hagakorwa *contre expertise* kugira ngo imibare nyayo igaragare. Anavuga ko kuba Ecobank Rwanda Ltd yaragiye yanga gutanga *historique* ari uko hari ibyo yashakaga guhisha, asaba Urukiko kuzabishingiraho rwemeza ko itsinzwe. Anavuga ko umwenda yemera ungana na 284 093 675Frw

- [23] Akomeza avuga ko ku wa 24/10/2012 Ecobank Rwanda Ltd yandikiye Arlcom Ltd isesa amasezerano, ibimenyesha RDB, bivuze ko iyo banki yari yatangiye imihango yo guteza cyamunara ibinyujije kuri RDB, nyamara ko itabikomeje ngo iteze cyamunara y'ingwate yahawe kandi ntacyabiyibuzaga, ibyo bikaba byarabagizeho ingaruka z'uko icyo gihe banki yari kwishyurwa gusa miliyoni 657 nk'uko yayishyuzaga mbere, ariko uyu munsi ikaba ivuga ko umwenda igomba kwishyurwa urenga miliyari.
- [24] Uwamahoro Florent de la Paix na Me Habinshuti Yves bavuga kandi ko hari amafaranga 500.000Frw Ecobank yakuye kuri konti ya Arlcom Ltd ku wa 02/06/2011 ariko ntiyayatangira ibisobanuro, ko hari n'andi mafaranga *Sotra Tour & Travel Agency* yishyuye Arlcom Ltd ikoresheje sheki ebyiri (imwe ifite N°36855080 ya 9.552.043 Frw yo ku wa 28/04/2011 n'indi ifite N°36855081 ifite agaciro ka 6.102.882 Frw) akaba yaragombaga kujya kuri konti ya Arlcom Ltd muri Ecobank Rwanda Ltd, nyamara iyo banki ikiyishyura ayo mafaranga ikereweho imisi 45, kandi yari gutuma umwenda ugabanuka, Ecobank Rwanda Ltd ikaba itagaragaza impamvu yatumye ikererwa kwiyishyura. Anenga kandi umuhanga kuba ataragaragaje igihombo yatejwe n'ubwo bukererwe ngo anakore ihwanyamyenda.

- [25] Me Habinshuti Yves avuga ko Arlcom Ltd na Uwamahoro Florent de la Paix bagerageje kwandikira Perezida w'Urukiko Rukuru rw'Ubucuruzi bamugaragariza inenge nyinshi ziri muri raporo y'umuhanga, muri zo hakaba hari izo urwo Rukiko rwemeye ariko ntirwategeka ko iyo raporo ivanwaho hagakorwa indi. Atanga ingero avuga ko umuhanga verekanye ko mu gukora restructurations, Ecobank Rwanda Ltd yagiye ihindura ikigero cy'inyungu (taux d'intérêt) inyuranyije n'ibyo bemeranyijwe mu masezerano, kuko nko ku rupapuro rwa rwa raporo ye yerekanye ko ikigero cy'inyungu zumvikanyweho mu kuvugurura umwenda wa 408.000.000Frw Ecobank Rwanda Ltd yakoresheje ikingana na 16,49% aho gukoresha 16%, ku rupapuro rwa 52 yerekana ko ku mwenda uvuguruwe wa 611.893.294, biboneka ko Ecobank Rwanda Ltd yakoresheje ikigero cy'inyungu kingana na 16,02% aho gukoresha icyumvikanyweho cya 15%. Avuga ko iyo izo nenge zose Urukiko Rukuru rw'Ubucuruzi ruziha agaciro, byari gutuma umwenda ugabanuka, ariko rukaba rwarabyirengagije.
- [26] Anavuga ko umuhanga yagaragaje ku rupapuro rwa 49 ko Ecobank Rwanda Ltd yabaze nabi umwenda iberewemo ubwo yakoraga restructuration ya 559.279.335Frw aho kuba 493.852.705 Frw, ko kandi nta bisobanuro iyo banki yatanze, ndetse ko no kuri restructuration ya 611.893.224 Frw ivugwa ku rupapuro rwa 51 rwa raporo, umuhanga yerekanye ko umwenda wari kuba ari 504.809.709Frw, nyamara ko aya makosa yose nayo ntacyo Urukiko rwayavuzeho.
- [27] Me Habinshuti Yves akomeza avuga ko Urukiko rwatanze ibisobanuro bidahwitse, aho garanties bancaires zahindutse umwenda ubyara inyungu kandi ibyo bitabaho, dore ko n'umuhanga Urukiko rwashyizeho yasobanuye ko bene izo

ngwate ari engagement par signature, ko atari inguzanyo banki iba yahaye umukiriya. Anenga n'umuhanga kuba yaragaragaje ikibazo gusa ariko ntiyigere avuga ingaruka zacyo, n'Urukiko rukaba rutarasuzumye ibibazo uwo muhanga yagaragaje ngo rubihe agaciro, ahubwo rukemeza ko izo nenge zidashingiye ku masezerano cyangwa amahame y'inguzanyo, aho kwemeza ko amafaranga n'inyungu zayo byabazwe nabi bigomba gukurwa mu myenda.

- [28] Yongeraho ko umuhanga yasanze hari ama sheki yakuwe kuri konti ya Arlcom Ltd ku mibare itariyo nk'uko biboneka ku rupapuro rwa 34 rwa raporo, kuko aho gukuraho 17.324.152Frw, Ecobank Rwanda Ltd yakuyeho 173.224.152Frw ariko ntiyagira icyo abikoraho.
- [29] Me Nkundabarashi Moïse uhagarariye Ecobank Rwanda Ltd yabanje gusubiza ku kinyuranyo cy'imibare ya 17.324.152Frw, na 173.224.152Frw kivugwa n'abo baburana, avuga ko biboneka ko ari amakosa yabaye mu gihe cyo kwandika, ko ariko umuhanga yagaragaje ku rupapuro rwa 34 rwa raporo ye ko byakosowe. Anavuga ko asanga ari byiza ko ubu Uwamahoro Florent de Paix noneho yemera ko hari umwenda abereyemo Ecobank Rwanda Ltd kubera ko mbere yavugaga ko ntawo.
- [30] Ku bijyanye n'umwenda nyirizina Ecobank Rwanda Ltd yishyuza, avuga ko imyenda iyo banki yatanze yavuguruwe inshuro eshatu byumvikanyweho n'impande zose, ku buryo umwenda wa nyuma wavuguruwe ari uwo ku itariki ya 14/06/2012, ukaba uhwanye na 611.893.224Frw, ariko ukaba warakomeje kubyara inyungu zisanzwe n'iz'ubukererwe kugeza ubu.

- [31] Avuga ko ikibazo cyo gukoresha ikigero cy'inyungu "taux d'intérêt" kitari cyo Ecobank Rwanda Ltd ibona kitagombye kubaho, kuko mu masezerano yo kuvugurura umwenda "restructuration" yo ku wa 14/06/2012, bemeranyijwe ko icyo kigero kingana na 15%, banemeranywa ko inyungu zo kutishyura zingana na 2% buri kwezi, kandi ibyo bigero by'inyungu akaba ari byo Ecobank Rwanda Ltd yakoresheje ibara inyungu igomba kwishyurwa kuva muri 2012 kugeza ubu, kuko inyungu zisanzwe zibariye kuri 15% kuva ku itariki ya 14/06/2012 kugeza ku ya 31/08/2015, ni ukuvuga imyaka itatu abiri. zikaba zingana na 374.157.837Frw, n'amezi hakiyongeraho inyungu z'ubukererwe "pénalité" za 2% buri kwezi, zose hamwe zikangana na 242.242.109Frw.
- [32] Avuga rero ko igiteranyo cy'umwenda wose Ecobank Rwanda Ltd yishyuza ubu hamwe n'inyungu zose ari = 611.893.224 Frw + 74.157.837Frw (inyungu zisanzwe) + 224.22.249.109 Frw (pénalité), yose hamwe akaba = 1.283.862.819Frw.
- [33] Me Kayigirwa Télésphore nawe uhagarariye Ecobank Rwanda Ltd avuga ko ku byerekeye 500.000Frw abo baburana bavuga ko yavanywe kuri konti ya Arlcom Ltd nta bisobanuro, icyo abona gishoboka ari uko ayo mafaranga ajyanye na "compte courant" akaba ntaho ahuriye n'umwenda Ecobank Rwanda Ltd yishyuza, ko ndetse sheki zijyanye n'ayo mafaranga zishobora kuba zarabuze kubera ikibazo cy'ububiko bw'inyandiko.
- [34] Anavuga ko sheki 2 za Sotra Tours & Travel Agency zashyizwe kuri konti ya Arlcom Ltd zakereweho iminsi 42, umuhanga yasobanuye ko yeretswe ko igihe izo sheki zatangwaga zitari zizigamiwe, naho ibyo umuhanga yavuze ko Ecobank Rwanda Ltd yanze kumwereka konti ya Sotra Tours &

Travel Agency ngo arebe ko koko izo sheki zatanzwe nta mafaranga ari kuri konti ya nyirazo, ko impamvu Ecobank Rwanda Ltd itamweretse iyo konti ari uko ntaho ihuriye na "expertise" yakorwaga, kuko banki ifite inshingano zo kugirira ibanga konti y'umukiliya (Sotra Tours & Travel Agency) wayo.

UKO URUKIKO RUBIBONA

- [35] Urukiko rusanga impande zose zumvikana ko umwenda Ecobank Rwanda Ltd ikurikiranye wavuguruwe inshuro 3, uwavuguruwe bwa nyuma Ecobank ikaba yarawubaze ikerekana ko ungana na 611.893.224Frw, ariko mu bisobanuro umuhanga washyizweho n'Urukiko Rukuru rw'Ubucuruzi yerekanye ko mu by'ukuri uwo mwenda wagombaga kungana na 610.166.856Frw anabitangira ibisobanuro bikubiye muri raporo ve. Ubwo Ecobank Rwanda Ltd idahakana imibare yakozwe n'uwo muhanga, uwo mubare wemejwe n'umuhanga niwo ugomba guherwaho harebwa ibijyanye n'inyungu iyo banki ibara kuko Uwamahoro na Arlcom Ltd batemera ibarwa ryazo. Ku rundi ruhande nanone, Urukiko rusanga rutahera kuri 284.093.675Frw Uwamahoro Florent de Paix avuga ko ari wo mwenda yemera, kuko atagaragaza aho awushingira.
- Urukiko rusanga ku itariki ya 24/10/2012, Ecobank [36] Rwanda Ltd yarandikiye Arlcom Ltd na Uwamahoro Florent de la Paix ikora "dénonciation du crédit" inasaba kwishyurwa 657.788.007 Frw (ni ukuvuga: 610.166.856 Frw "crédits amortissables" + inyungu za 8.340.713 Frw + inyungu z'ubukererwe: 11.509.852 Frw + Débit en compte courant": 27.270.586 Frw).

[37] Urukiko rushingiye ku masezerano y'umwenda yabaye, iyo banki yari yahawe ingwate ifite agaciro kangana 750.000.000Frw. Nk'uko Uwamahoro Florent de la Paix abiburanisha, ntibyumvikana uburyo nyuma yo gusesa amasezerano y'umwenda ku itariki imaze kuvugwa, hejuru y'umwenda wa 610.166.866Frw uvuguruwe bwa nyuma nk'uko wemejwe n'umuhanga, Ecobank Rwanda Ltd yahisemo gukomeza kubara inyungu zisanzwe n'iz'ubukererwe kandi igahera kuri 611.893.224Frw, aho gushaka uko igurisha ingwate yahawe, cyane cyane ko agaciro kayo gasumba kure amafaranga yishyuzaga icyo gihe. Urukiko rusanga Ecobank Rwanda Ltd igomba kwirengera ingaruka z'iyo mikorere kubera ko kutabyitaho kwaba ari ugutuma uwishyuzwa akomeza kubarirwa inyungu z'ikirenga kandi bikamutera igihombo ku makosa atari aye.

[38] Mu bisobanuro yatanze mbere kandi, umuhanga yagaragaje ku rupapuro rwa 67 rwa raporo ye, ko yabonye ikibazo cy'amafaranga ya sheki 2 zo ku wa 28/4/2011 za Sotra Tours & Travel Agency, imwe ya 9.552.043Frw n'indi ya 6.102.882Frw (zombi zihwanye na 15.654.925Frw) yahawe Ecobank Rwanda Ltd ku itariki ya 4/05/2011 agenewe gushyirwa kuri konti ya Arlcom Ltd, ariko ikayashyiraho ku itariki ya 16/6/2011, nyuma y'iminsi 42. Uwo muhanga anavuga ko mu bisobanuro yahawe na Ecobank Rwanda Ltd, yamubwiye ko kudahita iyashyira kuri konti ya Arlcom Ltd byatewe n'uko izo sheki zari zitazigamiwe, ariko ko iyo banki itamuhaye ikimenyetso cy'ibyo ivuga. Asoza yemeza ko biramutse bigaragaye ko izo mpungenge "réserves" yavuze kuri izo sheki zifite ishingiro, ingano y'umwenda kugeza ku itariki ya 4/05/2011 yahinduka.

- [39] Mu miburanire ya Uwamahoro Florent de la Paix n'umwunganira, nk'uko byasobanuwe, mu byo banenga Ecobank Rwanda Ltd ku bijyanye n'uburyo umwenda yishyuza wabazwe, harimo n'amafaranga avuzwe mu gika kibanziriza iki, kuko bavuga ko iyo iba yarayashyize kuri konti ya Arlcom Ltd ku gihe, yari kugabanya umwenda wishyuzwa. Ecobank Rwanda Ltd ku ruhande rwayo yo yakomeje kuvuga ko bishoboka ko izo sheki zitari zizigamiwe ko ndetse ifite inshingano yo kugira ibanga ku bijyanye na konti z'abakiliya bayo.
- [40] Urukiko rusanga ibyo bisobanuro Ecobank Rwanda Ltd bidakwiye, kuko ku rundi ruhande byagaragaye ko mu mafaranga yishyuza, harimo n'inyungu z'ubukererwe, nyamara nayo yarakerewe gushyira ku gihe amafaranga yavuzwe haruguru kuri konti ya Arlcom Ltd ku buryo byagize ingaruka ku kwiyongera kw'izo nyungu, ayo mafaranga akaba agomba rero kubarirwa inyungu zikavanwa mu z'ubukererwe zagiye zibarwa na Ecobank. Ayo mafaranga akaba abazwe ku buryo bukurikira: 6.102.882 Frw + 9.552.013 Frw= 15.654.925 x 42 x 2 = 9.566.283Frw 360x100
- [41] Nanone kandi, Urukiko rusanga umuhanga yarasobanuye ko hari 500.000Frw Ecobank Rwanda Ltd itagaragaza uburyo yavuye kuri konti ya Arlcom Ltd ku itariki ya 2/06/2011, akavuga ko niba nayo adatangiwe ibisobanuro, azagabanya umwenda wa Arlcom Ltd.
- [42] Urukiko rushingiye kuri ibyo bisobanuro by'umuhanga, no ku mpungenge Uwamahoro Florent de la Paix na Arlcom Ltd bagaragaje mu iburanisha, bikanahuzwa n'uko Ecobank Rwanda Ltd itabashije gusobanura ivanwa ry'ayo mafaranga kuri konti ya Arlcom Ltd, rusanga akwiye kuvanwa mu mwenda remezo wishyuzwaga mu ibaruwa yo ku wa 24/10/2012 ya Ecobank

Rwanda Ltd igihe yakoraga "dénonciation du crédit". Ni ukuvuga ko agomba gukurwa ku mwenda remezo wa 610.166.856Frw wabariweho inyungu z'ubukererwe, uwo mwenda ugasigara ari: 610.166.856Frw - 500.000Frw= 609.666.856Frw.

- [43] Ku bijyanye n'andi mafaranga ya "garantie bancaire" Uwamahoro Florent de Paix anenga ko yabazwe nk'umwenda atari byo, Urukiko rusanga umuhanga yarayatangiye ibisobanuro byumvikana, ku rupapuro rwa 67 rwa raporo ye, aho asobanura ko n'ubwo atari amafaranga umukiliya afata mu ntoki, abarwa nk'umwenda. Ku bijyanye n'andi makosa Uwamahoro Florent de la Paix na Arlcom Ltd bavuga ko yaba yarabaye mu mibare ya Ecobank Rwanda Ltd, Urukiko rusanga usibye impungenge umuhanga yagaragaje kandi zitaweho, ayandi batayagaragariza ibimenyetso.
- [44] Hakurikijwe ibisobanuro byatanzwe haruguru, umwenda wishyuzwa n'inyungu zawo biteye bitya: 609.666.856Frw (umwenda wakosowe) + 8.340.713Frw (inyungu zisanzwe) + inyungu z'ubukererwe: 1.943.569Frw (ahwanye na 11.509.852Frw- 9.566.283Frw + Débit en compte courant": 27.270.586Frw = 647.221.724Frw.

Ku bijyanye n'ubujurire bwuririye ku bundi

[45] Me Nkundabarashi Moïse uburanira Ecobank Rwanda Ltd, yasabye ko Uwamahoro Florent de la Paix na Arlcom Ltd bafatanya kwishyura iyo banki amafaranga y'ikurikiranarubabanza n'igihembo cy'Avoka kingana na 2 000 000Frw

[46] Uwamahoro Florent de la Paix na Arlcom Ltd basanga ubujurire bwuririye ku bundi bwa Ecobank Rwanda Ltd nta gaciro bugomba kugira kuko batemera umwenda wishyuzwa.

UKO URUKIKO RUBIBONA

[47] Urukiko rurasanga mu gihe hari ibyo Uwamahoro Florent de la Paix na Arlcom Ltd bategetswe kwishyura Ecobank Rwanda Ltd, bagomba kuyishyura 500.000Frw y'ikurikiranarubanza na 500.000Frw y'igihembo cy'Avoka kuri uru rwego kubera ko ariyo ari mu rugero rukwiye harebwe igihe uru rubanza rumaze n'amaburanisha yabaye.

III. ICYEMEZO CY'URUKIKO

- [48] Rwemeje ko ubujurire bwa Uwamahoro Florent de la Paix na Arlcom Ltd bufite ishingiro kuri bimwe;
- [49] Rwemeje ko ubujurire bwa Ecobank Rwanda Ltd bwuririye ku bundi bufite ishingiro kuri bimwe;
- [50] Ruvuze ko imikirize y'urubanza RCOMA0213/14/HCC rwaciwe ku wa 25/04/2014 n'Urukiko Rukuru rw'Ubucuruzi, ihindutse ku bijyanye n'ingano y'umwenda Uwamahoro Florent de la Paix na Arlcom Ltd bagomba kwishyura Ecobank Rwanda Ltd;
- [51] Rutegetse Uwamahoro Florent de la Paix na Arlcom Ltd gufatanya kwishyura Ecobank Rwanda Ltd umwenda n'inyungu bingana na 647.221.724Frw hamwe na 1.000.000Frw y'ikurikiranarubanza n'igihembo cya Avoka kuri uru rwego;

[52] Ruvuze ko amafaranga Uwamahoro Florent de la Paix na Arlcom Ltd batanzeho ingwate y'amagarama muri uru Rukiko, ahwanye n'ibyakozwe mu rubanza.

NYIRANJANGWE v. BPR Ltd N'ABANDI

[Rwanda URUKIKO RW'IKIRENGA – RCOMAA0019/15/CS (Hatangimbabazi, P.J., Gakwaya na Mukamulisa, J.) 13 Mata 2018]

Ingwate — Gutesha agaciro cyamunara — Kuba Umuhesha w'Inkiko yarateje cyamunara ingwate ashingiye ku igenagaciro ryateshejwe agaciro n'Urwego rw'abagenagaciro, ni impamvu ituma cyamunara yakozwe iteshwa agaciro — Itegeko N°17/2010 ryo ku wa 12/5/2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa mu Rwanda, ingingo ya 36

Incamake y'ikibazo: Nyiranjagwe yagiranye amasezerano y'inguzanyo na Banki y'abaturage y'u Rwanda (BPR Ltd) maze bemeranya ko natubahiriza amasezerano hazabaho kugurisha inzu yatanzeho ingwate nta manza zibayeho. Nyiranjagwe ntiyubahirije ayo masezerano maze Umwanditsi Mukuru muri RDB atanga icyemezo cyo kugurisha iyo ngwate.

Nyiranjagwe yatanze ikirego cyatanzwe n'umuburanyi umwe mu Rukiko rw'Ubucuruzi rwa Huye asaba guhagarika cyamurara y'inzu ye kuko igenagaciro iyi cyamunara ishingiyeho inyuranyije n'amahame asanzwe akurikizwa mu igenagaciro ku mutungo utimukanwa, urwo Rukiko rwemeza ko ikirego cye nta shingiro gifite.

Nyiranjagwe yongeye atanga ikirego muri urwo rukiko arega Umuhesha w'Inkiko w'umwuga hamwe na BPR Ltd, avuga ko cyamunara yakozwe mu buryo bunyuranyije n'amategeko kuko inzu yatejwe cyamunara ku gaciro kari munsi y'agaciro nyako, akaba asaba urukiko ko rwasesa iyo cyamunara, urukiko rwaciye urubanza rwemeza ko iyo cymunara isheshwe ndetse ko n'amasezerano yose ayishingiyeho asheshwe.

Umuhesha w'inkikow'umwuga na BPR Ltd ntibishimiye icyemezo cy'Urukiko bajuririra Urukiko Rukuru rw'Ubucuruzi ndetse B.E.S &Supply Ltd yagobotse ku bushake nk'uwaguze iyo inzu maze uru Rukiko rwemeza ko iyo cyamunara igumana agaciro kayo kuko yakozwe mu buryo bukurikije amategeko.

Nyiranjagwe yajuririye Urukiko rw'Ikirenga avuga ko Urukiko Rukuru rw'Ubucuruzi rutasuzumye impamvu nyamukuru yashingiweho asaba iseswa ry'amasezerano, muri urwo rukiko. Umuhesha w'inkiko, BPR Ltd na B.E.S & Supply Ltd batanze inzitizi yo kutakira ubujurire hashingiwe ku gaciro k'ikiburanwa bavuga ko katangana na 50.000.000Frw ateganywa n'itegeko; urukiko rwanzuye ko mbere yo gufata icyemezo hagomba kubanza gushyirwaho umugenagaciro kugirango agene agaciro k'iyo nzu, uru Rukiko rwemeza ko iyo nzitizi nta shingiro ifiteBPR Ltd yaongeye itanga indi nzitizi ivuga ko ubujurire bwa Nyiranjagwe budakwiye kwakirwa kuko ibyo aburanisha byaburanishijwe mu rundi rubanza rwabaye itegeko, nanone Urukiko rwemeza ko iyo nzitizi nta shingiro ifite.

Nyiranjagwe asobanura ko Urukiko Rukuru rw'Ubucuruzi rwanze gusuzuma mpamvu nyamukuru yashingiweho yuko cyamunara yakozwe ku nzu ye yashingiye ku igenagaciro (expertise) ryari ryateshejwe agaciro n'urwego rw'abagenagaciro maze ibyo bikaba byaratumye inzu ye igurishwa ku giciro gito cyane ugereranije n'agaciro yari ifite, kubwiyo akaba asaba ko cyamunara iseswa, akomeza asaba indishyi zitandukanye.

Umuhesha w'inkiko, BPR Ltd na B.E.S & Supply Ltd bo bireguye bavuga iyi mpamvu y'ubujurire bwa Nyiranjagwe nta shingiro yahabwa kuko mu rubanza rujuririrwa, Urukiko Rukuru rw'Ubucuruzi rwagiye rubisobanura ndetse ko n'indishyi asaba atazihabwa kuko atagaragaza uwo azisaba n'impamvu yazo ahubwo nibo bazigenerwa.

Incamake y'icyemezo: 1. Kuba Umuhesha w'Inkiko yarateje cyamunara ingwate ashingiye ku igenagaciro ryateshejwe agaciro n'Urwego rw'abagenagaciro, ni impamvu ituma cyamunara yakozwe iteshwa agaciro kuko iba yakozwe mu buryo bunyuranije n'amategeko.

2.Indishyi, z'akababaro, amafaranga y'ikurikiranarubanza n'ay'igihembo cya avoka agenwe mu bushishozi bw'urukiko kuko uwayasabye atagaragaje uko yabazwe .

Ubujurire bufite ishingiro. Amagarama y'urubanza aherereye kubarezwe.

Amategeko yashingiweho:

- Itegeko N°21/2012 ryo ku wa 14/6/2012, ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 208 n'iya 267.
- Itegeko N°17/2010 ryo ku wa 12/5/2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa mu Rwanda, ingingo ya 36.
- Itegeko Nº 10/2009 ryo ku wa 14/5/2009 ryerekeye ubugwate ku mutungo utimukanwa, ingingo ya 19 n'iya 24.
- Itegeko-Teka ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 258.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Nyiranjangwe Zura yagiranye na Banki y'Abaturage y'u Rwanda (BPR Ltd) amasezerano y'inguzanyo, atanga ingwate y'inzu, bemeranya ko natubahiriza amasezerano ingwate izagurishwa hatabayeho imanza. Nyiranjangwe Zura ntabwo yubahirije ayo masezerano, maze ku wa 27/1/2014, Umwanditsi Mukuru muri Rwanda Development Board (RDB) atanga icyemezo cyo kugurisha mu cyamunara inzu ya Nyiranjangwe Zura iherereye mu Ntara y'Amajyepfo, Akarere ka Nyanza, Umurenge wa Busasamana, Akagari ka Gahondo, yemeza ko uzagurisha iyo ngwate ari Ruganda Cryspin, kandi ko imirimo ye ijyanye no kuyigurisha izarangira ku wa 24/4/2014.
- [2] Ku wa 5/3/2014, Nyiranjangwe Zura yaregeye Urukiko rw'Ubucuruzi rwa Huye, atanze ikibazo gitanzwe n'umuburanyi umwe asaba guhagarika cyamunara y'inzu ye kuko amabwiriza y'iyo cyamunara anyuranyije n'icyemezo cya Rwanda Development Board (RDB) kiyishyiraho. Ku wa 7/3/2014, urwo Rukiko rwaciye urubanza RCOM0084/14/TC/HYE, rwemeza ko icyo kirego nta shingiro gifite.
- [3] Nyiranjangwe Zura yatanze ikindi kirego mu Rukiko rw'Ubucuruzi rwa Huye, arega Umuhesha w'Inkiko w'Umwuga Ruganda Cryspin hamwe na BPR Ltd avuga ko bateje cyamunara ingwate yahaye iyi Banki mu buryo butubahirije amategeko kuko bayihaye kandi bayigurisha ku gaciro kari munsi y'agaciro

nyako, asaba ko iyo cyamunara iseswa. Ku wa 7/11/2014, urwo Rukiko rwaciye urubanza RCOM0166/14/TC/HYE, rwemeza ko cyamunara y'inzu ya Nyiranjangwe Zura yabaye ku wa 24/3/2014 isheshwe, runemeza ko amasezerano yose ashingiye kuri iyo cyamunara asheshwe.

- [4] Ruganda Cryspin na BPR Ltd ntibanyuzwe n'icyo cyemezo cy'Urukiko rw'Ubucuruzi rwa Huye, bajuririra mu Rukiko Rukuru rw'Ubucuruzi. B.E.S. & Supply Ltd yagobotse ku bushake nk'uwaguze ingwate ivugwa muri uru rubanza. Ku wa 13/2/2015, urwo Rukiko rwaciye urubanza RCOMA0606/14/HCC RCOMA0608/14/HCC, rwemeza ko igurishwa ry'ingwate ivugwa muri uru rubanza ryakozwe mu buryo bukurikije amategeko, ko rihamana agaciro karyo.
- [5] Nyiranjangwe Zura ntiyishimiye imikirize y'urwo rubanza, ajuririra mu Rukiko rw'Ikirenga, avuga ko Urukiko Rukuru rw'Ubucuruzi rutasuzumye impamvu nyamukuru yashingiyeho asaba iseswa ry'amasezerano ya cyamunara y'inzu ye yabaye ku wa 24/3/2014.
- [6] Me Ntwali Justin, aburanira BPR Ltd, Me Murutasibe Joseph, aburanira B.E.S. & Supply Ltd na Me Nkundabatware Bigimba Félix, aburanira Ruganda Cryspin, batanze inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga hashingiwe ku ngingo ya 28, igika cya 4 y'Itegeko Ngenga rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya ko kugirango ubujurire bwa kabiri bwakirwe, ikiburanwa kigomba kuba gifite agaciro kangana nibura na 50.000.000Frw, ariko muri uru rubanza inzu yatejwe cyamunara ikaba idafite agaciro kangana nibura na 50.000.000Frw. Basobanura ko iyo nzu yahawe agaciro ka 42.000.000Frw nk'uko bigaragara kuri *expertise* yakoreshejwe hatezwa cyamunara, ari nayo yemewe na RDB,

bityo kuba agaciro k'ikiburanwa katangana nibura na 50.000.000Frw, ubujurire bwa Nyiranjangwe Zura bukaba butari mu bubasha bw'Urukiko rw'Ikirenga.

- [7] Ku wa 24/2/2017, uru Rukiko rwasanze mbere yo gufata icyemezo kuri iyo nzitizi y'iburabubasha bw'Urukiko rw'Ikirenga yatanzwe na BPR Ltd, ari ngombwa ko hashyirwaho umugenagaciro kugira ngo agene agaciro inzu iburanwa muri uru rubanza ifite ubu, ruvuga ko iburanisha risubitswe, rikazafungurwa ku wa 15/3/2017 kugira ngo ababuranyi Nyiranjangwe Zura, BPR Ltd na B.E.S. & Supply Ltd bamenyeshe Urukiko umugenagaciro bazaba bemeranyijweho, mu gihe batamwumvikanaho akazashyirwaho n'Urukiko.
- [8] Ku wa 15/3/2017, urubanza ntirwaburanishijwe kuko umwe mu bacamanza bagize inteko yari mu butumwa bw'akazi hanze y'igihugu, rwimurirwa ku wa 16/5/2017. Ku wa 20/4/2017, Urukiko rw'Ikirenga rwandikiye ababuranyi, rubamenyesha ko urubanza rwabo ruzaburanishwa ku wa 2/5/2017 aho kuba ku wa 16/5/2017.
- [9] Ku wa 2/5/2017, Urukiko rw'Ikirenga rwemeje Ir. Nkabije Alphonse Marie nk'umugenagaciro muri uru rubanza, rumusaba gutanga raporo ye bitarenze ku wa 22/5/2017, runasaba ababuranyi bafite icyo kuyivugaho kubikora bitarenze ku wa 30/5/2017, iburanisha rikazasubukurwa ku wa 27/6/2017. Kuri uwo munsi urubanza ntirwaburanishijwe kubera ko umwe mu bacamanza bagize inteko yari mu butumwa bw'akazi hanze y'igihugu, rwimurirwa ku wa 18/7/2017, ariko ku wa 29/6/2017, Urukiko rw'Ikirenga rumenyesha ababuranyi ko urubanza ruzaburanishwa ku wa 25/7/2017 aho kuba ku wa 18/7/2017 nk'uko byari byemejwe mu iburanisha ryo ku wa 27/6/2017.

- [10] Urubanza rwaburanishijwe mu ruhame ku wa 25/7/2017, Nyiranjangwe Zura yunganirwa na Me Kabasenga Berthilde na Me Mugabo Pio, BPR Ltd ihagarariwe na Me Ntwali Justin, Ruganda Cryspin ahagarariwe na Me Nkundabatware Bigimba Félix, naho B.E.S. & Supply Ltd ihagarariwe na Me Kiloha Olivier. Kuri iyo tariki, Urukiko rwumvise icyo ababuranyi bavuga kuri raporo y'umugenagaciro Ir. Nkabije Alphonse Marie, igaragaza ko agaciro k'inzu iburanwa kangana na 79.250.670Frw.
- [11] Ku wa 22/9/2017, Urukiko rw'Ikirenga rwaciye urubanza rubanziriza urundi, rwemeza ko inzitizi yatanzwe na BPR Ltd y'iburabubasha ry'Urukiko rw'Ikirenga rishingiye ku kuba ikiburanwa kitagejeje ku gaciro ka 50.000.000Frw, nta shingiro ifite, ko ubujurire bwa Nyiranjangwe Zura buri mu bubasha bw'Urukiko rw'Ikirenga.
- [12] Nyuma y'icyo cyemezo, Me Ntwali Justin, uburanira BPR Ltd, yatanze indi nzitizi yo kutakira ubujurire bwa Nyiranjangwe Zura, avuga ko iyo nzitizi ishingiye ku ngingo ya 142 y'Itegeko N°21/2012 ryo ku wa 14/6/2012, ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ngo kubera ko impamvu ye y'ubujurire irebana n'igena gaciro k'inzu ye, kandi hari urundi rubanza rufite RCOM 0084/14/TC/HYE, rwasuzumye ibijyanye n'iryo genagaciro (expertise) riregerwa, rukaba rwarabaye itegeko.
- [13] Ku wa 29/12/2017, Urukiko rw'Ikirenga rwaciye urubanza rubanziriza urundi, rwemeza ko inzitizi yatanzwe na BPR Ltd yo kutakira ubujurire bwa Nyiranjangwe Zura kuko ibyo ajuririra byaburanishijwe mu rundi rubanza rwabaye

itegeko, nta shingiro ifite, ko ubujurire bwe bwakiriwe kandi ko iburanisha ry'urubanza rizakomeza ku wa 20/2/2018.

[14] Kuri iyo tariki, urubanza rwaburanishije mu ruhame mu mizi, Nyiranjangwe Zura yunganirwa na Me Kabasenga Berthilde na Me Mugabo Pio, BPR Ltd ihagarariwe na Me Ntwali Justin, Ruganda Cryspin ahagarariwe na Me Ndagijimana Ignace, naho B.E.S. & Supply Ltd ihagarariwe na Me Busogi Emmanuel.

II. ISESENGURA RY'IBIBAZO BIGIZE URU RUBANZA

- a. Kumenya niba Urukiko Rukuru rw'Ubucuruzi rwaranze gusuzuma impamvu nyamukuru y'ubujurire bwa Nyiranjangwe Zura yo gutesha agaciro cyamunara yabaye ku inzu ye
- [15] Nyiranjangwe Zura avuga ko Urukiko Rukuru rw'Ubucuruzi rwanze gusuzuma impamvu nyamukuru yashingiyeho asaba ko cyamunara yaseswa ngo kandi iyo mpamvu ari nayo Urukiko rw'Ubucuruzi rwa Huye rwahereyeho rwemeza ko ikirego cye gifite ishingiro maze bigatuma cyamunara iseswa.
- [16] Nyiranjangwe Zura asobanura ko yasabye ko cyamunara yateshwa agaciro kuko yashingiye kuri *expertise* yateshejwe agaciro, bituma inzu ye igurwa ku giciro gito. Akomeza asobanura ko iyi mpamvu nta na hamwe igaragara mu rubanza rwajuririwe. Asobanura kandi ko kuba Urukiko Rukuru rw'Ubucuruzi rwaranze kuyisuzuma kandi ari yo ngingo aburanisha byafatwa nka *absence de motivation* muri uru rubanza, akaba rero asanga urubanza rujuririrwa rukwiye

kuvanwaho, hakagumaho imikirize y'urubanza RCOM0166/14/TC/HYE rwaciwe n'Urukiko rw'Ubucuruzi rwa Huye ku wa 18/6/2014.

- [17] Nyiranjangwe Zura avuga kandi ko ingingo ya 8 y'Amabwiriza y'Umwanditsi Mukuru N°03/2010/ORG yo ku wa 16/11/2010 agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, Urukiko Rukuru rw'Ubucuruzi rwashingiyeho, itemera ko hashingirwa ku igenagaciro ryateshejwe agaciro, ko ibikubiye muri iyo ngingo bireba igenagaciro rifite.
- Me Kabasenga Berthilde na Me Mugabo Pio bavuga ko ingingo nyamukuru uwo bunganira Nyiranjangwe Zura yari yaburanishije ku rwego rwa mbere ari uko yari yasabye gusesa cyamunara kubera ko inzu ye yari yagurishijwe ku gaciro gato cyane, kuko bayihaye agaciro ka miliyoni mirongo itandatu n'umunani (68) ariko igurishwa ku giciro kingana na miliyoni cumi n'umunani (18) gusa, uwayiguze nawe ahita ayishyira ku isoko ayigurisha miliyoni mirongo itatu n'esheshatu (36), bikaba bigaragaza uburyo Umuhesha w'Inkiko yayigurishije ku giciro gito bikabije. Bavuga kandi ko ingingo ya 36 y'Itegeko N° 17/05/2010 ryo ku wa 12/5/2010 ryavuzwe haruguru, abo baburana bayiyuga igice kuko ikomeza iyuga ko iyo hatabayeho kumvikana, baregera urwego rubifitiye ububasha, ariyo mpamvu bavuga ko Umuhesha w'Inkiko adapfa kugurisha uko yishakiye. Bavuga ko ikindi kigaragaza ko Umuhesha w'Inkiko yari agambiriye gutesha agaciro inzu ya Nyiranjangwe Zura ari uko yayigurishije avuga ko inzu yubatswe mu matafari ya rukarakara kandi yubakishije amatafari ahiye, ibyo yakoze bikaba byerekana ko atabikoze mu rwego rw'umwuga.

- [19] Me Ntwali Justin, uhagarariye BPR Ltd, avuga ko iyi mpamvu y'ubujurire nta shingiro ifite kuko Urukiko Rukuru rw'Ubucuruzi rwasuzumye impamvu z'ubujurire bwa BPR Ltd na Ruganda Cryspin, ko Urukiko rutari gusuzuma impamvu ze, mu gihe atajuriye. Akomeza asobanura ko kuvuga ko hari absence de motivation atari ko biri kuko kuva ku gace ka kane kugeza ku ka karindwi k'urubanza rujuririrwa, Urukiko Rukuru rw'Ubucuruzi rwabisobanuye, hanasuzumwa ukugoboka ku bushake kwa B.E.S Supply Ltd.
- [20] Me Nkundabatware Bigimba Félix, uhagarariye Ruganda Crispin, avuga ko iyi mpamvu y'ubujurire nta shingiro ifite kuko Urukiko Rukuru rw'Ubucuruzi rwasobanuye neza impamvu yafashe icyemezo cye.
- [21] Mu myanzuro ye, Me Murutasibe Joseph, uhagarariye B.E.S & Supply Ltd, avuga nawe ko iyi mpamvu y'ubujurire nta shingiro ifite kuko ku gace ka kane kugeza ku ka karindwi k'urubanza rujuririrwa, Urukiko Rukuru rw'Ubucuruzi rwabisobanuye neza, runagaragaza n'ingingo z'amategeko rwashingiyeho.

UKO URUKIKO RUBIBONA

[22] Ingingo ya 36 y'Itegeko N°17/2010 ryo ku wa 12/5/2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa mu Rwanda iteganya ko "Mu gihe habaye kutemeranya ku igenagaciro ry'umutungo utimukanwa, ukeka ko yarenganye ashyikiriza ikirego cye Urwego. Icyo gihe Urwego rushyiraho abandi bagenagaciro bemewe bagakoresha uburyo bushya bw'igenagaciro. Iyo impaka zidakemutse, ikirego gishyikirizwa urukiko rubifitiye ububasha".

- [23] Ingingo ya 19, igika cya mbere y'Itegeko N°10/2009 ryo ku wa 14/5/2009 ryerekeye ubugwate ku mutungo utimukanwa nk'uko ryahinduwe kandi ryujujwe kugeza ubu iteganya ko "Ucunga ingwate afite inshingano yo kugurisha ingwate ku giciro gikwiye kiri ku isoko, amaze kubimenyesha impande zombi".
- [24] Ingingo ya 267, igika cya mbere, y'Itegeko N° 21/2012 ryo ku wa 14/6/2012, ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko "Iyo bigaragaye ko ibintu byafatiriwe biramutse bigurishijwe byahabwa igiciro gikabije kuba munsi y'agaciro nyakuri, Umuhesha w'Inkiko, abisabwe n'uwafatiriye cyangwa urimo umwenda, ashobora gusaba ko cyamunara ishyirwa ku wundi munsi". Naho igika cya kabiri cy'iyo ngingo giteganya ko "Muri icyo gihe, Umukozi ushinzwe guteza cyamunara agena undi munsi bizagurishirizwaho, udashobora kurenga iminsi cumi n'itanu (15) kandi agakora ibyangombwa byose kugira ngo hatagira umuburanyi urengana".
- [25] Nk'uko bigaragara mu bice bya 7, 8, 9 na 10 by'urubanza RCOM0166/14/TC/HYE rwaciwe mu rwego rwa mbere n'Urukiko rw'Ubucuruzi rwa Huye ku wa 18/6/2014, Nyiranjangwe Zura yatanze ikirego, asaba ko cyamunara yabaye ku nzu ye ku wa 24/3/2014 yaseswa kuko yakozwe hashingiwe ku igenagaciro ryo ku wa 29/9/2013 ryateshejwe agaciro n'Urugaga rw'abagenagaciro, bikamenyeshwa RDB, BPR Ltd n'Umuhesha w'inkiko, Ruganda Cryspin, nk'uko bishimangirwa n'ibaruwa y'Umuyobozi w'Urugaga rw'abagenagaciro yo ku wa 20/3/2014. Urwo Rukiko rwemeje ko cyamunara y'inzu ya Nyiranjangwe Zura yabaye ku wa 24/3/2014 isheshwe, rusobanura ko, nk'uko bigaragara ku gace ka 28 k'urubanza

rwarwo, kuba Umuhesha w'Inkiko yaramenyeshejwe ko igenagaciro ashaka gushingiraho ateza cyamunara ryateshejwe agaciro n'urwego rubifitiye ububasha, akarenga akayishingiraho, ayo masezerano ya cyamunara yakorewe ku cyemezo cyangwa inyandiko byateshejwe agaciro nta shingiro afite kuko yakozwe mu buryo butemewe.

Nk'uko bigaragara mu myanzuro, B.P.R. Ltd yajuriye [26] Rukiko Rukuru rw'Ubucuruzi, ivuga ko Urukiko rw'Ubucuruzi rutahaye agaciro inzitizi yo kutakira ikirego cya Nyiranjangwe Zura kuko ikiburanwa muri uru rubanza cyaburanywe no mu rubanza RCOM0084/14/TC/HYE rwabaye ndakuka, ko rwemeje ko nyuma ya cyamunara aribwo Nyiranjangwe Zura yamenye expertise ya kabiri yemeza ko inzu ye ifite agaciro ka 42.000.000Frw, kandi iyo expertise varaburanywe mu rubanza RCOM0084/14/TC/HYE, ko hashingiwe ku ngingo ya 19, igika cya kabiri, y'Itegeko N°10/2009 ryo ku wa 14/5/2009 ryerekeye ubugwate ku mutungo utimukanwa no ku ngingo ya 208 y'Itegeko N°21/2012 ryo ku ryerekeye imiburanishirize y'imanza 14/06/2012 wa z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, rutari kwemeza ko Nyiranjangwe Zura yari afite uburenganzira bwo kuregera urukiko, asaba gutesha agaciro cyamunara kuko nubwo yari afite ubwo burenganzira, bidakuraho ko cyamunara yakozwe mu buryo bukurikije amategeko kandi impaka zivugwa mu ngingo ya 208 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, ntaho zihuriye n'ikibazo cy'igenagaciro. B.P.R. Ltd yajuriye kandi ivuga ko Urukiko rw'Ubucuruzi rwageneye Nyiranjangwe Zura indishyi, kandi atarazigaragarije ibimenyetso.

- [27] Dosiye y'urubanza igaragaza ko Ruganda Cryspin nawe yajuririye urubanza RCOM0166/14/TC/HYE, avuga ko Urukiko rw'Ubucuruzi rutagombaga kwemeza ko inzitizi yo kutakira ikirego cya Nyiranjangwe Zura nta shingiro ifite kuko atariwe wagombaga kuregwa, ko Urukiko rw'Ubucuruzi rwirengagije amategeko, rukitirira ingingo z'amategeko icyo zidateganya, ndetse ko rwivuguruje ku birebana no kumenya niba amabwiriza yarubahirijwe.
- [28] Mu rubanza rwajuririwe, Urukiko Rukuru rw'Ubucuruzi rwasuzumye ibibazo bitatu birebana no kumenya niba inzitizi yatanzwe na Ruganda Cryspin yo kutakira ikirego cya Nyiranjangwe Zura kuko atariwe wagombaga kuregwa, kumenya niba Ruganda Cryspin yaba yaratesheje agaciro inzu ya Nyiranjangwe Zura mu gihe cya cyamunara no kumenya niba ikirego cya Nyiranjangwe Zura kitaragombaga kwakirwa kuko cyari cyaburanwe mu rubanza RCOM0084/14/TC/HYE.
- [29] Nk'uko bigaragara mu bice bya 4, 5, 6 na 7 by'urubanza rwajuririwe, Urukiko Rukuru rw'Ubucuruzi rwasobanuye ko hashingiwe ku ngingo ya 8, 11 na 12 z'amabwiriza N°03/2010/ORG yo ku wa 16/11/2010 y'Umwanditsi Mukuru agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, ushinzwe kugurisha ingwate ariwe ufite inshingano zo gukoresha igenagaciro ry'umutungo watanzweho ingwate, akaba ariwe urishyikiriza Umwanditsi Mukuru kugirango abe ariwe uryemeza mu mabwiriza y'icyamunara, bivuze ko igenagaciro nyiri ugutanga ingwate aba yakoreshereje nta bubasha bw'itegeko ryagira kabone niyo ryaba ryarakozwe n'inzobere zabiherewe ububasha. Rwasobanuye kandi ko kuba Nyiranjangwe Zura atarerekanye ikimenyetso kidashidikanwaho cy'uko inzu ye yagurishijwe ku giciro gihabanye kure n'ibiciro

biri ku isoko, icy'uko habonetse mu cyamunara umuguzi washoboraga gutanga ikiguzi kirenze icyo iyo ngwate yagurishijweho, n'icy'uko ku kagambane ka Ruganda Cryspin na B.P.R. Ltd iyo ngwate yagurishijwe ku giciro gito, Ruganda Cryspin na B.P.R. Ltd badashobora gukurikiranwaho gutesha agaciro ingwate yatanzwe na Nyiranjangwe Zura.

- [30] Amabwiriza y'igurisha mu cyamunara y'inzu ya Nyiranjangwe Zura agaragaza ko igurishwa muri cyamunara rizaba ku wa 24/2/2014, kandi ko riramutse ritabye kubera kubura kw'abapiganwa cyangwa batanze igiciro gito, iyo cyamunara yakwimurirwa bwa mbere ku wa 3/3/2014, ubwa kabiri ku wa 10/3/2014, ubwa gatatu ku wa 17/3/2014 naho ubwa nyuma ku wa 24/3/2014.
- [31] Ibaruwa y'Umwanditsi Mukuru yo ku wa 28/2/2014 igaragaza ko ku wa 5/2/2014, Nyiranjangwe Zura yamwandikiye asaba ko amabwiriza y'igurisha muri cyamunara y'inzu ye yateshwa agaciro kuko igenagaciro riri muri ayo mabwiriza ritesha agaciro umutungo we, maze Umwanditsi Mukuru amumenyesha ko kuba atishimira igenagaciro ryakozwe, ashobora gushyikiriza ikirego cye Urwego rw'abagenagaciro, hashingiwe ku ngingo ya 36 y'Itegeko Nº 17/2010 ryo ku wa 12/5/2010 ryavuzwe haruguru.
- [32] Dosiye y'urubanza igaragaza ko ku wa 20/3/2014, Acting Chairperson of the regulatory Council of Real Property Valuation yandikiye Umwanditsi Mukuru wa RDB ibaruwa yabonye ku wa 24/3/2014, agenera kopi Institute of Real Property Valuers, Managing Director of B.P.R. Ltd, Ruganda Cryspin na Nyiranjangwe Zura, amumenyesha ko raporo y'igenagaciro yakozwe ku mutungo utimukanwa wa Nyiranjangwe Zura, hashingiwe ku cyemezo N°14-003881 cyo

kugurisha ingwate cyo ku wa 27/1/2014, nta gaciro ifite kuko ibimenyetso by'agaciro igaragaza binyuranije n'amahame asanzwe akurikizwa mu igenagaciro ku mutungo utimukanwa, ko kuri uru rwego, mu nyungu z'ababuranyi bombi ku cyamunara cyakozwe, agaciro k'umutungo kadakwiye gufatwa nk'agaciro fatizo kuko bigoye kumenya niba ako gaciro gashingiye ku biciro biri ku isoko

- [33] Nk'uko bigaragara mu dosiye y'urubanza, Umwanditsi Mukuru wa RDB, asubiza ku ibaruwa yo ku wa 20/3/2014 yavuzwe haruguru, yandikiye Regulatory Council of Real Property Valuation ku wa 8/4/2014, agenera kopi Umuyobozi Mukuru wa B.P.R. Ltd, Ruganda Cryspin na Nyiranjangwe Zura, amubwira ko ashingiye ku ngingo ya 24 y'Itegeko N°10/2009 ryo ku wa 14/4/2009 ryerekeye ubugwate ku mutungo utimukanwa, asaba umuntu wese bireba kwitabaza Inkiko zibifitiye ububasha, zikamurenganura.
- [34] Urukiko rw'Ikirenga rurasanga isuzuma ry'urubanza rujuririrwa rigaragaza ko mu gutesha agaciro urubanza rwaciwe ku rwego rwa mbere, Urukiko Rukuru rw'Ubucuruzi rutasuzumye ikibazo nyamukuru cyatanzwe na Nyiranjangwe Zura cyo gutesha agaciro cyamunara cyabaye ku nzu ye ku wa 24/3/2014 kuko mu kugurisha ingwate iburanwa, Umuhesha w'Inkiko yashingiye kuri *expertise* yateshejwe agaciro n'Urwego rw'Abagenagaciro ku wa 20/3/2014, ahubwo ko rwasuzumye gusa ikibazo kirebana no kumenya niba Umuhesha w'Inkiko Ruganda Cryspin yaba yaratesheje agaciro inzu ya Nyiranjangwe Zura mu gihe cya cyamunara.
- [35] Urukiko rw'Ikirenga rurasanga urwo Rukiko rwaragombaga byanze bikunze gusuzuma icyo kibazo cyatanzwe na Nyiranjangwe Zura mu rwego rwa mbere, cyane cyane ko mu

myanzuro yayo mu rwego rw'ubujurire, B.P.R. Ltd yajuriye, ivuga ko Urukiko rw'Ubucuruzi rutari kwemeza ko Nyiranjangwe Zura yari afite uburenganzira bwo kuregera urukiko, asaba gutesha agaciro cyamunara kuko nubwo yari afite ubwo burenganzira, bidakuraho ko cyamunara yakozwe mu buryo bukurikije amategeko.

- [36] Urukiko rw'Ikirenga rurasanga isuzuma ry'ingingo ya 36 y'Itegeko N°17/2010 ryo ku wa 12/5/2010 ryavuzwe haruguru, hamwe n'ingingo ya 19, igika cya mbere, y'Itegeko N°10/2009 ryo ku wa 14/5/2009 ryavuzwe haruguru n'iya 267 y'Itegeko N°21/2012 ryo ku wa 14/6/2012 ryavuzwe haruguru, ryumvikanisha ko mu gihe bigaragaye ko ingwate ishobora kugurishwa ku giciro kiri hasi y'igiciro gikwiye kiri ku isoko, bisabwe n'uwatanze ingwate cyangwa n'uwahawe ingwate, ucunga ingwate afata icyemezo cyo guhagarika icyamunara, akayishyira ku wundi munsi, kandi agakora ibishoboka byose kugirango hatagira urengana.
- [37] Urukiko rw'Ikirenga rurasanga kuba kuva ku wa 5/2/2014, Nyiranjangwe Zura yarandikiye Umwanditsi Mukuru asaba ko amabwiriza y'igurisha muri cyamunara y'inzu ye yateshwa agaciro kuko igenagaciro riri muri ayo mabwiriza ritesha agaciro umutungo we, nyuma akurikije ibyo Umwanditsi yamubwiye, agatanga ikirego rw'Abagenaciro, maze mu ibaruwa yo ku wa 20/3/2014, urwo Rwego rukandikira Umwanditsi Mukuru, rukagenera kopi *Institute of Real Property Valuers, Managing Director* of B.P.R. Ltd, Ruganda Cryspin na Nyiranjangwe Zura, rumumenyesha ko raporo y'igenagaciro yakozwe ku mutungo utimukanwa wa Nyiranjangwe Zura, nta gaciro ifite bitewe n'uko ibimenyetso by'agaciro igaragaza binyuranije n'amahame asanzwe

akurikizwa mu igenagaciro ku mutungo utimukanwa, rero aho guhagarika cyamunara yo ku wa 24/3/2014, Umuhesha w'Inkiko yabirenzeho, agurisha ingwate ashingiye ku igenagaciro ryateshejwe agaciro, bityo iyo cyamunara ikaba igomba guteshwa agaciro kuko yakozwe mu buryo bunyuranije n'amategeko.

[38] Hashingiwe ku bimaze gusobanurwa haruguru, Urukiko rw'Ikirenga rurasanga ubujurire bwatanzwe na Nyiranjangwe Zura bufite ishingiro.

b. Kumenya niba ababuranyi bakwiye indishyi basaba muri uru rubanza

- [39] Me Kabasenga Berthilde na Me Mugabo Pio bavuga ko Nyiranjangwe Zura bunganira, asaba indishyi zingana na 1.500.000Frw zo gushorwa mu manza n'igihembo cy' Abavoka yishyuye mu manza zabanje, 3.000.000Frw y'indishyi z'ikurikiranarubanza, na 12.960.000Frw y'igihombo yatewe no kuba ataba mu nzu ye, abayifite bayikodesha we acumbikiwe n'abagiraneza, ayo asaba akaba yarayabaze ashingiye ko inzu yakodeshwaga 270.000Frw ku kwezi, mu gihe cy'imyaka ine (4), ndetse akaba asaba na 10.000.000Frw y'indishyi z'akababaro.
- [40] Me Kabasenga Berthilde na Me Mugabo Pio bakomeza bavuga ko Ruganda Cryspin ntacyo akwiye gusaba kuko uruhare runini ariwe warukoze agira ubushake buke mu kumva ikigenderewe, maze inzu yari ifite agaciro ka miliyoni mirongo itandatu n'umunani (68.000.000 Frw) mu kwandikisha ingwate, inzobere mu igenagaciro zikaza kwemeza ko ifite agaciro ka miliyoni mirongo ine n'ebyiri (42.000.000Frw), ndetse n'Umuhesha w'Inkiko yajya kugurisha iyo nzu akayivuga uko itari

- [41] Me Ntwali Justin, uhagarariye B.P.R. Ltd, avuga ko indishyi Nyiranjangwe Zura asaba, nta shingiro zifite cyane cyane ko atagaragaza uwo azisaba n'impamvu yazo, kandi ko Banki yo itazitanga mu gihe kugeza ubu yananiwe kwishyura umwenda kandi n'inyungu zikaba zarahagaritswe kubarwa kuva urubanza rugitangira, ku buryo byateye Banki igihombo, byongeye kandi ibyabaye akaba nta ruhare Banki yabigizemo. Avuga kandi ko impamvu nta ndishyi Banki yasabwa, ari uko mu gihe Urukiko rwakwemeza ko cyamunara isheshwe, inzu itaba iya Banki ahubwo ko yaba iya Nyiranjangwe Zura, ko rero ari we wakwishyura agaciro kiyongereye kuri iyo nzu.
- [42] Me Ndagijimana Ignace, wunganira Ruganda Cryspin, avuga ko batanze ubujurire bwuririye ku bundi basaba indishyi zingana na 3.000.000Frw, harimo 1.000.000Frw y'igihembo cy'Avoka na 2.000.000Frw z'ikurikiranarubanza, ndetse bagahabwa na 2.500.000Frw y'igihembo cya Avoka mu manza zose zabaye. Avuga kandi ko ibyakozwe ku nzu bitabazwa Umuhesha w'Inkiko, ahubwo ko byabazwa uhawe inzu, cyane cyane ko habayeho gusubiza amafaranga, atazagaruka ku Muhesha w'Inkiko, ariyo mpamvu ntacyo Ruganda Cryspin yabazwa.
- [43] Me Busogi Emmanuel, uhagarariye B.E.S. Supply Ltd, avuga ko inzu bayiguze miliyoni mirongo itatu n'eshanu (35.000.000Frw), barayivugurura, bashyiramo 16.735.800Frw, ku buryo raporo y'igenagaciro iheruka yagaragaje ko ubu ifite agaciro ka miliyoni mirongo irindwi n'icyenda ibihumbi magana biri n'imirongo itanu magana atandatu mirongo irindwi (79.250.670 Frw), ko rero basaba ko Ruganda Cryspin na B.P.R. Ltd bazabasubiza agaciro bayishyizeho, kandi uzagaragaraho

amakosa muri bo akishyura igihembo cya Avoka cya 1.000.000Frw.

UKO RUKIKO RUBIBONA

- [44] Ingingo ya 258 y'Igitabo cya gatatu cy'Urwunge rw'amategeko mbonezamubano iteganya ko ''igikorwa cyose cy'umuntu cyangirije undi gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse''.
- [45] Ku birebana na 1.500.000Frw y'igihembo cya Abavoka yishyuye mu manza zabanje no kuri uru rwego, Nyiranjangwe Zura asaba kwishyurwa na B.P.R. Ltd na Ruganda Cryspin, Urukiko rw'Ikirenga rurasanga agomba kuyahabwa kuko byabaye ngombwa ko ashaka umuhagararira kuva mu rwego rwa mbere kugeza muri uru Rukiko.
- [46] Ku birebana na 3.000.000Frw y'ikurikiranarubanza kuva mu rwego rwa mbere kugeza muri uru Rukiko, Nyiranjangwe Zura asaba kwishyurwa na B.P.R. Ltd na Ruganda Cryspin, Urukiko rw'Ikirenga rurasanga akwiye kuyahabwa kuko byabaye ngombwa ko akurikirana imanza ze, ariko kuba atagaragaza uko ayabara, mu bushishozi bwarwo rukaba rumugeneye 300.000Frw ku rwego rw'Urukiko rw'Ubucuruzi, 500.000Frw ku rwego rw'Urukiko Rukuru rw'Ubucuruzi na 500.000Frw kuri uru rwego, yose hamwe akaba 1.300.000Frw.
- [47] Ku birebana na 10.000.000Frw y'indishyi z'akababaro Nyiranjangwe Zura asaba kwishyurwa na B.P.R. Ltd na Ruganda Cryspin, Urukiko rw'Ikirenga rurasanga akwiye kuyahabwa, ariko kuba ayo asaba ari ikirenga, akaba agomba kuyagenerwa mu bushishozi bw'Urukiko, agahabwa 2.000.000 Frw.

- [48] Ku birebana na 12.960.000 Frw Nyiranjangwe Zura asaba kwishyurwa na B.P.R. Ltd na Ruganda Cryspin, y'igihombo yatewe no kuba ataba mu nzu ye, abayifite bakaba bayikodesha, nyamara we acumbikiwe n'abagiraneza, Urukiko rw'Ikirenga rurasanga nubwo bigaragara ko Nyiranjangwe Zura yakodeshaga inzu ivugwa mbere y'uko igurishwa mu cyamunara, kandi ko yayikodeshaga 120.000Frw buri kwezi nk'uko bigaragara mu masezerano y'ubukode yagiranye na Ecobank Rwanda Ltd yo ku wa 1/10/2012 na fagitiri No 03/06/2013 yashyikirijwe iyo banki ku wa 8/6/2013, adakwiye guhabwa indishyi asaba kuko azisaba bwa mbere muri uru Rukiko.
- [49] Ku birebana n'amafaranga B.P.R. Ltd na Ruganda Cryspin basaba Nyiranjangwe Zura, Urukiko rw'Ikirenga rurasanga batazihabwa kuko batsinzwe muri uru rubanza.
- Ku byerekeye indishyi B.E.S. Supply Ltd isaba zirebana n'amafaranga bakoresheje bavugurura inzu yagurishijwe mu cyamunara na 1.000.000Frw y'igihembo cya Avoka, Urukiko rw'Ikirenga rurasanga itazihabwa kuko yagobotse ku bushake muri uru rubanza mu rwego rwa kabiri igamije gusaba Urukiko ko ikirego cya Nyiranjangwe Zura Rukuru kwemeza kitagombaga kwakirwa mu rwego rwa mbere kubera ko impamvu zashingiweho zari zarafashweho ibyemezo mu manza zabaye itegeko no kwemeza ko ingwate iburanwa yagurishijwe mu buryo bukurikije amategeko, nyamara nk'uko bigaragara mu mwanzuro wayo wo kwiregura muri uru Rukiko, yashyigikiye imyiregurire ya B.P.R. Ltd na Ruganda Cryspin, bityo ikaba idashobora gusaba bwa mbere kuri uru rwego ko B.P.R. Ltd na Ruganda Cryspin bategekwa kuyiha ayo mafaranga kandi kuva na mbere yarashyigikiye imiburanire yabo.

III. ICYEMEZO CY'URUKIKO

- [51] Rwemeje ko ubujurire bwa Nyiranjangwe Zura bufite ishingiro;
- [52] Rwemeje ko cyamunara y'inzu ya Nyiranjangwe Zura yabaye ku wa 24/3/2014 n'amasezerano yose ashingiye kuri iyo cyamunara bisheshwe;
- [53] Rutegetse B.P.R. Ltd na Ruganda Cryspin gufatanya kwishyura Nyiranjangwe Zura 1.500.000Frw y'igihembo cya Abavoka, 1.300.000Frw y'ikurikiranarubanza kuva ku rwego rwa mbere kugeza muri uru Rukiko na 2.000.000 Frw y'indishyi z'akababaro, yose hamwe akaba 4.800.000Frw;
- [54] Rutegetse B.P.R. Ltd na Ruganda Cryspin gufatanya kwishyura 700.000Frw y'igenagaciro yategetswe n'uru Rukiko;
- [55] Rutegetse B.P.R. Ltd na Ruganda Cryspin gufatanya kwishyura amagarama y'urubanza angana na 100.000Frw.

IMANZA NSHINJACYAHA

UBUSHINJACYAHA v. DUSABIMANA

[Rwanda URUKIKO RW'IKIRENGA – RPAA0066/15/CS (Rugege, P.J., Kayitesi Z.na Kayitesi R., J) 04 Mutarama 2019]

Amategeko agenga ibimenyetso — Kwemera icyaha — Buri gihe kwemera icyaha ntibiba ikimenyetso ntakuka gihagije cyashingirwaho mu kwemeza ko uregwa ahamwa n'icyaha akurikiranyweho — Kuba uregwa yemera icyaha ubundi akagihakana bishyira inshingano ku Bushinjacyaha zo gutanga ibindi bimenyetso bishyigikira ukwemera icyaha k'uregwa.

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Ngoma Dusabimana akurikiranywe n'ubushinjacyaha ku cyaha cyo kwihekura buvuga ko afatanyije na Hategekimana yishe umwana we w'umuhungu witwa Sibomana wari ufite imyaka ibiri. Muri uru rukiko uregwa yaburanye ahakana icyaha asobanura ko atiyiciye umwana ko ahubwo yazize uburwayi ko kandi afite impapuro zo kwa muganga zibigaragaza, urukiko rwaciye urubanza rwemeza ko abaregwa bahamwa n'icyaha, ruhanisha buri wese igihano cy'igifungo cya burundu.

Abaregwa bajuririye Urukiko Rukuru, urugereko rwa Rwamagana, Dusabimana yaburanye noneho yemera icyaha abisabira imbabazi ariko urwo Rukiko ntirwemeye ukwemera icyaha kwe kuko rwasanze kutuzuye kuko ngo hari aho yavugaga ko yajyanye umwana kwa muganga agapfira mu nzira ubundi akavuga ko yishe uwo mwana abitewe n'uburakari bityo ntiyagabanyirizwa igihano.

Dusabimana yaje nanone kujuririra Urukiko rw'Ikirenga avuga ko yaburanye yemera icyaha akagisabira imbabazi, ariko Urukiko ntirumugabanyirize ibihano, rukamugumisha ku gifungo cya burundu ko mu nkiko zabanje yaburanye yemera icyaha atakoze bitewe nuko yari yabwiwe ko nacyemera ahita arekurwa, ko ariko atiyiciye umwana ahubwo ko uwo mwana yarwaye bakamutwara ku bitaro akaza gupfa bakamushyingura kwa sekuru ubyara se kandi ko ariwe mwana wenyine yabyaye. Yakomeje avuga ko kuba yaragiye arangwa no kwivuguruza byatewe nuko atari afite umwunganira mu mategeko ariko ko nta kimenyetso kigaragaza ko yiyiciye umwana.

Nyuma yo kumva ubujurire bw'uregwa ndetse nicyo ubushinjacyaha bubivugaho urukiko rwasanze mbere yo guca urubanza rugomba kwikorera iperereza ku birebana n'umwana uregwa ashinjwa kwica, urukiko rwanasabye kandi ko Dusabimana akorerwa isuzumwa kugirango hamenyekane niba nta kibazo cyo mu mutwe yaba afite, runategeka ko ubushinjacyaha bwongera gukora iperereza bukagaragaza umubare w'abana uregwa yaba yarabyaye, bukerekana igice umwana yiciwemo naho yashyinguwe. Urukiko rwanasanze kandi ari ngombwa ko umurambo washyinguwe kwa sekuru w'umwana utabururwa (exhumation) kugira ngo ukorerwe ikizamini cya DNA, hagaragazwe niba umwana ushyinguwe muri iyo mva ari umukobwa cyangwa ari umuhungu n'isano yaba afitanye na Dusabimana.

Ku byerekeranye n'ikibazo cyo mu mutwe yaba yari afite, ibitaro by'indwara zo mu mutwe by'i Ndera byagaragaje ko ibitekerezo bye biri ku murongo, naho ikizami cya ADN cyakozwe kigaragaza ko nta sano y'umwana n'umubyeyi ihari hagati ya Dusabimana n'umurambo w'umwana wapimwe.

Urubanza rwaje gusubukurwa Dusabimana avuga ko kuba ikizamini cya ADN kigaragaza ko umwana byavugwaga ko ari uwe nta sano y'umwana n'umubyeyi bafitanye bityo ko nta cyashingirwaho hemezwa ko yishe umwana we, ko ahubwo Ubushinjacyaha bwagombye kugaragaza ikindi cyaba cyarishe umwana.

Ubushinjacyaha bwo buvuga ko kuba uregwa ahakana icyaha mu bujurire kandi yaracyemeye mu nkiko zabanje byamutsindisha kandi ko imiburanire y'uregwa n'umwunganira itafatwaho ukuri kuko inyuranye n'ibimenyetso biri muri dosiye, naho ku bijyanye naho umwana Sibomana yaba yarashyinguwe, Ubushinjacyaha bwagaragaje ko aho umurambo w'umwana washyinguwe cyangwa wajugunywe hatazwi kuko uregwa yanze kuhavuga.

Incamake y'icyemezo: 1. Buri gihe kwemera icyaha ntibiba ikimenyetso ntakuka gihagije cyashingirwaho mu kwemeza ko uregwa ahamwa n'icyaha akurikiranyweho, bityo imvugo zashingiweho n'inkiko zibanza zihamya Dusabimana icyaha cyo kwihekura ntizihagije kugirango ahamwe n'icyaha kuko izo mvugo zitagaragaza neza icyaha yemeye.

- 2. Iyo uregwa yemera icyaha ubundi akagihakana bishyira inshingano ku Bushinjacyaha zo gutanga ibindi bimenyetso bishyigikira ukwemera icyaha k'uregwa.
- 3.Gushidikanya birengera ushinjwa,bityo kuba umurambo wapimwe udafitanye isano y'umwana n'umubyeyi n'uregwa utandukanye nuwo ubushinjacyaha bwavuze buhereye ku mvugo z'abatangabuhamya, no kuba ibimenyetso byatanzwe n'ubushinjacyaha bitemeza nta shiti ko uregwa yakoze icyaha cyo kwihekura, agomba kugirwa umwere.

Ubujurire bufite ishingiro; Amagarama aherereye ku isanduku ya Leta.

Amategeko yashingiweho:

Itegeko Ngenga N°01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy'amategeko ahana, ingingo ya 143.

Itegeko N° 30/2013 ryo kuwa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 85 na 165.

Imanza zifashishijwe:

Ubushinjacyaha v. Nyirahabimana, RPA0229/10/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 19/09/2014.

Ubushinjacyaha v. Ndungutse, RPA0042/14/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 02/06/2017.

Inyandiko z'abahanga zifashishijwe:

Adrien Masset, Ann Jacobs & Michel Franchimont, Manuel de procédure pénale, Maison d'édition Larcier, 2009, p. 1174.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Ngoma, Ubushinjacyaha burega Dusabimana Jeannette, ko ku wa 22/06/2013, afatanyije na Hategekimana Léonard, bishe umwana we witwa Sibomana Samuel, wari ufite imyaka 2 y'amavuko, kugira ngo bakunde babane nk'umugore n'umugabo.

- [2] Dusabimana Jeannette yaburanye avuga ko atishe uwo mwana ahubwo ko yazize uburwayi, ndetse ko afite n'impapuro zo kwa muganga zibihamya. Ku wa 21/11/2013, Urukiko Rwisumbuye rwa Ngoma rwaciye urubanza RP0678/13/TGI/Ngoma, rwemeza ko Dusabimana Jeannette na Hategekimana Léonard bahamwa n'icyaha bakurikiranyweho, ruhanisha buri wese igifungo cya burundu. Bombi barujuririye mu Rukiko Rukuru, Urugereko rwa Rwamagana maze ruca urubanza RPA0385/13/HCRWG–RPA394/13/HC/RWG, ku wa 12/06/2014 rwemeza ko ubujurire bwabo nta shingiro bufite.
- [3] Urukiko mu gusuzuma ingingo z'ubujurire bwa Dusabimana Jeannette, aho avuga ko yajuriye agira ngo asabe imbabazi ku cyaha yakoze, rwasanze ukwemera icyaha kwe kutuzuye kuko nubwo acyemera atagaragaje ukwicuza ahubwo ko yivuguruzaga, rimwe akavuga ko yajyanye umwana kwa muganga ari kumwe na Hategekimana Léonard, ari nawe wari umuteruye, bagera mu gashyamba akamubwira ngo umwana ashizemo umwuka kandi yaragiye amukandakanda, ubundi akavuga ko yishe uwo mwana abitewe n'uburakari bwuko umugabo we yamuriye umutungo w'iwabo, agafasha Hategekimana Léonard bakica uwo mwana.
- [4] Dusabimana Jeannette yajuriye mu Rukiko rw'Ikirenga avuga ko yaburanye yemera icyaha akagisabira imbabazi, ariko Urukiko ntirumugabanyirize ibihano, rukamugumisha ku gifungo cya burundu, no kuba yarashinjuye Hategekimana Léonard agaragaza ko ntaho ahuriye n'imikorere y'icyaha, ariko Urukiko ntirubihe agaciro, asaba ko Hategekimana Léonard yagirwa umwere, kuko icyaha ari gatozi. Ubujurire bwanditswe kuri N° RPAA0066/15/CS.

- [5] Urubanza rwaburanishijwe mu ruhame ku wa 22/01/2018, Dusabimana Jeannette yitabye yunganiwe na Me Ndayambaje Gilbert naho Ubushinjacyaha buhagarariwe na Me Munyaneza Nkwaya Eric, Umushinjacyaha ku Rwego rw'Igihugu. Dusabimana Jeannette yatangiye ahakana ibikubiye mu nyandiko y'ubujurire yazanywe mu Rukiko rw'Ikirenga, avuga ko atari we wayanditse kuko yari arwaye, ko mu nkiko zabanje yaburanye yemera icyaha atakoze bitewe nuko yari yabwiwe ko nacyemera ahita arekurwa, ko ariko atiyiciye umwana Sibomana Samuel ahubwo ko uwo mwana yarwaye bakamutwara ku bitaro akaza gupfa bakamushyingura kwa sekuru ubyara se.
- [6] Nyuma yo kumva ubujurire bwa Dusabimana Jeannette, uhagarariye Ubushinjacyaha akagira icyo abuvugaho, Urukiko rwasanze mbere yo guca urubanza burundu, rugomba kwikorera iperereza ku birebana n'umwana Dusabimana Jeannette ashinjwa kwica. Ubwo uru Rukiko rwakoraga iperereza ku wa 28/02/2018, abatangabuhamya babajijwe aribo Uwimana Beatrice, Ntirenganya Fabien, Harerimana Damascene bavuze ko Tuyisenege na Dusabimana babyaranye abana babiri ariko bakaba batazi aho umwana wa kabiri witwaga Sibomana Samuel aherereye, kuko umwana bazi wapfuye arwaye ari uwitwa Uwineza Aline kandi ko bamushyinguye kwa sekuru ubyara se.
- [7] Mu iburanisha ryo ku wa 19/03/2018, uregwa yitabye Urukiko yunganiwe n'Ubushinjacyaha buhagarariwe nk'uko byari bimeze mu iburanisha riheruka. Nyuma yo gusuzuma uko Dusabimana Jeannette asobanura uko ibintu byabaye ugereranije nibyo yari yavuze mbere, Urukiko rwemeje ko hongera gukorwa iperereza, Ubushinjacyaha bugashyikiriza Dusabimana Jeannette abaganga babifitiye ubumenyi kugira ngo bamusuzume,

bamenyeshe Urukiko niba nta kibazo cy'uburwayi bwo mu mutwe yaba afite. Urukiko rwasanze kandi ari ngombwa ko Ubushinjacyaha bukora iperereza ry'inyongera, bukagaragaza niba Dusabimana Jeannette yaba yarabyaye abana babiri (Uwineza Aline na Sibomana Samuel) cyangwa niba yarabyaye umwe, ndetse bukanagerageza kwerekana igice buvuga ko Sibomana Samuel yiciwemo naho yashyinguwe. Urukiko rwanategetse ko Tuyisenge Emmanuel, umugabo wa Dusabimana Jeannette atumizwa kugira ngo agire ibyo arusobanurira, hemezwa ko iburanisha rizasubukurwa ku wa 25/06/2018

- [8] Ku wa 20/06/2018, Ibitaro by'Indwara zo mu Mutwe by'i Ndera byoherereje Urukiko raporo yerekana ko isuzuma Dusabimana Jeannette yakorewe kuva yinjira ibitaro ku wa 17/05/2018 kugeza ku wa 20/06/2018, ryagaragaje ko ibitekerezo bye biri ku murongo. Ikimenyetso kimwe yagaragaje n'icy'agahinda kuko rimwe na rimwe arira, akavuga ko ababara umutwe, ariko muganga akaba asobanura ko ibyo ashobora kuba abiterwa n'ubuzima yanyuzemo mbere na nyuma yo gufungwa, byanzura ko nta bimenyetso bifatika by'uburwayi bwo mu mutwe byamugaragayeho.
- [9] Ku wa 25/06/2018, ababuranyi bose baritabye, impande zombi zigira icyo zivuga ku byavuye mu iperereza no kuri raporo ya muganga. Kimwe mu byo Urukiko rwari rwasabye Ubushinjacyaha, ni ukugaragaza niba Dusabimana Jeannette yaba yarabyaye abana babiri (Uwineza Aline na Sibomana Samuel) cyangwa niba yarabyaye umwe. Ubushinjacyaha bukaba bwaragaragaje amafoto y'imva buvuga ko Uwineza Aline ariho ashyinguye, ko aho Sibomana Samuel yashyinguwe cyangwa yajugunywe hatazwi kuko uregwa yanze kuhavuga.

- [10] Dusabimana Jeannette we yavuze ko iyo mva ishyinguyemo Sibomana Samuel kandi ko ariwe mwana wenyine yabyaye kandi ko ajya kubana na Tuyisenge Emmanuel yasanze afite undi mwana w'umukobwa ukiriho.
- [11] Urukiko rwasanze mbere yo guca urubanza burundu, ari ngombwa ko umurambo washyinguwe kwa sekuru w'umwana utabururwa (exhumation) kugira ngo ukorerwe ikizamini cya DNA, hagaragazwe niba umwana ushyinguwe muri iyo mva ari umukobwa cyangwa ari umuhungu n'isano yaba afitanye na Dusabimana Jeannette, rutegeka ko Tuyisenge Emmanuel yongera guhamagazwa kugira ngo agire ibyo arusobanurira. Ikizamini cya ADN cyakozwe na Dr Christa Augustin wo mu kigo *UKE Institute of Legal Medecine, Hamburg, Germany,* kigaragaza ko umurambo wapimwe ari uw'umukobwa, ariko ko atari uwa Dusabimana, ntabe n'uwa Tuyisenge.
- [12] Urubanza rwongeye kuburanishwa mu ruhame ku wa 03/12/2018, uregwa yitabye Urukiko yunganiwe n'Ubushinjacyaha buhagarariwe na Rudatinya Nyangezi Gaspard, naho Tuyisenge atitabye, ariko yarahamagajwe mu buryo bukurikije amategeko, maze ababuranyi bahabwa umwanya kugira ngo bagire icyo bavuga kuri raporo ku kizamini cya DNA.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

Kumenya niba hari ibimenyetso bidashidikanywaho bigaragaza ko Dusabimana Jeannette yishe umwana we Sibomana Samuel.

- [13] Dusabimana Jeannette avuga ko mu nkiko zabanje yahamijwe icyaha atakoze kandi atariwe wiyiciye umwana, ko ahubwo yamujyanye kwa muganga ari kumwe na Tuyisenge Emmanuel (Se w'umwana), uwo mwana aza kuzira uburwayi. Avuga ko yemeye icyaha mu Bugenzacyaha no mu nkiko zabanje bitewe nuko yari yabwiwe n'abamufunze ko nacyemera ahita arekurwa, ko anajurira mu Rukiko rw'Ikirenga atariwe wanditse ibaruwa ijurira kuko yari arwaye.
- [14] Avuga ko umwana bamushinja ko yishe atapfuye mu 2013 nk'uko muri dosiye bivugwa ko ahubwo yapfuye mu 2011, bamushyingura mu murima wa Sekuru, mu Mudugudu wa Nyabageni, Akagari ka Kabazungu, Umurenge wa Musanze, Intara y'Amajyaruguru, kandi bakaba baramushyinguye Se w'umwana n'abaturanyi babo bahari, abo yibuka bari bahari barimo Ntirengaya Fabien, Harerimana Damascène, Ntawiha na Uwimana Nirere.
- [15] Abajijwe kugira icyo avuga ku mvugo z'abantu we yivugiye ko bamuherekeje kwa muganga ajya kuvuza umwana, nyamara bakaba barahakanye ko batazi iby'urupfu rwa Sibomana Samuel ndetse ko ntaho agaragara mu bitabo by'irangamimerere, yasubije ko muganga wabasuzumye ashobora kuba yararangaye ntiyandike mu gitabo cyabugenewe, naho kuba ababajijwe barahakanye ibyo yavuze, yasobanuye ko atamenya impamvu yabibateye kuko ibyabaye byabaye ku manywa, abantu bose babireba.
- [16] Ku birebana n'ibyavuye mu iperereza ry'inyongera, Dusabimana Jeannette yongeye gushimangira ko yabyaranye na Tuyisenge Emmanuel umwana umwe witwa Sibomana Samuel, ariko bajya kubana akaba yari afite undi mwana kandi ko nubu agihari, bityo abemeza ko yari afite abana babiri bakaba aribyo

bashingiyeho babivuga, umwana yabyaranye na Tuyisenge akaba yarapfuye afite imyaka 3 kandi ashyingurwa kwa Sekuru, ndetse ko mu gihe bimukaga bajya Kirehe uwo mwana yari yarapfuye.

- [17] Me Ndayambaje Gilbert umwunganira, yavuze ko kuba Dusabimana Jeannette yagiye arangwa no kwivuguruza, bitewe nuko atari afite umwunganizi mu mategeko, ariko muri rusange nta kimenyetso na kimwe kigaragaza ko uwo mwana yishwe na nyina, ndetse ko ababajijwe mu iperereza ryakozwe ntacyo bafashije urukiko, icyo bose bahurizaho nuko batazi icyishe uwo mwana.
- Me Ndayambaje Gilbert avuga ko ikizamini cy'ADN [18] cyakozwe kigaragaza ko nta sano ry'umwana n'umubyeyi hagati y'umurambo wapimwe na Dusabimana na Tuyisenge, ko kuba ADN igaragaza ko umwana bavugaga ko bahuriyeho atari uwabo, hakwibazwa icyashingirwaho bemeza ko Dusabimana yishe umwana we kandi nta kigaragaza aho yapfiriye, ahubwo ko ikigaragara ari uko babyaranye umwana nyuma akicwa n'urw'ikirago, bitafatwa bityo, Ubushinjacyaha bukaba bwagombye kugaragaza ikindi cyaba cyarishe uwo mwana. Asaba ko yagirwa umwere hashingiwe ku biteganywa n'ingingo 165 y'Itegeko rigenga imiburanishirize y'imanza z'inshinjabyaha kuko hari ugushidikanya.
- [19] Uhagarariye Ubushinjacyaha we avuga ko ibivugwa na Dusabimana Jeannette ko yajyanye na Se w'umwana kumuvuza kandi ko yaguye kwa muganga nta kuri kurimo kuko mu Bugenzacyaha Tuyisenge Emmanuel, yasobanuye ko yabajije Dusabimana aho umwana ari undi aramwihorera, nyuma yaho aza kumubwira ko yapfuye, ibyo bikaba bigaragaza ko umwana apfa atari kumwe na Se.

- [20] Akomeza avuga ko nubwo Dusabimana Jeannette ahakana inyandiko y'ubujurire, ibiyikubiyemo birimo kuba yarasobanuye uburyo umwana yarize, agahinda kamwica akamuniga, akamuta mu kirombe cyari mu gasozi aho bacukuraga umucanga, izo mvugo ziri muri iyo baruwa zikaba zumvikanisha ko nta wazandikira undi cyane ko muri ubwo bujurire, ashinjura Hategekimana Léonard.
- [21] Avuga ko kuba Dusabimana Jeannette ahakana icyaha mu bujurire kandi yaracyemeye mu nkiko zabanje, byamutsindisha hashingiwe ku ngingo ya 104 y'Itegeko ry'ibimenyetso ndetse ko ibyo Dusabimana n'umwunganira bavugiye mu iburanisha bitafatwaho ukuri kuko binyuranye n'ibimenyetso biri muri dosiye kandi bikaba bihagije.
- [22] Yavuze ko ibyavuye mu iperereza bigaragaza neza uko ibintu byagenze, kuko ababajijwe bose bagaragaje ko umwana bazi washyinguwe kwa Sebukwe wa Dusabimana Jeannette, yitwaga Aline ndetse bagahuriza ko umwana wa kabiri wa Dusabimana yari mu kigero cy'imyaka 2, uwo mwana akaba atandukanye n'umwana witwa Sibomana wakiriwe ku Kigo Nderabuzima cya Bisate ku wa 25/05/2011. Asoza avuga ko inyandiko Dusabimana Jeannette yiyandikiye ajurira ariyo irimo ukuri kwe nubwo avuga ko yayandikiwe.
- [23] Ku ngingo ijyanye no kumenya aho Sibomana Samuel yiciwe n'igihe yiciwe, avuga ko bitaboroheye kubibonera igisubizo kuko abafite amakuru bose bavuze ko bayakuye kuri Dusabimana, ariko bakavuga ko umwana yaguye hagati ya Kirehe na Musanze. Akomeza avuga ko mu rwego rwo kumenya ukuri kw'ibivugwa na Dusabimana Jeannette ko atariwe wiyandikiye umwanzuro ujurira ngo kuko yari arwaye, habajijwe umutangabuhamya ufungiye muri Gereza ya Ngoma witwa

Nyirabarima Florida (umwe mu bandikira abandi imyanzuro muri Gereza ya Ngoma), yasobanuye ko yamwandikiye umwanzuro ari muzima ko atari arwaye ndetse bakaba barabanje no kuganira amwereka ibibi byo guhisha ukuri ndetse mu gihe yamwandikiraga uwo mwanzuro akaba yaricujije impamvu yabeshyeye Hategekimana Léonard.

[24] Uhagarariye Ubushinjacyaha avuga ko ikizamini cya ADN cyagaragaje ko umwana washyinguwe ari umwana w'umukobwa kandi ko icyo ari ikimenyetso kigaragaza ko uregwa yishe umwana we w'umuhungu witwa Sibomana Samuel, binyuranye n'ibyo uregwa avuga ko yapfuye agashyingurwa kwa sekuru, ko rero iki kimenyetso gishimangira ibindi bimenyetso batanze mbere, kikaba kigaragaza ko uwo mwana atashyinguwe kwa sekuru.

UKO URUKIKO RUBIBONA

- [25] Dusabimana Jeannette yarezwe icyaha cyo kwihekura giteganywa n'ingingo ya 143 y'Itegeko Ngenga N°01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy'amategeko ahana iteganya ko "kwihekura ni ubwicanyi bukorewe umwana wabyaye cyangwa uwo ubereye umubyeyi mu buryo bwemewe n'amategeko. Kwihekura bihanishwa igifungo cya burundu".
- [26] Ingingo ya 85 y'Itegeko N°30/2013 ryo kuwa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha iteganya ko "ubushinjacyaha, uwakorewe icyaha cyangwa abamufiteho uburenganzira iyo baregeye indishyi z'akababaro cyangwa biregeye umuburanyi, nibo bagomba gutanga ibimenyetso byemeza icyaha". Dosiye y'urubanza igaragaraza ko

Dusabimana Jeannette yahamijwe icyaha cyo kwihekura n'inkiko zibanza zishingiye ku kuba yaba yaremeye icyaha.

[27] Dosiye y'uru rubanza inagaragaza ko Dusabimana Jeannette abazwa mu Bugenzacyaha ku wa 06/08/2013 (cote 17-20) yahakanye icyaha aregwa, asobanura ko umwana we yishwe n'uburwayi bwo mu nda kandi ko yari yaramuvuje. Dusabimana Jeannette yahinduye imvugo mu Bushinjacyaha ku wa 12/08/2013, yemera icyaha avuga ko ari Hategekimana wanize umwana we ubwo yari agiye kumwereka umuvuzi wa gakondo. Yongeye guhindura imvugo ageze mu Rukiko Rwisumbuye rwa Ngoma, ahakana icyaha cyo kwihekura, avuga ko atishe umwana we ahubwo ko yamurwaje agapfa. Na none kandi Dusabimana Jeannette, yongeye guhindura imvugo aburana mu Rukiko Rukuru, yemera ko yafatanyije na Hategekimana Léonard kwiyicira umwana bakamushyingura mu gashyamba. Aburana mu Rukiko rw'Ikirenga yahakanye icyaha.

Ukwemera icyaha kwa Dusabimana mu Bushinjacyaha [28] kugaragara muri aya magambo " icyaha ndegwa ndacyemera. Hari tariki 22/06/2013 mu gihe cya saa cyenda z'amanywa ubwo Musanze, umwana yararwaye twarajyanye twari i Hategekimana agiye kunyereka umuvuzi wa gakondo icvo gihe Hategekimana niwe wari ufashe umwana, tugeze mu nzira hagati arambwira ati umwana avuye mu mubiri mubaza uko bigenze ambwira ko yapfuye. Icyo nabivugaho nuko ashobora kuba yaramunize akabimpisha [....]". Iyi mvugo ya Dusabimana mu Bushinjacyaha yiyongera kuyindi ye mu Bugenzacyaha (C7) aho avuga "[...] icyo nsabira imbabazi nuko nahishiriye icyaha cyo kwica umwana wacu nkaba ntaragaragaje ukuri [...]". Nubwo yaburanye mu Rukiko Rwisumbuye ahakana icyaha, izi mvugo nizo urwo rukiko rwashingiyeho rumuhamya icyaha.

- [29] Indi mvugo ya Dusabimana yemera icyaha, yayivugiye mu Rukiko Rukuru aburana. Yagize ati: "ndemera icyaha nkagisabira imbabazi kuko naburanye ngihakana. Nemeye ko umwana wange yicwa. Yarambwiye ngo uyu mwana simushaka aramufata aramuhotora [...]. Ndasaba kugabanyirizwa ibihano [...]". Nkuko bigaragara mu gika cya 9 cy'urubanza RPA0385&394/13/HC/RWG rwaciwe n'Urukiko Rukuru, imvugo ya Dusabimana yafashwe nk'ikimenyetso kimushinja, ariko urwo Rukiko rusanga atarasobanuye ku buryo bufatika uko yakoze icyo cyaha.
- [30] Imvugo zashingiweho n'inkiko zibanza zihamya Dusabimana Jeannette icyaha cyo kwihekura uru Rukiko rurasanga ubwazo zidahagije kugirango ahamwe n'icyaha kuko Bugenzacyaha no mu Bushinjacyaha izo mvugo ntizigaragaza neza icyaha Dusabimana yemeye kuko nawe yavuze ko yakekaga ko umwana we yishwe na Hategekimana. Nkuko ingingo ya 85 y'Itegeko N°30/2013 ryo ku wa 24/05/2013 ryavuzwe haruguru ibiteganya, Ubushinjacyaha nibwo bufite inshingano yo kugaragaza ibimenyetso by'icyaha burega Dusabimana, no gusobanura uko cyakozwe. Bwashoboraga guhera kuri izi mvugo za Dusabimana Jeannette bushingiraho yemeye icyaha, bugashaka ibimenyetso buvuga ko bizishyigikira. Ntibyumvikana ukuntu yabwiye Ubugenzacyaha aho baba barataye umurambo w'umwana ntibumujyane ngo ahabereke, kandi umurambo ufatwa nka kimwe mu bigize icyaha.
- [31] Kwemera icyaha, ni kimwe mu bimenyetso bishobora gushingirwaho n'urukiko rukemeza ko uregwa yakoze icyaha. Ariko, buri gihe, kwemera icyaha ntibiba ikimenyetso ntakuka kihagije cyashingirwaho mu kwemeza ko uregwa ahamwa n'icyaha akurikiranyweho. Abahanga mu mategeko Adrien

Masset, Ann Jacobs, Michel Franchimont bo bemeza mu gitabo banditse kitwa "Manuel *de procédure pénale*" ko kwemera icyaha ari ikimenyetso nk'ibindi, gishobora no kudahabwa agaciro, kuko gishobora kuba ikimenyetso kidafatika kandi cyoroshye. Babivuga muri aya magambo: "l'aveu n'est plus qu'un élément parmi d'autres de la conviction du juge, dont il faut d'ailleurs se méfier, car il peut être une preuve fragile". ¹

[32] Ku birebana n'uru rubanza, Dusabimana yatangiye ahakana icyaha, nyuma avuga ko acyemeye nabwo akabikora mu buryo budasobanutse. Urukiko rurasanga guhitamo imvugo yemera icyaha nk'icyimenyetso gishinja uregwa, rukirengagiza imvugo ye igihakana bigomba kugendana n'ibindi bimenyetso cyane cyane nko muri uru rubanza aho uregwa ari umuturage utajijutse, utazi gusoma no kwandika² ushobora kwemera ibyo abandi bamubwiye atabanje gushishoza ngo amenye ingaruka zibyo avuga.

[33] Iby'uko kwemera icyaha kudashobora kuba ikimenyetso cyonyine gihagije gishobora gutuma uregwa ahamwa n'icyaha mu gihe nta kindi kimenyetso gifatika kicyunganira, byemejwe mu rubanza RPA0229/10/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 19/09/2014 haburana Ubushinjacyaha na Nyirahabimana Esperance no mu rubanza RPA0042/14/CS rwaciwe ku wa 02/06/2017 haburana Ubushinjacyaha na Ndungutse Deo. Muri izi manza zombi, Urukiko rwasanze kuba uregwa yaremeye ibyaha nyuma akaza kubihakana, bishyira inshingano ku

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¹ Adrien Masset, Ann Jacobs & Michel Franchimont, *Manuel de procédure pénale*, Maison d'édition Larcier, 2009, p. 1174.

² Kuba Dusabimana Jeannette atazi gusoma no kwandika yabivuze ubwo yabazwaga mu Bugenzacyaha ku wa 6/8/2013, yongera kubivuga ku wa 12/8/2013 abazwa mu Bushinjacyaha.

Bushinjacyaha yo gutanga ibindi bimenyetso bishyigikira imvugo z'uregwa zemera icyaha.

- [34] Aburana mu Rukiko rw'Ikirenga, Dusabimana Jeannette yavuze ko Sibomana Samuel yishwe n'uburwayi, ashyingurwa mu isambu yo kwa sekuru. Ubushinjacyaha n'ababajijwe mu iperereza bavuze ko umwana ushyinguwe aho Dusabimana Jeannette yavuze ari undi mwana we witwa Uwineza Aline yabyaranye na Tuyisenge. Kugaragaza ko umwana ushyinguye aho Dusabimana Jeannette yavuze, ari umwana we w'umukobwa nkuko Ubushinjacyaha bwabivuze, byari kuba ikimenyetso kigaragaza ko atari Sibomana Samuel (umwana w'umuhungu) uhashyinguwe.
- [35] Ikizamini cy'ADN cyakozwe cyagaragaje ko umurambo wapimwe ari uw'umwana w'umukobwa, ariko ko hagati ye na Dusabimana Jeannette nta sano y'umwana n'umubyeyi ihari. Ibyo ninako bimeze hagati y'uwapimwe na Tuyisenge, ibizamini byagaragaje ko atari se. Urukiko rurasanga ibyo bigize ugushidikanya ku murambo wapimwe, kuko nubwo ikizamini cyagaragaje ko ar'uw'umukobwa, ntabwo ari uw'umwana wa Dusabimana nkuko byari byavuzwe n'Ubushinjacyaha.
- [36] Ubushinjacyaha nibwo bwakoresheje ikizamini cya ADN hasuzumwa umurambo bwavugaga ko ari uwa Uwineza Aline ushyinguye kwa sekuru Gakaramu wafatanije n'umuhungu we Tuyisenge Emmanuel gutanga ikirego bavuga ko Dusabimana yishe Sibomana. Ibirebana n'ipimishwa ry'umurambo byakozwe n'Ubushinjacyaha Dusabimana atabigizemo uruhare kuko afunzwe. Igiteye gushidikanya nuko hapimwe umurambo utandukanye nuwo Ubushinjacyaha bwavuze buhereye ku mvugo ya Gakaramu sekuru w'umwana Sibomana Samuel, n'abandi batangabuhamya b'Ubushinjacyaha bavuze ko umwana

w'umukobwa wa Dusabimana witwa Uwineza Aline ariwe ushyinguwe kwa sekuru, ko atari Sibomana Samuel. Sekuru w'umwana wagaragaje imva ntiyakabaye yitiranya imva yaho umwuzukuru we avuga witwa Uwineza Aline iherereye. Ibi bitera gushidikanya kukuri kw'ibyavuzwe na Gakaramu ndetse n'abandi batangabuhamya.

- [37] Urukiko rurasanga ikindi gituma habaho gushidikanya ari imiterere ya dosiye idasobanura neza uko ibintu byagenze cyane cyane uko Sibomana Samuel yapfuye, icyamwishe ndetse naho ashyinguwe. Mu rwego rwo gushaka kubimenya neza no kuvanaho urujijo, Urukiko rw'Ikirenga rwatumije mu buryo bukurikije amategeko Tuyisenge Emmanuel se w'umwana Sibomana Samuel inshuro ebyiri kugirango rugire ibyo rumubaza, yanga kwitaba nta mpamvu kandi ariwe watanze ikirego. Bikaba byatera kwibaza niba ibyo yavugiye mu Bugenzacyaha yaravugishije ukuri cyangwa niba hari ibyo ashaka guhisha.
- [38] Nkuko biteganywa n'ingingo ya 85 y'Itegeko N°30/2013 ryo kuwa 24/05/2013 ryavuzwe haruguru, Ubushinjacyaha nibwo bufite inshingano zo gutanga ibimenyetso byemeza ko uwo bwareze yakoze icyaha. No muri uru rubanza nibwo bwagombaga gutanga ibimenyetso bigaragaza nta shiti ko Dusabimana yishe umwana we Sibomana, uko yamwishe, aho yamwiciye n'ibindi bimenyetso ku mikorere y'icyaha. Muri uru rubanza, Urukiko rurasanga byarakozwe igice, Ubushinjacyaha bugendera gusa ku mvugo z'uregwa nazo zidahagije nkuko byasobanuwe hejuru.
- [39] Ingingo ya 165 y'Itegeko rivugwa muri iki gika ivuga ko "gushidikanya birengera ushinjwa. Iyo urubanza rwakurikiranywe mu buryo bwose, ntihagire ibimenyetso nyakuri

biboneka byemeza nta shiti abacamanza ko ushinjwa yakoze icyaha koko, bagomba kwemeza ko atsinze". Urukiko rurasanga rero hasesenguwe ibimaze kuvugwa n'ingingo z'amategeko zavuzwe haruguru, hari ugushidikanya gukabije gutuma Dusabimana Jeannette agomba kugirwa umwere ku cyaha yarezwe cyo kwihekura kubera ko ibimenyetso byatanzwe n'Ubushinjacyaha bitemeza nta shiti ko yagikoze koko.

III. ICYEMEZO CY'URUKIKO

- [40] Rwemeje ko ubujurire bwa Dusabimana Jeannette bufite ishingiro.
- [41] Rwemeje ko Dusabimana Jeannette adahamwa n'icyaha cyo kwihekura kubera gushidikanya.
- [42] Rwemeje ko imikirize y'urubanza RPA0385&394/13/HC/RWG rwaciwe n'Urukiko Rukuru, Urugereko rwa Rwamagana ku wa 12/06/2014 ihindutse mu ngingo zayo zose.
- [43] Rutegetse ko Dusabimana Jeannette ahita arekurwa urubanza rukimara gusomwa.
- [44] Rutegetse ko amagarama y'urubanza aherera mu Isanduku ya Leta kuko uregwa afunze.

UBUSHINJACYAHA v. SIBOMANA

[Rwanda URUKIKO RW'UBUJURIRE – RPAA00327/2018/CA (Hitiyaremye, P.J.) 07 Ukuboza 2018]

Amategeko agenga ibimenyetso — Ibimenyetso — Gukekwaho icyaha — Kuba uregwa n'uwahohotewe (victim) bari basanzwe bafitanye amakimbirane ntago ubwabyo byafatwa nk'ikimenyetso gihamya icyaha.

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Muhanga, Ubushinjacyaha bukurikiranye Sibomana n'umugore we Mukanyiriminega nyuma yuko uwitwa Munyensanga arasiwe muri Boutique ye n'umuntu utazwi mu ijoro ryo ku wa 16/12/2014, abaregwa bakaba baraketswe kuko hari abatangabuhmya bahamije ko bari basanzwe bafitanye amakimbirane na nyakwigendera. Abaregwa baburanye bahakana icyaha.

Uru Rukiko rwahamije Sibomana icyaha aregwa rumuhanisha igihano cy'igifungo cya burundu naho umugore we Mukanyiriminega agirwa umwere.

Uregwa ntiyishimiye imikirize y'urwo rubanza maze arujuririra mu Rukiko Rukuru, urugereko rwa Nyanza avuga ko yahamijwe icyaha atakoze maze urwo rukiko rwemeza ko ubujurire bwe nta shingiro bufite hashingiwe ku batangabuhamya bemeje ko uregwa yari yarahize kuzicisha nyakwigendera.

Yaje kongera kujuririra Urukiko rw'Ikirenga, ariko ruza koherezwa mu Rukiko rw'Ubujurire kubera ivugurwa ry'inkiko. Mu mpamvu z'ubujurire akagaragaza ko Urukiko Rukuru rwahaye agaciro imvugo z'abamushinja gusa maze rwanga

kumva abatangabuhamya bamushinjura, anasaba Urukiko kwikorera iperereza aho nyakwigendera yarasiwe. Uregwa kandi yakomeje avuga ko atigeze yigamba kuzica nyakwigendera ndetse ko atigeze agerageza kumurogesha nkuko hari ababimushinje.

Ubushinjacyaha bwo bugaragaza ko abatangabuhamya babajijwe bose bemeje ko yari afitiye urwango nyakwigendera kandi ikindi kigaragaza ko Sibomana yagize uruhare mu iraswa rya nyakwigendera aruko hari umutangabuhamya wemeje ko mbere yuko icyaha gikorwa moto ya Sibomana yamunyuzeho ihetse abantu atazi mu kanya gato nyakwigendera agahita araswa.

Incamake y'icyemezo: 1. Kuba uregwa n'uwahohotewe (victim) bari basanzwe bafitanye amakimbirane ntago ubwabyo byafatwa nk'ikimenyetso gihamya icyaha.

Ubujurire bufite ishingiro; Amagarama aherereye ku isanduku ya Leta.

Amategeko yashingiweho:

- Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, ingingo ya 2, igika cya 1, agace ka 5.
- Itegeko N°30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 165.
- Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 62, 65 na 119.

Nta manza zifashishijwe.

Inyandiko z'abahanga zifashishijwe:

Etienne Vergès, Géraldine Vial, Olivier Leclerc, Droit de la Preuve, 1ère Edition 2015, p. 552, para. 570.

Henri-D. Bosly et Damien Vandermeersch, Droit de la Procédure Pénale, 4ème Edition, Bruxelles, 2005, P. 1316.

Michel Franchimont, Ann Jacobs, Adrien Masset, Manuel de Procédure pénale, 2^{ème} édition, p. 1028.

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Ku itariki ya 16/12/2014 mu gihe cya saa mbiri n'igice z'ijoro, uwitwa Munyensanga Protogène yarasiwe muri *boutique* ye n'umuntu utazwi waje yambaye igikoti cy'umukara n'ingofero, Polisi itangira iperereza hakekwa Sibomana Valens n'umugore we Mukanyiriminega Sylvie bari basanzwe bafitanye amakimbirane na nyakwigendera, kuko hari abatangabuhamya bemeza ko bagendaga bigamba kuzamwikiza hakoreshejwe imbunda, ariko abaketswe babajijwe bahakana icyaha.
- [2] Nyuma y'iperereza, Ubushinjacyaha bwabaregeye Urukiko Rwisumbuye rwa Muhanga, imbere y'Urukiko abaregwa bakomeza guhakana icyaha. Ku itariki ya 12/06/2015, urwo Rukiko rwaciye urubanza RP0111/15/TGI/MHG rwemeza ko Sibomana Valens ahamwa n'icyaha cy'ubwicanyi aregwa, rumuhanisha igifungo cya burundu, naho Mukanyiriminega Sylvie agirwa umwere kuri icyo cyaha kuko Ubushinjacyaha butabashije kugaragaza ibimenyetso simusiga byerekana uruhare rwe mu ikorwa ryacyo.

- [3] Sibomana Valens yajuririye Urukiko Rukuru, Urugereko rwa Nyanza, avuga ko yahamijwe icyaha atakoze, ku itariki ya 21/01/2016, urwo Rukiko ruca urubanza RPA0389/15/HC/NYA rwemeza ko ubujurire bwe nta shingiro bufite kuko abatangabuhamya batandukanye babajijwe bemeje ko yari yarahize kuzicisha Munyensanga Protogène inkuba cyangwa amasasu, bitewe n'amakimbirane bari bafitanye akomoka ku mpamvu y'uko yavugaga ko ari we wamurogeye umwana.
- [4] Sibomana Valens yajuririye Urukiko rw'Ikirenga avuga ko Urukiko Rukuru rwanze kumva abatangabuhamya bamushinjura ahubwo ruha agaciro imvugo z'abamushinja gusa, avuga ko uwitwa Munyaneza Florien wakekwaga ko ari we warashe nyakwigendera atigeze amushinja, asaba ko Urukiko rwajuririwe rwakwikorera iperereza muri *centre* ya Nyabuhuzu aho Munyensanga Protogène yarasiwe.
- [5] Nyuma y'ishyirwaho ry'Urukiko rw'Ubujurire, ubujurire bwe bwoherejwe muri urwo Rukiko hashingiwe ku ngingo ya 105 y'Itegeko N°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko¹.
- [6] Urubanza rwaburanishijwe mu ruhame ku itariki ya 07/11/2018, Sibomana Valens yunganiwe na Me Nkundirumwana Joseph, Ubushinjacyaha buhagarariwe na Rudatinya N. Gaspard, Umushinjacyaha ku rwego rw'Igihugu

¹ Ingingo ya 105, igika cya mbere: "Guhera igihe iri tegeko ritangiriye gukurikizwa, uretse imanza zatangiye kuburanishwa, imanza zose zitakiri mu bubasha bw'urukiko zaregewe, zohererezwa Urukiko rubifitiye ububasha hakurikijwe ibiteganywa n'iri tegeko".

II. IKIBAZO KIRI MU RUBANZA N'ISESENGURWA RYACYO

Kumenya niba nta bimenyetso bidashidikanywaho byashingiweho n'Urukiko Rukuru, Urugereko rwa Nyanza, mu guhamya Sibomana Valens icyaha.

- [7] Sibomana Valens avuga ko yajuriye kubera ko Urukiko Rukuru rwamurenganyije cyane, ruvuga ko ari we warashe nyakwigendera Munyensanga Protogène nyamara atarigeze aba umusirikare cyangwa ngo akore imyitozo ya gisirikare, rwanga kubaza abatangabuhamya bamushinjura, ntirwanakora iperereza yasabye kugira ngo ukuri kugaragare, icyo cyaha akaba atari we wagikoze kuko yatabaye kimwe n'abandi.
- [8] Ku birebana n'ibyavuzwe n'Urukiko Rukuru ko ari we wari waragaragarije urwango rukomeye nyakwigendera Munyensanga Protogène, ko ndetse yari yaranavuze ko azakora ibishoboka byose akamwica, byaba ngombwa agakoresha amasasu, Sibomana Valens avuga ko yagaragarije Urukiko ko icyo bapfaga ari uburengere, ko ariko icyo kibazo cyari cyarakemuwe n'Inteko y'Abunzi ndetse akaba yaramutsinze, hakaba nta mpamvu ihari yari gutuma amwica kandi yaramutsinze.
- [9] Sibomana Valens akomeza avuga ko amagambo yo kwigamba ko azica Munyensanga Protogène ntayo yigeze avuga, ndetse n'ibyo kuba yaragerageje kumurogesha mbere y'uko araswa nk'uko hari ababimushinje bikaba ntabyabayeho, ko ahubwo hari umupfumu baturanye wamusabye amafaranga ibihumbi ijana (100,000Frw) ngo amurogorere umwana kuko yamubwiraga ko inzu ye yubakiye ku magini arayamwima, akaba ari yo mpamvu yamushinje ibinyoma. Asoza asaba

kurenganurwa kuko Urukiko Rukuru rwamuhamije icyaha hashingiwe ku bimenyetso bidafite ireme, byuzuyemo ugushidikanya gusa.

- Me Nkundirumwana Joseph avuga ko abashinja [10] Sibomana Valens bose bafitanye isano na Munyensanga Protogène, kandi ko muri bo ntawamushinje ko ari we wamurashe, akaba yarasabye ko hakorwa iperereza ariko Urukiko ntirwarikora. Avuga ko mu bimenyetso Urukiko Rwisumbuye rwashingiyeho ruhamya Nsabimana Valens icyaha harimo imvugo ya Munyensanga Protogène mbere y'uko apfa, aho yavugaga ko uwamurashe yari yambaye igikoti cy'umukara n'ingofero kandi akeka ko ari Nsabimana Valens, ibi Urukiko rutaragombaga kubishingiraho rukaba kuko harimo ugushidikanya, ahubwo ko Ubushinjacyaha bwari gushakisha ibimenyetso bihagije, byabura akarenganurwa.
- [11] Ku birebana n'uruhare Sibomana Valens aregwa muri uru rubanza, Me Nkundirumwana Joseph avuga ko mu Rukiko Rwisumbuye yarezwe nk'icyitso, ariko Urukiko rumuhamya icyaha nka gatozi (auteur principal) rushingiye ku mvugo ya Munyensanga Protogène mbere y'uko apfa aho yavugaga ko akeka ko ariwe wamurashe, ibi nabyo bikaba biteye urujijo no gushidikanya kuko mu gihe yafatwa nk'icyitso hakwibazwa impamvu uwarashe atakurikiranywe. Asoza asaba ko uwo yunganira yagirwa umwere.
- [12] Uhagarariye Ubushinjacyaha avuga ko Sibomana Valens yakurikiranywe nk'icyitso kuko ariwe woheje uwishe Munyensanga Protogène. Mu gusobanura uruhare rwe mu ikorwa ry'icyaha, avuga ko abatangabuhamya babajijwe bose bemeje ko yari afitiye urwango Munyensanga Protogène ndetse akaba

yaragerageje kumurogesha, bityo rero akaba ari we wagiye gushaka uwamurashe.

- Uhagarariye Ubushinjacyaha akomeza avuga ko mu [13] batangabuhamya babajijwe harimo umupfumu witwa Hitabatuma Janvier ushinja Sibomana Valens ko yamubwiye ko Protogène Munyensanga azica ndetse n'Umukuru w'Umudugudu witwa Ntuyenabo Alexis akaba yaremeje ko yumvise ayo magambo, agahamya ko Munyensanga Protogène amaze kumenya imigambi ya Sibomana Valens yahise ajya kwishinganisha. Avuga ko ikindi kigaragaza ko Sibomana Valens yagize uruhare mu iraswa rya Munyensanga Protogène, ari uko hari umutangabuhamya wemeje ko mbere y'uko icyaha gikorwa moto ya Sibomana Valens yamunyuzeho ihetse abantu atazi, mu kanya gato nyakwigendera agahita araswa.
- [14] Ku birebana no kuba umucamanza w'Urukiko Rwisumbuye yarashingiye ku mvugo ya nyakwigendera mbere y'uko apfa wavuze ko yarashwe na Sibomana Valens ndetse n'Urukiko Rukuru rukayigarukaho, uhagarariye Ubushinjacyaha avuga ko iyo mvugo itakwitabwaho kuko yabajijwe amerewe nabi yenda gupfa, kuba yaravuze ko yarashwe na Sibomana Valens bikaba byaratewe n'uko yari yarumvise ko yahigiye kuzamwica

UKO URUKIKO RUBIBONA

[15] Ingingo ya 62 y'Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko "ubuhamya ni ibivugwa mu rukiko bivuzwe n'umuntu

wabibonye cyangwa wabyumvise ubwe ku byerekeye ikiburanwa".

- [16] Ingingo ya 65 y'iryo Tegeko, iteganya ko "urukiko ni rwo rwonyine rupima ko imikirize y'abatangabuhamya ihuye n'ikiburanwa, ifite ingingo zikiranuye kandi ikaba ikwiye kwemerwa cyangwa guhakanwa. Ntirwitsitsa ku mubare w'abatangabuhamya. Rwita cyane cyane ku bumenyi bwabo bw'ibyabaye, no ku buryo babivuga uko byagenze ntacyo bihimbira".
- [17] Ingingo ya 119, igika cya kabiri, y'Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko "Urukiko ruhamya ku buryo butavuguruzwa ko ibimenyetso byose birega cyangwa biregura ari byo kandi ko bishobora kwemerwa".
- [18] Inyandiko zigize dosiye y'urubanza, zigaragaza ko ibimenyetso byashingiweho mu rubanza rujuririrwa mu guhamya Sibomana Valens icyaha cy'ubwicanyi bwakorewe Munyensanga Protogène warashwe ku itariki ya 16/12/2014, ahanini bigizwe n'imvugo z'abatangabuhamya bemeje ko yababwiye ko azica nyakwigendera cyangwa ababyumvise.
- [19] Abo batangabuhamya barimo umuvuzi wa gakondo witwa Hitabatuma Janvier wavuze ko Sibomana Valens yamwibwiriye ko afite umugambi wo kurasa Munyensanga Protogène, akaba yarahise abimenyesha nyir'ubwite ndetse n'ubuyobozi bw'umudugudu, uyu mutangabuhamya akaba yaranasobanuye ko yajyanye na Sibomana Valens n'umugore we mu Murenge wa Mushishiro mu Karere ka Muhanga kurogesha

Munyensanga Protogène kubera ko yavugaga ko ari we wabiciye umwana.

[20] Undi mutangabuhamya ni umukuru w'umudugudu witwa Nturanyenabo Alexis wemeje ko Sibomana Valens na Munyensanga Protogène bari bafitanye urwango rukomeye ku buryo uyu yari yaramubwiye ko Sibomana Valens arimo gucura umugambi wo kumwica, avuga ko urupfu rwe nta wundi rwabazwa uretse Sibomana Valens n'umugore we, ariko ko atazi umuntu bakoresheje, iby'izi nzangano kandi bikaba byaranemejwe n'abatangabuhamya bandi barimo Nyirahabimana Emerthe, Karemera Célestin, Bahigabose Eugène, Gahutu Viateur, Ndatimana Vianney, Kayitesi Marie Jeanne, Uwitonze Lucie na Musabyimana.

rw'Ubujurire Urukiko rurasanga imvugo z'abatangabuhamya bose babajijwe bakemeza ko Sibomana afitiye urwango rukabije nyakwigendera Valens vari Munyensanga Protogène kandi ko yagendaga yigamba ko azamwica zitashingirwaho mu kumuhamya icyaha cy'ubwicanyi nk'uko yagihamijwe n'Urukiko rwaciye urubanza rujuririrwa, kuko nta n'umwe wigeze avuga ko yamubonye akora icyaha cyangwa se ngo abe yarabyumvanye uwabibonye nk'uko biteganywa n'ingingo ya 62 y'Itegeko N°15/2004 ryo ku wa 12/06/2004 ryavuzwe haruguru. Ibi kandi akaba ari nako n'abahanga mu mategeko babisobanura, aho bemeza ko abatangabuhamya ari abavuga ibyo babonye cyangwa bumvise [...] (Le témoignage ou preuve testimoniale n'a pas été défini par aucun texte. La doctrine s'accorde cependant pour admettre qu'il s'agit de la preuve résultant des déclarations de personnes qui

relatent ce qu'elles ont vu ou entendu [...])². Ibyavuzwe n'abo batangabuhamya wenda byafatwa nk'impamvu zari gutuma Sibomana Valens akekwa, ariko ntibyafatwa nk'ibimenyetso bikomeye, bisobanuye kandi bihuye byashingirwaho mu kumuhamya icyaha.

[22] Ku bivugwa n'uhagarariye Ubushinjacyaha ko Sibomana Valens yakurikiranywe nk'icyitso mu rupfu rwa Munyensanga Protogène, uru Rukiko rurasanga Ubushinjacyaha buterekana ikimenyetso cy'igikorwa na kimwe kigaraza ko yafashije uwakoze icyaha nk'uko biteganywa n'ingingo ya 2, igika cya mbere, agace ka 5, y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange³, iby'uko ari Sibomana

-

² Etienne Vergès, Géraldine Vial, Olivier Leclerc, Droit de la Preuve, 1ère Edition 2015, p. 552, para. 570.

³ Icyitso: umuntu wafashije uwakoze icyaha mu byagiteguye bigaragarira muri kimwe mu bikorwa bikurikira:

a) utuma hakorwa icyaha akoresheje igihembo, isezerano ry'igihembo, iterabwoba, agakabyo k'ubutegetsi cyangwa k'ububasha cyangwa amabwiriza agamije gukoresha icyaha;

b) ufasha uwakoze icyaha mu byagiteguye, mu byoroheje imikorere yacyo cyangwa mu byakinonosoye kandi yarabikoze abizi, cyangwa uwashishikaje uwakoze icyaha;

c) utuma undi akora icyaha akoresheje imbwirwaruhame, urusaku rushishikaza cyangwa iterabwoba, bibereye ahantu hateraniye abantu barenze babiri (2), inyandiko, ibitabo cyangwa ibindi byanditswe n'icapiro, biguzwe cyangwa bitangiwe ubuntu cyangwa byatangarijwe ahantu hateraniye abantu benshi, amatangazo amanitse cyangwa yeretswe rubanda;

d) uwahishe uwakoze icyaha, umufatanyacyaha cyangwa uwahishe icyitso kugira ngo ataboneka cyangwa adafatwa, umufasha kwihisha cyangwa gucika cyangwa umuha aho kwihisha cyangwa uwamufashije guhisha ibintu byakoreshejwe cyangwa byagenewe gukoreshwa icyaha;

e) uwahishe abizi ikintu cyangwa ibikoresho byakoreshejwe cyangwa byagenewe gukoresha icyaha;

Valens wagiye gushaka uwishe Munyensanga Protogène akamushuka nta kimenyetso na kimwe gitangwa n'Ubushinjacyaha uretse gukeka gusa, cyane cyane ko buvuga ko n'uwakoze icyaha nka gatozi (auteur principal) atashoboye kumenyekana, ibyo abatangabuhamya bavuze ko bari bafitanye urwango bishingiye ku gukeka gusa nk'uko byasobanuwe haruguru, kuko n'iyo urwango bavuga rwaba rwari ruhari koko, ibyo ubwabyo si ikimenyetso ko Sibomana Valens hari icyo yafashije uwakoze icyaha kuko atari ihame ko ufitanye n'undi urwango byanze bikunze amugirira nabi.

[23] Uru Rukiko rurasanga kandi ikindi kimenyetso gitangwa n'Ubushinjacyaha cy'uko hari umutangabuhamya wemeje ko mbere y'uko icyaha gikorwa moto ya Sibomana Valens yamunyuzeho ihetse abantu atazi, mu kanya gato nyakwigendera agahita araswa, nacyo nta shingiro cyahabwa kuko uwo mutangabuhamya witwa Ntakirutimana Jean Pierre atemeje niba abo bantu ari bo bishe Munyensanga Protogène ngo byumvikane ko ari abo Sibomana Valens yari ahetse kuri moto ye bagiye kwica nyakwigendera.

[24] Abahanga mu mategeko Henri-D. Bosly na Damien Vandermeersch, bavuga ko umucamanza adashobora guhamya uregwa icyaha atabonye ko ibimenyetso yabishyikirijwe mu buryo bwemewe n'amategeko, bitarimo ugushidikanya, kandi ibyo bimenyetso impande zombi zikaba zarabigiyeho impaka, ubundi akabisesengura mu bwisanzure (Le juge ne peut déclarer un prévenu coupable que s'il a acquis l'intime conviction de sa culpabilité au-delà de tout doute raisonnable sur la base

f) uwiba, uhisha cyangwa wonona nkana ku buryo ubwo aribwo bwose ibintu byagombye gufasha kugenza icyaha, gutahura ibimenyetso cyangwa guhana abakoze icyaha;

d'éléments de preuve qui lui ont été régulièrement produits et soumis à la contradiction et qu'il apprécie, en règle, souverainement)⁴. Ibi kandi bigarukwaho n'undi muhanga mu mategeko Michel Franchimont, uvuga ko Urukiko rusesengura mu bwisanzure ibimenyetso biba byatanzwe, ubundi rugashingira ku myumvire yarwo rutaziritswe n'ikimenyetso iki n'iki kiba cyatanzwe (...Le juge forme sa conviction librement sans être tenu par telle preuve plutôt que par telle autre. Il interroge sa conscience et décide en fonction de son intime conviction...)⁵.

Hashingiwe ku ngingo ya 165 y'Itegeko N°30/2013 ryo [25] ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, iteganya ko "gushidikanya birengera ushinjwa. Iyo urubanza rwakurikiranywe mu buryo bwose, ntihagire ibimenyetso nyakuri biboneka byemeza nta shiti abacamanza ko ushinjwa yakoze icyaha koko, bagomba kwemeza ko atsinze", no ku ngingo ya 119, igika cya kabiri, y'Itegeko N°15/2004 ryavuzwe haruguru, no ku bisobanuro bitangwa n'abahanga mu Urukiko rw'Ubujurire rurasanga ibimenyetso mategeko. byatanzwe n'Ubushinjacyaha kimwe n'ibyashingiweho n'Urukiko Rukuru, Urugereko rwa Nyanza, mu kwemeza ko Sibomana Valens yagize uruhare mu rupfu rwa Munyensanga Protogène, birimo ugushidikanya nk'uko byasesenguwe haruguru, bityo akaba agomba kugirwa umwere kuri icyo cyaha.

⁴ Henri-D. Bosly et Damien Vandermeersch, *Droit de la Procédure Pénale*, 4ème Edition, Bruxelles, 2005, P. 1316.

⁵ Michel Franchimont, Ann Jacobs, Adrien Masset, Manuel de Procédure pénale, 2ème édition, p. 1028 (appréciation des preuves).

III. ICYEMEZO CY'URUKIKO

- [26] Rwemeje ko ubujurire bwa Sibomana Valens bufite ishingiro;
- [27] Rwemeje ko Sibomana Valens ahanaguweho icyaha cy'ubwicanyi yaregwaga kubera gushidikanya;
- [28] Ruvuze ko imikirize y'urubanza RPA0389/15/HC/NYA rwaciwe n'Urukiko Rukuru, Urugereko rwa Nyanza, ku itariki ya 21/01/2016 ihindutse muri byose;
- [29] Rutegetse ko Sibomana Valens ahita arekurwa urubanza rukimara gusomwa;
- [30] Rutegetse ko amagarama y'urubanza aherera ku Isanduku ya Leta.

RWANDA LAW REPORTS

ENGLISH VERSION



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PREFACE

Dear Readers,

The Rwandan judiciary is pleased to publish the third volume of Rwanda Reports for the year 2019. We reiterate our thanks to you, for regularly providing us with your ideas and showing us the areas of improvement. This helps us to publish a more enhanced Law Reports, useful to those who face legal challenges in their profession.

This volume of Rwanda Law Reports, contains seven (7) cases, of which six (6) of them were rendered in merit: two (2) commercial cases, two (2) criminal case, one (1) civil case and one (1) petition seeking to declare a law unconstitutional, while the remaining one (1) is a procedural case.

We are also pleased to remind you that published cases can also be accessed on the website of the judiciary http://decisia.lexum.com/rlr/kn/nav.do which facilitates the users to find cases easily.

Prof. Sam RUGEGE
President of the Supreme Court
President of the High Council of Judiciary

SCOPE OF THE REPORTS

These reports cover cases decided by the Supreme Court and the Court of appeal cited under the heading below:

CITATION

The Reports in this volume are cited thus: [2019] 3 RLR

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should not be based on as grounds to repeal the provisions laying down that penalty, because imprisonment sentence is imposed in order to deter people from committing crimes, with the purpose of punishing, rehabilitate, and educate

Re MUGISHA.....1

Flourishment of the family – Flourishment of the family does not mean liberty to do whatever anybody wants rather it denotes liberty and security of the family members which cannot be achieved in a family characterized with adultery, concubinage and desertion of the marital home, therefore penalizing these crimes, is neither breaking the family nor encroaching on its flourishment rather, it is preventing what might threaten it – the Constitution of the Republic of Rwanda of 2003 revised in 2015, article 18.

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Freedom of press and expression – In exercising the freedom of expression a person may express his/her opinion about religious rituals, symbols and religious items and the right to seek, receive and impart information and opinions in the public on religious rituals, symbols and religious items as long as he/she does not act contrary to what is prohibited by Article 38 of the Constitution of the Republic of Rwanda.

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Re MUGISHA.....1

Expression of the views and opinions on the actions of National leaders – Freedom of expression, and to impart information on the activities of National leaders, stresses the democratic principle of transparency and accountability of the leaders who serve the people.

Re MUGISHA.....1

Freedom of press and expression – Information or opinions should not necessarily be gratifying the administration nor prejudicing some people, rather on the contrary the opinion and views which is not pleasant to the administration and to some citizens should be tolerated because when there are no diverse opinions, tolerance, broad views, democracy is unattainable.

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[Rwanda SUPREME COURT — RS/INCONST/SPEC 00002/2018/SC (Rugege, P.J., Kayitesi Z, Mutashya, Kayitesi R, Cyanzayire, J.) 24 April 2019]

Constitution — Acts prejudicial to the general interests — A legislator may criminalize some acts and determine the penalty of imprisonment thereof, even though they are related to contracts, this does not impede the offended party to institute a civil claim seeking for damages or the execution of the of the contract.

Constitution – Consequences of imprisonment sentence on the family – The consequences of imprisonment sentence on the family should not be based on as grounds to repeal the provisions laying down that penalty, because imprisonment sentence is imposed in order to deter people from committing crimes, with the purpose of punishing, rehabilitate, and educate.

Constitution – Flourishment of the family – Flourishment of the family does not mean liberty to do whatever anybody wants rather it denotes liberty and security of the family members which cannot be achieved in a family characterized with adultery, concubinage and desertion of the marital home, therefore penalizing these crimes, is neither breaking the family nor encroaching on its flourishment rather, it is preventing what might threaten it – the Constitution of the Republic of Rwanda of 2003 revised in 2015, article 18.

Constitution – Freedom of press and expression – In exercising the freedom of expression a person may express his/her opinion about religious rituals, symbols and religious items and the right

to seek, receive and impart information and opinions in the public on religious rituals, symbols and religious items as long as he/she does not act contrary to what is prohibited by Article 38 of the Constitution of the Republic of Rwanda.

Constitution – Withdrawal of a claim of adultery – The offended spouse may at any stage of the proceedings request that the case be terminated when he/she withdraws the complaint – Stopping the proceedings or the execution of the judgement has effects on the co-offender

Constitution – Differentiation among people – Differentiation per se, is not discrimination, or treating people unequally before the law, it can be done upon a reasonable ground to defend persons in the vulnerable category, that ground must be objectively justifiable and legitimate and such differentiation should be proportionate to the purpose to be achieved.

Constitution — Expression of the views and opinions on the actions of the leadership — Freedom of expression, and to impart information on the activities of leaders, stresses the democratic principle of transparency and accountability of the leaders who serve the people

Constitution – Freedom of press and expression – Information or opinions should not necessarily be gratifying to the leadership nor prejudicing some people, rather on the contrary the opinion and views which are not pleasing to the leadership and to some citizens should be tolerated because when there are no diverse opinions, tolerance, broad minded views, democracy is unattainable.

Facts: After the publication of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general in the Official

Gazette, Mugisha Richard petitioned the Supreme Court seeking to declare that articles 233, 236, 136, 138, 154 and 139 of that law infringe articles 15, 18 and 38 of the constitution. He further stated that the articles which he seeks to be repealed are in two categories the first one contains three articles: 154, 233 and 236 and the second has three articles; 136,138 and 139.

The State Attorney raised a prelinary objection of inadmissibility of the petition on the ground that the petitioner has no interest in the petition. On the 18/03/2019 the Court found that he has the interest to petition the court requesting to declare unconstitutional some of the provisions of the law and thus overruled that objection. Because of the importance of the issues in that case the Court requested individuals, institutions or non Governmental organisations with expertise, who would like to give their opinions in the case as Amicus Curiae to apply. The Court examined applications and concluded that the following are the ones who are eligible to appear before the court hearing as amicus curiae: Association Rwandaise Des Journalistes or Rwanda Association (ARJ), The women's Organisation- PRO-FEMMES / TWESE HAMWE; and The University of Rwanda -School of Law.

Concerning the provisions the petitioner has in the second category which are 136 providing that any spouse who has sexual intercourse with a person other than his/her spouse, commits an offence, 138 which provides that a person who lives as a husband and wife with a person other than his/her spouse while one or both of them are married, commits an offence and that of 139 providing that a spouse who, without serious reasons, deserts his/her marital home for more than two (2) months and evades his/her obligations, commits an offence, the petitioner argues that those provisions infringe on article 18 because they provide for

a penalty of imprisonment for one of the spouses convicted of the crime of adultery, concubinage or desertion of the marital home yet a family cannot be protected, nor flourish when one of the spouses is incarcerated, especially that article 18 of the Constitution of the Republic of Rwanda provides that the State puts in place appropriate legislation and organs for the protection of the family, which is the reason why he is of the opinion that incorporating the acts of adultery, concubinage and desertion of the marital home in the Law determining offences and penalties in general is not a reasonable approach to protect a family. He furthermore argues that the provisions of those articles should be incorporated in the civil laws because they originate from the agreement between two people.

The State Attorney argues that there are various acts around the world that are criminalized yet they emanate from contracts moreover those offences of adultery, concubinage and desertion of marital home are bad acts with harmful consequences to the general public, to human dignity, to the national values adhered to by the nationals and such conduct is contrary to the good conduct and good morals which degrade a person, that is the reason the State should intervene in order to prevent and punish such acts.

PRO-FEMMES / TWESE HAMWE argues that those articles should not be repealed as this would result in the perception that adultery, concubinage and desertion of the marital home are legalized acts and this would have effects that would ruin the Rwandan family to the extent that there will no longer be stable families since they will be insecure and article 18 of the Constitution of the Republic of Rwanda mandates the state to protect the family as it is the natural foundation of the Rwandan society

The University of Rwanda - School of Law argues that marriage is premised on the will emanating from love with the purpose to establish a marriage. In case that will or love is no more to the degree that one of the spouses decides to breach the commitment he/she had towards the other, shouldn't be a matter to refer to criminal courts but rather to civil courts; - the courts with jurisdiction to hear and resolve family cases and moreover punishing adultery, concubinage and desertion of the marital home with imprisonment causes misunderstandings between spouses, leading to the neglect of their duties of upbringing of their children and paying their tuition fees to the extent that the offended spouse is compelled to grant forgiveness.

In respect of the category comprising of article 154, 233 and 236, article 154, provides that any person who publicly defames religious rituals, symbols and religious objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. The petitioner argues that the provisions of this article are not clear to the extent that they may be wrongly applied when prosecuting someone who commits such acts and that it encroaches on the freedom of press and of expression and that of expressing opinions on religions and their functioning, thus, for fear of prosecution, journalists will fear to criticize religions.

The State Attorney contends that, the fact that some of the provisions of that article are ambiguous, does not constitute a ground to repeal the whole law or the article, but rather it should given proper interpretion. The Rwanda Journalist Association (ARJ) argues that this article disregards the people's freedom of religion to the extent that what is provided therein, may deter people from expressing their views on beliefs. Instead, if a person

or an organization with legal personality believes that it was defamed by the press or journalist should lodge a civil claim so that it may be accorded justice and damages. On the part of the University of Rwanda -School of Law it is argued that the article is ambiguous since it does not define what religion is, nor does it define where religious rituals are designated to be performed or where they are normally observed, therefore this implies that people would be unjustly treated if this article remains the way it is now. There is a need for a clear definition of what religion is so that even its rituals may be clearly understood.

For article 233 which provides for the offence of humiliating a member of Parliament, Cabinet, security officers or any other person in charge of a public service, the petitioner avers that it infringes on article 15 and 38 of the constitution of the republic of Rwanda because it discriminates among the people it's supposed to protect and prejudices the freedom of press, of expression and of access to information.

The state Attorney argues that article 15 of the Constitution of the Republic provides for the equality before the law, and equal protection of the law, implying that all people should be treated equally whenever they are in the same circumstances, which is the reason why some people are protected by the law because they do certain duties or work in given organs especially that it is the organ or the duties that are protected not the person per se, considering that if that person vacates the office, the successor is protected the same way the predecessor was.

The Rwanda Journalist Association (ARJ) urges that the article mentioned above violates the freedom of press and of expression as it criminalizes the act of publishing any information on the leader's or a public servants' poor leadership because a public servant should not fear to have information published on them if they are really innocent. It further argues that this would shield public servants or other people in charge of public services, who manifest elements of misconduct from any comment or any criticism. The University of Rwanda, School of Law argues that the article does not distinguish between the time when one of the members mentioned in this article is exercising his/her mandate and when the exercise is solely in connection with the performance of his/her duties, neither does it clarify if the protected persons in this article are any public servants. It also does not define what defamation really means, and for that matter they contend that this article is contrary to the principle of legal certainty.

With regard to article 236 which provides that any person who insults or defames the President of the Republic, commits an offence, the applicant states that this crime could be used as a pretext in violating the freedom of press, especially considering that the crime of defamation is ambiguous. He argues that the article infringes on article 15 of the Constitution since it does not protect people equally by punishing those who insult or defame one person only.

The State Attorney states that the freedom of press is limited by the honor and security of the leader and that besides, the article does not prohibit anybody from publishing anything on the President of the republic, but rather, it prohibits insulting or defaming him/her.

For the Rwanda Journalists Association (ARJ), they also concur that, given the nature of the responsibilities he/she has, the President of the Republic should possess the highest level of discipline. However, publishing information on him/her should not be criminalized. The University of Rwanda, School of Law argues that if those provisions are compared to those provided by

article 161 which punishes the crime of Public insult, the crime is penalized when committed in the public, whereas article 236 indicates that this crime is penalized wherever it may be committed, signifying that, even if two people in a secret place insulting each other, one may falsely accuse another of committing that crime, and he/she may be prosecuted for the same. It concludes by remarking that the same grounds that led to the repealing of this crime for other people, should be applied in repealing the crime of defaming the President of the Republic.

- **Held:** 1. Based on the purpose to be achieved, a legislator may criminalize some acts and determine the penalty of imprisonment thereof, even though they are related to contracts, this does not impede the offended party to institute a civil claim seeking for damages or the execution of the of the contract, therefore for the offences of adultery, concubinage, and desertion of the marital home being related to the contract of marriage does not prevent those acts from being prosecuted as crimes.
- 2. The consequences of imprisonment sentence on the family should not be based on as grounds to invalidate the provisions laying down that penalty, because imprisonment sentence is imposed in order to deter people from committing crimes, with the purpose of punishing, rehabilitate, and educate. Also these penalties are reasonable and proportional to the crimes thereof.
- 3. Flourishing of the family does not mean liberty to do whatever anybody wants rather it denotes liberty and security of the family members which cannot be achieved in a family characterized with adultery, concubinage and desertion of the marital home, therefore penalizing these crimes, is neither breaking the family nor encroaching on its ability to flourish rather, it is preventing what might threaten it.

- 4. The offended spouse may at any stage of the case request that the proceedings be terminated when he/she withdraws the complaint and stopping the proceedings or the execution of the judgement has effects on the co-offender.
- 5. In exercising the freedom of expression a person may express his/her opinion about religious rituals, symbols and religious items and the right to seek, receive and impart information and opinions in the public on religious rituals, symbols and religious items as long as he/she does not act contrary to what is prohibited by Article 38 of the Constitution of the Republic of Rwanda.
- 6. differentiating among people per se, is not discrimination, or treating people unequally before the law, it can be done upon reasonable ground to defend persons in the vulnerable category, that ground must be objectively justifiable and legitimate and such differention should be proportionate to the purpose to be achieved.
- 7. Freedom of expression, and to impart information on the activities of the leadership, stresses the democratic principle of transparency and accountability of the leaders who serve the people.
- 8. Information or opinions to be disseminated should not necessarily be those gratifying to the leadership nor those which do not displeased people, rather on the contrary the opinions and views which do not please the leadership and some of the citizens should be tolerated because when there are no diverse opinions, tolerance, broad minded views, democracy is unattainable.

Petition has merit in part; Paragraph 3 of article 136 is amended as follows: The offended spouse may at any stage of the case request that the proceedings be terminated when he/she withdraws the complaint and stopping the proceedings or the execution of the judgement has effects on the co-offender;

Paragraph one, two and three of article 136 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general is consistent with article 18 of the Constitution;

Paragraph four and five of article 136 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general are invalid and of no effect;

Article 138 and 139 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general are not inconsistent with article 18 of the Constitution;

Article 154 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general infringes on article 38 of the Constitution, thus is invalid and of no effect; Article 233 of the Law N°68/2018 of the Law 30/08/2018 determining offences and penalties in general infringes 15 and 38 of the Constitution, thus is invalid and of no effect:

Article 236 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 15 and 38 of the Constitution; Orders that this judgment be published in the official gazette of the republic of Rwanda.

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 revised in 2015, article 4,10,15,17,18,38,41,97,98,108 Universal Declaration of Human Rights 1948, article 19

- International Covenant on Civil and Political Rights, (ICCPR), article 19
- Law N°54/2011 of 14/12/2011 relating to the rights and the protection of the child.

Cases referred to:

- Re Uwinkindi, N°RS/INCONST/PEN0005/12/CS rendered by the Supreme Court on 22/02/2013
- Joseph Shine v Union of India 2018 SCC Online SC1676 delivered on 27 September, 2018
- Joseph Burstyn, Inc. v. Wilson, U.S. Supreme Court ,343 U.S. 495 (1952)
- European Court of Human Rights, Handyside v. United Kingdom, Judgment of 7 Dec. 1976, Series A N° 24

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- UN Working Group on Women's Human Rights: Report (18 October, 2012)
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UN Human Rights Committee, Communication No. 414/1990, Mika Miha v. Equatorial Guinea, Views adopted on 8 July 1994.

Organization for Security and Cooperation in Europe "Defamation and Insult Laws in the OSCE Region: A comparative Study" March 2017.

Parliamentary Assembly of the Council of Europe, Recommendation 1805 (2007).

T. Tridimas, The General principles of EC Law (OUP, 2nd edn, 206)

Judgment.

I. FACTS OF THE CASE

- [1] Mugisha Richard submitted an application to the Supreme Court. He contends that, after the Official Gazette published Law N°68/2018 of 30/08/2018 determining Offences and Penalties in General, he read it and noticed that Articles 136, 138, 139, 154, 233 and 236 contravene the Constitution of the Republic of Rwanda of 2003 as revised in 2015.
- [2] The impugned articles are in two (2) categories. The first category comprises Articles 154, 233 and 236 of Law N° 68/2018. Article 154 states that any person who publicly defames religious rituals, symbols and religious cult objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. Article 233 stipulates that any person who, verbally, by gestures or threats, in writing or cartoons, humiliates a member of

Parliament when exercising his or her mandate, a member of the Cabinet, security officers or any other person in charge of a public service in the performance of his or her duties or any other activity emanating from his or her duties, commits an offence. Article 236 provides that any person who insults or defames the President of the Republic commits an offence. These articles also set out the penalties for each offence.

[3] Mugisha argues that these articles contravene Article 15 of the Constitution of the Republic of Rwanda on the grounds that they protect persons of given categories on the basis of their duties, even though all persons are equal before the law. He contends that these articles infringe upon the freedom of the press, whether print or audio-visual, as provided in Article 38 of the Constitution. These laws will forbid the press from spreading information concerning those categories of officials or religious associations when criticizing a given issue, whereas the Constitution protects the freedom of press, of expression and of access to information.

[4] The second category includes three (3) articles. The first is Article 136, which provides that any person who has sexual intercourse with a person other than his or her spouse commits an offence. Article 138 stipulates that a person who lives as husband

¹ The article 15 states that "All persons are equal before the law. They are entitled to equal protection of the law."

² The article 38 states that "Freedom of press, of expression and access to information are recognized and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by the law".

and wife with a person other than his or her spouse, while one or both of them are married, commits an offence. Then Article 139 stipulates that a spouse who, without serious reasons, deserts his or her marital home for more than two (2) months and evades his or her obligations, commits an offence. Mugisha Richard contends that these articles are contrary to Article 18 of the Constitution of the Republic of Rwanda, which requires that the State put in place appropriate legislation and organs for the protection of the family in order to ensure that it flourishes. This is because Articles 136, 138 and 139 sentence one of the spouses to imprisonment, and a family can neither be protected nor flourish when one of the spouses is imprisoned.

- [5] State Attorney Kabibi Speçiose raised an objection. She argued that Mugisha's claim was inadmissible because he did not have standing to bring the claim. He failed to prove that he had a personal interest in filing the claim or that the articles have detrimental effects on him.
- [6] Because of the gravity of the legal issues to be examined in this case, the Court allowed participation of amici curiae. All persons, institutions and non-governmental organizations who had pertinent expertise and desire to intervene as amici curiae could apply for leave to do so through the Supreme Court registry no later than February 2, 2019. They were to submit all documents to the Court no later than February 28, 2019.
- [7] After receiving the applications for leave to intervene as amici curiae, the Court examined the applications and found the following entities eligible as amici curiae: Association Rwandaise Des Journalistes or Rwanda Journalists Association (ARJ), the women's umbrella organisation Pro-Femmes/Twese

Hamwe and University of Rwanda School of Law. These entities submitted their opinions on MUGISHA's case.

[8] The trial was held on March 18, 2019, and Mugisha Richard was assisted by Advocate Kabasinga Florida and Advocate Nkundabarashi Moïse, whereas State Attorney Kabibi Speçiose represented the Government of Rwanda. The Rwanda Journalists Association (ARJ) was represented by Advocate Gakunzi Musore Valery whereas University of Rwanda School of Law was represented by Bikesha Denis, Murefu Alphonse, Sezirahiga Yves and Ruvebana Etienne.

II. LEGAL ISSUES ARISING IN THE CASE AND THEIR ANALYSIS

- a. Whether Articles 136, 138 and 139 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general contravene Article 18 of the Constitution of the Republic of Rwanda
- [9] Mugisha Richard petitions the Court to find that Article 136, 138 and 139 of Law No 68/2018 contravene Article 18 of the Constitution. These articles prescribe penalties for spouses convicted of adultery, concubinage or desertion of the marital home. He argues that a family can neither be protected nor flourish when one of the spouses is incarcerated. He states that he by no means commends the misconduct addressed in these articles. He only requests the Court to examine whether in a bid to inhibit such delinquency it is reasonable to incorporate these articles in the penal code.

- [10] He contends that what is provided in Articles 136, 138 and 139 of Law N° 68/2018 infringes on the relationships of couples who have confessed their vows to be married out of the love they have for each other. Their love results in procreation, and the primary obligation to maintain and sustain the family falls on the two spouses. To create a peaceful spousal relationship, it is necessary for the offending partner to apologise to the offended one and thus the two can reconcile.
- [11] Mugisha Richard contends that the articles penalizing the crimes of adultery, concubinage and desertion of the marital home are contrary to Article 18 of Constitution of the Republic of Rwanda which provides that the family, being the natural foundation of the Rwandan society, is protected by the State. The impugned articles prescribe penalties of imprisonment for one of the spouses found guilty. It contravenes the principle that a family cannot be protected when one of the spouses is imprisoned.
- [12] He further contends that Article 18 of the Constitution of the Republic of Rwanda requires that the State put in place appropriate legislation and organs for the protection of the family. However, it was argued by applicant that making the acts of adultery, concubinage and desertion of the marital home offences under Penal Code was not the right approach to protecting the family. This approach closes the door on the spouses wishing to ask for forgiveness from each other and to reconcile, and hence does not assist in building but rather harms the family.
- [13] Advocate Kabasinga Florida argues that Articles 136, 138 and 139 of Law N° 68/2018 contravene not only the Constitution of the Republic of Rwanda but also the international principles and precedents of international courts. She concedes that, certainly the conduct featured in these articles is not

commendable; nonetheless, she urges that such conduct should be governed by other laws. As some legal scholars have argued, it is not appropriate to apply criminal laws to every person who has committed a reprehensible act.

[14] She proceeds to contend that, considering that adultery, concubinage and desertion of the marital home only affect one's spouse and do not prejudice the public, and that only an affected spouse can bring a complaint to initiate prosecution, it is not reasonable to address these acts in the Penal Code. She notes a case that was decided by the Supreme Court of India³ where the Court expounded that, for an act to be called a crime it should be prejudicing the public or society, and that penal sanctions should only be enacted if an act prejudices the public. Therefore, in her opinion, the fact that the crimes envisaged in Articles 136, 138 and 139 of Law N° 68/2018 are not committed against the public constitutes a substantial ground not to include these articles in the penal code.

[15] Advocate Nkundabarashi Moïse argues that the conduct punished by Articles 136, 138 and 139 of Law N° 68/2018 should be dealt with as civil wrongs, because Article 2:1° of the aforementioned law defines "offence" as an act or omission that breaches public order, whereas the provisions of the three (3) impugned articles are predicated on the agreement between two people and only one of them is eligible to lodge a complaint. Furthermore, Article 18 of the Constitution states that the freedom of the family shall be protected, which is impractical if one of the spouses is incarcerated. He especially notes that no research has been conducted to show that a discharged spouse who was convicted of one of the crimes in question enjoys a good

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 $^{^3}$ PETITION (CRIMINAL) N° 194 OF 2017, Joseph Shine v. Union of India.

relationship with the offended spouse. Instead, their relationship manifestly deteriorates.

- [16] He further emphasizes that, since those crimes stem from the marriage contract, only an aggrieved spouse can lodge a complaint and no other person who has witnessed the crimes can do so. Moreover, the police are not allowed to intervene in these cases, which further indicates that these crimes are not committed against society and thus prosecuting them is not in the public interest.
- [17] State Attorney Kabibi Speçiose contends that the assertions of Mugisha and his counsels that the aforementioned crimes stem from the marriage contract and thus should not be criminalized is immaterial. She argues that there are various acts around the world that are criminalized though they emanate from contracts. She cites the crimes of the non-payment of bills, breach of trust and many other examples, all of which result from contracts.
- [18] State Attorney Kabibi Speçiose maintains that the crimes of adultery, concubinage and desertion of the marital home are harmful to the general public, human dignity, and Rwandan values. Such conduct is contrary to good conduct and good morals and degrades a person, hence the government should intervene to prevent and punish it.
- [19] Kanakuze Jeanne d'Arc representing the umbrella organization Pro-Femmes/Twese Hamwe argues that Articles 136, 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general should not be repealed as this would result in the perception that adultery, concubinage and desertion of the marital home are legalized acts. This would ruin

the Rwandan family to the extent that a safe family will cease to exist since it is deprived of its security.

- [20] Advocate Munyankindi Monique, who assisted umbrella organization Pro-Femmes/Twese Hamwe, contends that Article 18 of the Constitution mandates the State to protect the family as it is the natural foundation of the Rwandan society, to the point that the State has the duty to enact laws that penalize any person who commits acts that threaten the family in any way. This accounts for the reason behind enacting the articles in dispute—to preserve the sovereignty and freedom of the family, since the acts punished by those articles can incite conflicts in the family, leading to its ruin and sporadic deaths.
- [21] Mr. Bikesha Denis, Mr. Murefu Alphonse and Mr. Sezirahiga Yves representing the University of Rwanda School of Law argue that a crime is an act or omission that breaches the public order, as Article 2:1° of Law N° 68/2018 provides. Preemptive intervention of the state is only justified for acts that threaten the public order and undermine the general interest. Furthermore, they urge that the Legislature should be extra cautious not to over-criminalize by punishing conduct that does not comprise of elements of a crime; otherwise the law may harm the people it is supposed to protect.
- [22] They contend that marriage is premised on the will, emanating from love, to establish a marriage. If the will or love diminishes to the degree that one of the spouses decides to breach the commitment he or she has made to the other, the matter should be referred to civil courts who have the jurisdiction to hear family cases instead of criminal courts.

[23] They further maintain that, providing a penalty of imprisonment for adultery, concubinage and desertion of the marital home generates conflicts between spouses, leads to problems in the upbringing of children, and makes paying the children's tuition fees more difficult. Thus, the family is in no way protected. Most importantly, there is no proof that any spouse, after being discharged from prison, can live harmoniously with the offended spouse. In India, England, South Korea, South Africa, Nigeria, Ghana and some other countries, adultery was once criminalized but today it is only an ordinary civil wrong that may be a basis for damages and/ or lead to a divorce.

THE FINDING OF THE COURT

- [24] Article 18 of the Constitution provides that: "The family, being the natural foundation of the Rwandan society, is protected by the State. Both parents have the right and responsibility to raise their children. The State puts in place appropriate legislation and organs for the protection of the family, particularly the child and mother, in order to ensure that the family flourishes."
- [25] Article 18 comprises three principles: the family is the natural foundation of the Rwandan society, both parents have the rights and responsibilities to raise their children, and the State has the responsibility to protect family members.
- [26] Mugisha Richard argues that three articles in Law N° 68/2018 of 30/08/2018 determining offences and penalties in general contravene Article 18 of the Constitution of the Republic of Rwanda: Article 136 on adultery, Article 138 on concubinage and Article 139 on the desertion of the marital home.

Article 136 of Law No 68/2018 of 30/08/2018 [27] determining offences and penalties in general provides that: "Any spouse who has sexual intercourse with a person other than his/her spouse, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than six (6) months and not more than one (1) year. The prosecution of adultery is initiated only upon complaint of the offended spouse. In that case, the prosecution is initiated against the accused spouse and the cooffender. The offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint. However, if the matter is already brought before court or if a decision thereon has been taken, retraction does not stop the consideration of the case or the execution of the judgement. The judge considers the case after which he/she can accept or refuse such a retraction upon justification. If a judge accepts the retraction of the offended spouse, stopping the proceedings or the execution of the judgement has effects on the co-offender."

[28] Article 138 of Law N° 68/2018 of 30/08/2018 provides that: "A person who lives as a husband and wife with a person other than his/her spouse while one or both of them are married, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of more than one (1) year and not more than two (2) years. Article 139 stipulates that: A spouse who, without serious reasons, deserts his/her marital home for more than two (2) months and evades his/her obligations, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than three (3) months and not more than six (6) months. Penalties referred to in Paragraph 2 of this Article also apply to a husband who, willfully and without serious reasons, deserts his wife for more than one (1) month knowing that she is

pregnant. However, separation following mistreatment of one of the spouses is not considered as desertion of the marital home when he/she has informed the nearest local administration and a record relating thereto has been drawn."

[29] Mugisha Richard argues the articles providing penalties for adultery, concubinage and desertion of the marital home contravene the Constitution of the Republic of Rwanda. He maintains that prosecuting and punishing these crimes and imprisoning one of the spouses infringes on the flourishing of the family and break it down instead of building it up. He further argues that those crimes are based on a marriage contract between two people. These articles therefore hamper reconciliation and forgiveness between the spouses.

1. Whether the crimes of adultery, concubinage and desertion of the marital home are premised on contracts and are thus not fit to be crimes but rather civil faults

- [30] Mugisha Richard is petitioning the Court to repeal Article 136 on adultery, Article 138 on concubinage and Article 139 on desertion of the marital home, since they are premised on civil contracts and should thus be governed by civil laws.
- [31] A legislator may criminalize and punish acts even if they are related to contracts. In cases of adultery, concubinage and desertion of the marital home, the offending spouse is bound by a marriage contract, but penalizing these acts does not contravene the Constitution of the Republic of Rwanda since the Constitution does not forbid criminalizing contractual acts. What these articles penalize is adultery, concubinage and desertion of the marital home, not the breaching of the marriage contract per se. Article 29:7° of the Constitution prohibits imprisoning a person on the

grounds of inability to fulfil a contractual obligation, yet this is not the nature of the laws against adultery, concubinage and desertion of the marital home.

- [32] The law may criminalize certain contractual acts and impose the penalty of imprisonment for these acts. For instance, Article 176 criminalises breach of trust, Article 248 criminalises intentional embezzlement of seized or confiscated property, and Article 178 criminalises embezzlement or destruction of a mortgaged property. The law requires these acts be prosecuted, but the offended party can also institute a civil claim seeking damages or performance of the contract. The underpinning fact is that all these crimes infringe on the public interest, which the law should protect.
- [33] The Court is convinced that the marriage contract is not an ordinary contract. It is an exceptional contract calling for the state's protection as provided in Article 18 of the Constitution of the Republic. It is on this ground that the law lays down the marriage celebration procedures in which the State is involved in recognizing a marriage. The Court also believes that monitoring the relationship of married couples is in the public interest. Punishing adultery, concubinage and desertion of the marital home not only prevents threats that might jeopardize family members' security and flourishing, but also protect children's safety and wellbeing. As provided in Article 18 of the Constitution of the Republic, both parents have the responsibility to raise their children. Article 19 of the same law states that every child has the right to specific mechanisms of protection by his or her family, other Rwandans and the State. If a spouse is busy committing adultery or attending to a concubine, or if the spouse

deserts the marital home, it would be practically difficult to fulfil the responsibility of raising his or her children as required.

- [34] The preceding paragraph has stated that if the offending spouse indulges in sensual activities and concubinage with a paramour, that spouse will squander the family property, thus harming the family's interest. Furthermore, the spouse will not be able to fulfil the responsibility of taking care of the children where necessary. For these reasons, adultery, concubinage and desertion of the marital home will harm the freedom, security and prosperity of the family. Furthermore, when the family is not stable, the development of the nation is automatically affected. The wasted property could have been invested in profitable activities for the family.
- Mugisha Richard argues that divorces due to adultery, [35] concubinage and desertion of the marital home are steadily surging, which suggests that penalizing these acts does not deter couples from divorcing; therefore, the articles in dispute fall short of the purpose of protecting marriage. He also argues that the national budget allocated to the prosecution of these crimes can be channelled to other activities that could advance justice. The Court finds these arguments immaterial, because Mugisha Richard has failed to demonstrate how adultery, concubinage and desertion of the marital home are not reasonably deterred. Furthermore, according to theories of punishment, deterrence is one but not the only purpose of punishment, since there are other discouraging revenge purposes like or retaliation rehabilitating the offender. The best way forward is not repealing the law, but rather putting more effort in strategies for prevention.
- [36] The fact that many countries have either decriminalized or have never criminalized adultery, concubinage, and desertion

of the marital home is not a ground to remove these crimes from the Rwandan Penal Law. India, South Africa, Korea, Ghana and many other countries decriminalized adultery, but there are also many other countries that penalize adultery. Each country has unique culture and values it upholds or does not uphold. Adultery, concubinage and desertion of the marital home have never been Rwandan values. Even those who engage in such acts do it covertly because they know they are not supported by Rwandan society.

- [37] In Rwandan culture, if a woman separates from her husband and returns to her parents' home, it is a sign that there is misunderstanding at her own home and that her husband is mistreating her. This would be remedied when the husband goes to her home, gives a cow to her family as a fine and brings back his wife. This is not construed as desertion of the marital home. Instead, it is a cultural mechanism of restoring a good relationship at home. This is the rationale behind the "exception" to the crime of desertion of the marital home provided in Article 139, Paragraph 4: "However, separation following mistreatment of one of the spouses is not considered as desertion of the marital home when he/she has informed the nearest local administration and a record relating thereto has been drawn."
- [38] Another reason why Rwanda should not rush to amend the law on these crimes is that the law does not contradict any international principles. In 2012, a U.N. Working Group on Human Rights recommended that countries decriminalize adultery because it believed that this infringed on women's rights. The Working Group's motivation is that in many countries, the crime of adultery is applicable to women only, and men cannot legally commit adultery. In some countries, only women are

penalized, and men are excused. Some other countries provide different penalties for men and women. Such practice does not exist in Rwanda, since men and women may be equally prosecuted for adultery and the same penalty applies regardless of gender. There is no discrimination in the applicable laws in deterring and punishing adultery, concubinage and desertion of the marital home

[39] The grounds advanced by the U.N. Working Group on Human Rights were echoed in Joseph Shine v. Union of India, a case from the Supreme Court of India. MUGISHA asks this Court to repeal the articles in dispute as was done in Joseph Shine. Article 497 of the Indian Penal Code penalized only a man who had sexual intercourse with a married woman. A woman would not be penalized as either an offender or co-offender. Only the offended man could institute a claim, whereas an offended woman had no right to lodge a claim. The article was undeniably repealed in that case but on grounds different from those advanced by MUGISHA. The Indian Supreme Court found that the article in question did not offer equal protection of the law, manifested sexual discrimination, and encroached on the freedom of the people; hence, it contravened Articles 14, 15 and 21 of the Constitution of India and international human rights principles. These grounds are totally different from those tendered by MUGISHA requesting to decriminalize the crime of adultery in Rwanda

[40] For these reasons, the Court finds that the fact that crimes of adultery, concubinage and desertion of the marital home emanate from contract does not justify waiving the prosecution and subsequent punishment thereof as crimes.

2. Breaking down the family and encroaching on its freedom instead of protecting it

- [41] Article 23 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states: "Principal penalties applicable to natural persons are the following: <u>imprisonment</u> [...]" This Article shows that imprisonment is one form of legal punishment under Rwandan law.
- [42] The spouse who is found guilty of the crime of adultery, concubinage or desertion of the marital home may be sentenced to a penalty of imprisonment. Mugisha asserts that imprisoning one of the spouses may be detrimental to the family in various ways. However, the Court finds that imprisoning one of the spouses convicted of these crimes should be envisaged as penalizing the committed crime itself, especially considering imprisonment is one of the penalties prescribed under Rwandan law as expounded in the preceding paragraph.
- [43] Imprisonment inevitably affects the offender and his or her family. However, the Court is convinced that the family of the offender convicted of adultery, concubinage or desertion of the marital home should not be given exceptional treatment to the degree that the laws in question be omitted from the penal code. The effects of imprisonment on the family are the same regardless of the crime that occasions it. Moreover, Mugisha has not advanced or proven that the consequences emanating from imprisonment for these crimes are different from those occasioned by imprisonment for other crimes like theft, murder, defilement and more.
- [44] If this Court were to hold that the laws on the crimes of adultery, concubinage and desertion of the marital home are

unconstitutional because of the imprisonment sentence, it would categorically suggest that other criminal laws providing for imprisonment, regardless of the nature of the crime, should be repealed. Imprisonment has diverse ramifications for the family of the offender, such as suffering humiliation and reproach. However, the consequences of a penalty on a family are no grounds to repeal the prescription of that penalty. Imprisonment not only cautions people not to commit crimes, but also serves the functions of punishment, rehabilitation and education. It is the opinion of this Court that the penalties for the crimes in question are reasonable and proportional to the crimes.

The other controversy is the interpretation of the phrase [45] "freedom of the family" as provided in Article 18 of the Constitution. Mugisha and his counsel contend that a family cannot flourish if one of the spouses is incarcerated for adultery. concubinage or desertion of the marital home. However, flourishing does not mean the liberty to do whatever one wants. Article 18 states that: "The State puts in place appropriate legislation and organs for the protection of the family, particularly the child and mother, in order to ensure that the family flourishes." The phrase "in order to ensure that the family flourishes" conveys the importance of the flourishing and security of the family members. In the English version of this Article, the words used are "to flourish" which means to "succeed, to prosper or to grow". A family cannot achieve any of these goals if it is always in conflict, especially if the family relationship is affected by adultery, concubinage, or desertion of the marital home. The Kinyarwanda Dictionary suggests the same. It defines "Kwisanzura", which means "to flourish", as to live in a comfortable environment with no obstacles. If a family

has conflicts, fights and altercations caused by infidelity or desertion of the marital home, it cannot flourish.

- [46] As argued by Pro Femme/Twese Hamwe, adultery, concubinage and desertion of the marital home breed sour relationships in the family that might in extreme circumstances even result in deaths. Pro Femme/Twese Hamwe recounted instances of deaths precipitated by adultery, concubinage, and desertion of marital home. These examples involved people killing their spouses or committing suicide because they could not tolerate such unbecoming conduct that contravenes both the law and the Rwandan culture of family harmony. Therefore, this Court holds that penalizing these crimes neither breaks up the family nor encroaches on its flourishing; rather it deters that which might threaten the family.
- [47] Adultery and concubinage may also result in the birth of children outside the marital union. This breeds conflict between married partners, between the offended spouse and the paramours, and even among the children. This is contrary to the Rwandan policy of family planning and also contrary to the Constitution, which in Article 17, paragraph 2, states: "A civil monogamous marriage between a man and a woman is the only recognized marital union." Therefore, it is in the public interest that there be laws that prevent such extramarital births and the likely effects thereof.
- [48] As expounded in the preceding paragraphs, the fact that Law N°68/2018 of 30/08/2018 criminalizes adultery, concubinage and desertion of the marital home, and even lays down the penalties thereof, should not be construed as damaging the family. After all, imprisonment is not imposed only for the crimes discussed herein, but also for other crimes; it is a lawful

penalty under Rwandan law, and it is imposed with the purpose to both punish and deter. There is no reason to construe the application of this legal penalty to the crimes of adultery, concubinage and desertion of the marital home as infringing on the flourishing of the family. Of course, imprisonment for any crime necessarily encroaches on the flourishing of the one convicted, but here there is no exceptional negative impact on the family as a whole.

3. Impeding reconciliation and forgiveness between the spouses

- [49] Another argument advanced by Mugisha Richard in moving the Court to repeal Article 136 (providing for the crime of adultery), Article 138 (providing for the crime of concubinage), and Article 139 (providing for the crime of desertion of the marital home) is that these provisions impede reconciliation and forgiveness between spouses.
- [50] Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states that the prosecution of the crimes mentioned in the preceding paragraph can only be initiated upon complaint of the offended spouse. Article 140 makes the same provision for concubinage and desertion of the marital home. It is the finding of this Court that, given that the prosecution of these three crimes is inevitably preceded by the lodging of a claim by an offended spouse, the law does not deprive the spouses of any wished-for time of reunion and forgiveness; no prosecution for the crime of adultery would take place without the complaint of one of the spouses.
- [51] Aside from the fact that these crimes are prosecuted only when the offended spouse initiates the claim in court, the law also

allows the offended spouse to request that the proceedings be terminated at any stage of the proceedings if the complainant withdraws the complaint. This shows that the field for reconciliation and forgiveness between spouses is broad; if the offended partner and the defendant were not able to reconcile before the prosecution commences, they are still allowed to do so during the court hearings. The fact that the case was able to proceed through prosecution to the sentencing stage means that the parties were unable to reconcile because of other reasons but not because the law prevented them from doing so.

- [52] For most crimes, the offended party normally has no prerogative to initiate the prosecution or terminate it at any stage of procedure. Moreover, reconciliation and forgiveness between the offender and the offended does not halt the prosecution of the crime (for instance, a victim of rape or child sexual harassment may reconcile with the perpetrator, but the prosecution continues). It is therefore in the finding of the Court that the provisions of the law on the crime of adultery, concubinage and desertion of the marital home do not contradict the objective of forgiveness in the family. Nevertheless, the Court notes that some paragraphs of these Articles do impede reconciliation and forgiveness between spouses. It is again in the finding of this court that, regarding the prosecution of the crimes of adultery, concubinage and desertion of the marital home, there are two different paragraphs in each of Articles 136 and 140 which may contradict each other
- [53] As provided by Articles 136 and 140 of Law No 68/2018 of 30/08/2018 determining offences and penalties in general, prosecution of the crimes of adultery, concubinage and desertion of the marital home can only be initiated upon complaint by the

offended spouse. The same Articles give the offended spouse authority to terminate the proceedings at any stage of procedure if he or she retracts and withdraws the complaint. However, if the matter has already been brought before the court, or if a decision in the matter has been made, the offended spouse no longer has the prerogative to terminate the proceedings without the approval of a judge.

[54] According to Article 136, paragraph 4, of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, if the matter has already been brought before the court, or if a decision thereon has been made, retraction does not stop the consideration of the case or the execution of the judgement. The judge considers the case after which he or she can accept or refuse such a retraction with justification. The same allowance is made in the last paragraph of Article 140, which concerns the prosecution of the crimes of concubinage and desertion of the marital home. Within these two paragraphs, it is manifestly clear that the judge may, even if requested by the offended spouse, refuse to terminate the proceedings.

[55] The first paragraphs of both Articles 136 and 140 give the offended spouse who wishes to terminate the proceedings the prerogative to do so, but the second paragraphs shift this discretion to the judge who may refuse to allow the termination. This Court therefore finds that the second paragraph encroaches on the right of the offended spouse who wishes to terminate the proceedings for reasons of his or her own. Thus, paragraphs 4 and 5 of Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general serve no purpose and should be repealed. If the offended spouse was given the authority to terminate the proceedings, he or she should be able to freely do

so without any hindrance. With regard to stopping the proceedings or the execution of the judgement that has effects on the co-offender, this provision can be incorporated in paragraph 3 of the same Article so as not to create a gap in the law.

- [56] For the reasons expounded herein, it is in the finding of the Supreme Court that Articles 136, 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are not contrary to Article 18 of the Constitution of the Republic. They envisage adultery, concubinage and desertion of the marital home as crimes punishable by imprisonment, but they do not threaten the flourishing of the family nor lead to its ruin. Furthermore, the way these crimes are prosecuted does not impede reconciliation and forgiveness between the spouses, save paragraphs 4 and 5 of Article 136. The Court finds that these Articles implement the state mandate of protecting the family.
 - b. Whether Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, providing for the crime of public defamation of religious rituals, contravenes Article 38 of the Constitution of the Republic on the freedom of press, of expression and of access to information
- [57] Mugisha Richard argues that Article 154 provides that any person who publicly defames religious rituals, symbols and religious cult objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. He proceeds to argue that the provisions of this Article are not explicit enough, which may result in its misapplication and the unjust prosecution of one who

has committed such an act. He further argues that it encroaches on the freedom of press and of expression.

- [58] Advocate Nkundabarashi Moïse and Advocate Kabasinga Florida representing Mugisha Richard argue that Article 154 is likely to infringe on the press's freedom of expression with regard to religions and their functioning, as, for fear of prosecution under this law, journalists will fear to criticize religions.
- [59] State Attorney Kabibi Speçiose contends that, even if some of the stipulations of Article 154 are ambiguous, this does not constitute ground to repeal the whole law or article. Rather, it should be interpreted that the crimes featured in this article do not concern journalists only, since the laws uses the phrase: "Any person..."
- [60] Advocate Musore Gakunzi Valery representing Rwanda Journalists Association (ARJ) argues that Article 154 disregards the people's freedom of religion to the degree that its provisions may discourage people from airing their views on the beliefs of others. He presents to the Court two schools of thought: first, freedom of expression constitutes the backbone of democracy and should be fostered; and second, freedom of religion should be protected in an exceptional way, even from freedom of expression.
- [61] Musore Gakunzi proceeds to contend that defamation of religious rituals targets the religion itself and its foundational beliefs, but is distinct from defaming a religious leader him or herself. Thus, since rights and freedoms belong to a person and not to a religion per se, there is no need to criminalize public defamation of religious rituals when freedom of expression is being exercised. He argues that enacting criminal laws against a

journalist who has published an article or has expressed his or her constructive opinions would interfere with the functioning of the press in general and is contrary to Article 38 of the Constitution. If a person or an organization with legal standing believes that it has been defamed by the press or a journalist, the person or organization can lodge a claim to seek justice and damages in civil courts

- [62] Bikesha Denis, Ruvebana Etienne and Sezirahiga Yves, representing University of Rwanda School of Law, argue that Article 154 is ambiguous since it does not define what religion really is, nor does it define where religious rituals are designated to be performed or where they are normally observed. This suggests that leaving the Article in its current state would be unjust, as there should a clear definition of religion and its rituals. If the constituent elements of a crime are vague, the principle of legal certainty holds that the act must be treated as no crime, for no one shall be held guilty of any criminal offence on account of any act or omission which is not clearly defined by law as a crime.
- [63] Article 38 of the Constitution of the Republic of Rwanda states: "Freedom of press, of expression and of access to information are recognized and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law."
- [64] Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states: "Any person who publicly defames religious rituals, symbols and religious cult objects by use of actions, words, signs, writings, gestures or

threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than fifteen (15) days but less than three (3) months and a fine of not less than one hundred thousand Rwandan francs (FRW 100,000) and not more than two hundred thousand Rwandan francs (FRW 2,000,000) or only one of the penalties."

Article 38 of the Constitution establishes the principle that the freedom of press, of expression and of access to information are recognized and guaranteed by the State. It also lays down another principle: there are some essential values that shall not be prejudiced by these freedoms. A clear definition of the freedom of press, of expression and of access to information is found in Article 19 of the Universal Declaration of Human Rights of 1948: "This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."4 The same sentiment is expressed in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁵ Given that freedom of press, of expression and of access to information are recognized by the Constitution of the Republic of Rwanda, anything that prejudices these freedoms—including laws—is categorically contrary to the Constitution.

[66] In exercising the freedoms protected by Article 38 of the Constitution, a person may express his or her opinion about

 5 International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. And Rwanda adopted it on 12/02/1975 (see the decree law N° 8/75 of 12/02/1975, official gazette n° 5 of 01/03/1975

⁴ Rwanda ratified and adopted it on 18/09/1962

religious rituals, symbols and religious cult objects. Also, a person has the right to seek, receive and impart information and opinions in the public about religious rituals, symbols and religious cult objects and may criticize these without fear, even to the displeasure of those in power, as long as he or she does not act contrary to those essential values the Article 38 protects.

- [67] Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general punishes the act of public defamation of religious rituals, symbols and religious cult objects. It also states that defamation may be in the form of actions, words, signs, writings or gestures. Based on its language, the Court notes that this Article prejudices the right to seek, receive and impart information and opinions in the public concerning religious rituals, symbols and religious cult objects, because any person wishing to criticise any religion would fear that he or she would be prosecuted for committing the crime of defamation. As stressed above, the freedom of press, of expression and of access to information are recognized by the Constitution and should not be prejudiced by anything.
- [68] The freedom of press, of expression and of access to information regarding religious rituals, symbols and religious cult objects should not be impeded by the prosecution of any person who would like to comment on a religion. The importance of the freedom to criticise religion was articulated by the U.N. Human Rights Committee who stated in 2011 that it is not appropriate for any country to prohibit religious dissent or prosecute those who criticize religious leaders or beliefs of the religion.
- [69] The U.N. committee expressed its concern in these words: "Prohibitions of displays of lack of respect for a religion or other

belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith". ⁶

[70] In 2007, in order to preserve the freedom of press and of access to information, the Parliamentary Assembly of the Council of Europe adopted a resolution requesting the decriminalisation of blasphemy in the domestic laws of the member states. The resolution reads: "The Assembly recommends that the Committee of Ministers ensure that national law and practice are reviewed in order to decriminalize blasphemy as an insult to a religion [...]"

[71] Many member states of that organization have hitherto removed from their laws the crime of blasphemy.⁸ Numerous countries from other continents have done so as well. For example, in North America, Canada officially repealed its

⁶ UN Human Rights Committee, General Comment 34 on the International Covenant on Civil and Political Rights,

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concerning freedoms of opinion and expression. Paragraph 48. July 2011.

⁷ Recommendation 1805 (2007) of the Parliamentary Assembly of the Council of Europe

⁸ Sweden in 1970, Norway in 2015, Netherlands in 2014, Iceland in 2015, Malta in 2016, and others.

blasphemy law in December 2018, whereas in the United States of America, blasphemy was never criminalized at all. In the view of this Court, Rwanda can and should follow the example of other countries by repealing the articles penalizing blasphemy in order to protect the freedom of expression, of the press and access to information. Criminalizing blasphemy is a tool used by governments wishing to protect their state religion. But Rwanda, as provided in Article 4 of the Constitution of the Republic, is a secular state.⁹

[72] As Rwanda has no state religion, it is not appropriate for the State to enact laws penalizing those who publicly defame religious rituals. This would not be in the public interest but only in the interest of a particular religion. Anyone offended by another person's speech or expression on his or her religion should file a civil case on the matter. As was articulated in the case of *Joseph Burstyn, Inc. v. Wilson* decided by the Supreme Court of the United States of America, it is not for the government to protect religious beliefs from any attack, whether through publications, speeches or motion pictures. The court in Burstyn expressed its stance on this matter in these words: "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious' doctrine, whether they appear in publications, speeches or motion pictures." 10

[73] In light of the arguments expounded above, the Supreme Court acknowledges that Article 154 of the law determining offences and penalties in general defines public defamation of religious rituals as a crime. The Court finds, however, that this is

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⁹ That Article states: "Rwandan State is an independent, sovereign, democratic, social and secular Republic [...]"

¹⁰ U.S. Supreme Court, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)

contrary to Article 38 of the Constitution, since it prejudices the freedom of press, of expression and of access to information.

- c. Whether Article 233 of Law N°68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 15 and Article 38 of the Constitution of the Republic of Rwanda
- [74] Mugisha Richard contends that Article 233 is contrary to Article 15 and Article 38 of the Constitution because it discriminates among the people it is meant to protect, and because it prejudices the freedom of press, of expression and of access to information. He further contends that, while he does not approve of defamation or humiliation of anybody, his prayer to the Court is the removal of these Articles from the penal code, as there are other methods appropriate for defending the victims of defamation or insults (such as the provision in the media law whereby the offended party may initiate a claim for damages in civil court).
- [75] Advocate Nkundabarashi Moïse and Advocate Kabasinga Florida, representing MUGISHA Richard, point out that there are multiple international conventions ratified by Rwanda that provide that all people have the right to express their views whatever they may be, as long as they do not prejudice the good reputations of others. While they concede that these international instruments provide limits on the freedom of expression in the service of other rights, they maintain that Article 233 has nothing to do with protecting these rights; rather, it generally prohibits both the press and the citizens from criticizing the leaders mentioned in the law.

- [76] State Attorney Kabibi Speciose responds that the stipulations of Article 233 do not prejudice the freedom and the rights of journalists, given that their freedoms are limited by respect for the freedom and the rights of other Rwandans. She contends that Article 15 of the Constitution of the Republic advances two relevant and notable points: equality before the law and equal protection of the law, both of which imply that all people should be treated equally whenever they are in the same circumstances. By this reasoning, some people are protected by the law not because they are fundamentally different from others, but because they are fulfilling certain duties or performing work in government organs. Thus, it is not the case that people are protected unequally, as the protection attaches not to a group of people per se, but to a certain set of offices. If a national leader or other covered person vacates his or her office, the legal protection passes on to his or her successor.
- [77] State Attorney Kabibi proceeds to argue that the unequal treatment of people based on the categories to which they belong does not equal violation of the principle of equality before the law. On the contrary, what equality before the law guards against is the unequal treatment or protection of people in the same category. Thus, if there are different categories of people or staff, there should also be different laws governing those categories and the specific nature and functioning of the work they do.
- [78] Advocate Musore Gakunzi Valery, representing Rwanda Journalists Association (ARJ) urges the Court to remember that in the media law, there are already provisions determining how rights are exercised and how journalists are monitored, which ensures that they do not violate the human dignity. A journalist

who acts contrary to these provisions will face justice in civil court.

- [79] Advocate Musore Gakunzi Valery proceeds by arguing that Article 233 violates the freedom of press and of expression as it criminalizes the act of publishing information on the poor performance of leaders or public servants. A public servant should not fear to have information on their activities published if they are really innocent of wrongdoing. Moreover, there is no way to combat the mismanagement of government property without publishing legally procured information on the officials' actions, even if it is detrimental to the officials whose information is published. He argues that Article 233 protects public servants and other people in charge of public services even when they manifest misconduct. At such time these officials should not be protected from any comment or criticism.
- [80] Next, Advocate Musore Gakunzi Valery addresses the issue of cartoons. He contends that drawing someone in cartoons is not itself injurious, that it is ordinarily done in the public interest, and that if anyone feels defamed, he or she should lodge a complaint seeking civil damages in the court. Imprisoning a person on grounds of defamation does not restore a victim's dignity, and granting appropriate civil damages is better suited to the goal of making the victim whole.
- [81] Bikesha Denis, Ruvebana Etienne and Sezirahiga Yves further contend that Article 233 does not distinguish between the time at which one of the members featured in that article is "exercising his/her mandate" and when the exercise is solely "in connection with the performance of his/her duties", nor does it elucidate whether the persons protected by this Article include all public servants. It also does not define what defamation really

means. For these reasons, they argue that this article is contrary to the principle of legal certainty.

- The attorneys proceeds to contend that Article 233 is ambiguous on the grounds that among the people it protects, there is the category of "any other person in charge of a public service". However, determining who is considered "any other person in charge of a public service" is problematic, given that not all public services are provided by public servants, since there are some private persons who provide services that are important to the general public. Furthermore, the law refers to a person "when exercising his/her mandate," but what is the extent of such exercise? Would a public servant be protected if humiliated while en route to their workplace during a long commute? Would travelling to the workplace be in exercise of official duties, and thus within the ambit of what is penalized by the law? They further contend that the act of humiliation is itself difficult to define since it is subjectively determined and depends on the victim's own perception of what is humiliating. Since this Article is ambiguous, yet laws should in principle be certain, the Article is fundamentally flawed and interferes with the freedom of expression.
- [83] They next contend that this Article is flawed in that it intends to protect one group of people—the public servants—and this is contrary to the principles of equal protection and equality before the law. According to their interpretation of the Article, public servants are hereby protected in the exercise of their mandate, but similar employees from private institutions are left out. They contend that the Article's explicit mention of leaders, security officers and "any other person in charge of a public service", insinuates that if any other person not featured in the

article (for instance, a private entrepreneur) is defamed, the defamation shall not constitute a crime. This, they maintain, is contrary to the principle of equality before the law; the Article discriminates among groups of people based on their duties.

THE FINDING OF THE COURT

i. Whether Article 233 violates equal protection

- [84] Article 15 of the Constitution of the Republic states: "All persons are equal before the law. They are entitled to equal protection of the law."
- [85] Article 233 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states: "Any person who, verbally, by gestures or threats, in writings or cartoons, humiliates a member of Parliament when exercising his/her mandate, a member of the Cabinet, security officers or any other person in charge of a public service in the performance or in connection with the performance of his/her duties, commits an offence [...]"
- [86] Mugisha Richard asks the Court to repeal Article 233 on the grounds that it treats people unequally under the law by protecting only one category of people—public servants—and thus is contrary to Article 15 of the Constitution of the Republic of Rwanda. He is also of the view that Article 233 is contrary to Article 38 of the Constitution since it violates the freedom of press, of expression and of access to information.
- [87] The title of Article 233 is: "Humiliation of national authorities and persons in charge of public service". As made clear by this title, the Article's intent is to punish persons who

humiliate those in the category of national leaders and persons in charge of public service. However, the Article is silent on the humiliation of persons outside these categories. This connotes that any person who does not fall in the specified categories cannot be protected through the procedures laid down in the penal laws if they are humiliated, since under Rwanda law, humiliation is a crime only when the offended is a national authority or a person in charge of public service.

[88] The scope of Article 233 is manifestly based on a category of people and the duties they perform. The Court believes that there is no justification for the enactment of a provision of this kind which criminalizes an act when committed against a certain category of people exercising certain duties, and permits the same act to be committed against others. Such a difference is unjustified, especially since there are people outside the group mentioned in Article 233, be they in the private sector or nongovernmental organizations, whose positions might also make them targets of humiliation to the prejudice of their dignity. Yet, in such cases the offender would not be prosecuted under this law.

[89] Laws that differentiate between groups of people are not discriminatory per se. Distinctions can be reasonably made to defend persons in a vulnerable category. That is the reason why many laws specifically protect women and children. Where such a distinction is drawn, the legitimate objective should be manifestly clear to everybody, and the method used to achieve the legitimate objective should be proportionate to its end.

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¹¹ Take the examples of Law N° 54/2011 Of 14/12/2011, Relating to The Rights and The Protection of the Child, and Article 10 part 4 of the Constitution of the Republic, which provides for "women occupying at least thirty percent (30%) of positions in decision-making organs."

- [90] The State Attorney argues that the meaning of Article 15 of the Constitution of the Republic of Rwanda is that people should be treated equally when they are in the same circumstances, but if they are not, there are reasons they might justly be treated unequally. True as this reasoning is, with regard to this case, no reasonable and indispensable argument has been tendered to justify the special protection of the categories of public servants in question. State Attorney KABIBI Speçiose argues that the national leaders and other public servants mentioned in Article 233 are exceptional persons such as vulnerable persons protected by other laws, but she does not demonstrate to the Court how they are vulnerable.
- Another issue, raised by amicus curiae, the University of [91] Rwanda School of Law, is that Article 233 does not sufficiently indicate who is protected by it, whether it refers to all public servants, or only the national leadership. The Article speaks of a member of Parliament, a member of the Cabinet, security officers or "any other person in charge of a public service". It could be said that this protection covers all public servants against humiliation, a large group with no exceptionality to justify its special protection beyond that of others who do not work for the state. Furthermore, it is not clear in the law what it means to humiliate a person "in the exercise of his/her duty or in connection with the performance of his/her duties". This may confuse people who might not know when they risk committing such a crime. Such laws are contrary to the principle of legal certainty. This is well expounded by the legal scholar Tridimas, who wrote "the principle of legal certainty and legitimate expectation provides an important assertion of the rule of law that

those subject to the law must know what the law is so as to plan their action accordingly". 12

[92] Upon considering the arguments tendered by the parties,, the Court finds that Article 233 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 15 of the Constitution of the Republic of Rwanda, which provides that all persons are equal before the law and are entitled to equal protection of the law. As elucidated above, Article 233 treats people differently and does not protect them equally.

ii. Whether Article 233 unjustly limits the freedom of press, of expression and of access to information

[93] Article 38 of the Constitution of the Republic of Rwanda provides that "[f]reedom of press, of expression and of access to information are recognized and guaranteed by the State". Article 233 of the of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general provides that any person who, "verbally, by gestures or threats, or in writings or cartoons", humiliates a national leader or other person in charge of a public service, commits an offence.

[94] Article 19 of the Universal Declaration of Human Rights¹³ defines freedom of expression and access to information in the following words: "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

¹² T. Tridimas, *The General Principles of EC Law* (OUP, 2nd ed., 206).

¹³ Rwanda ratified this agreement on 18/09/1963.

[95] These rights are also provided in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)¹⁴, in the following words:

Everyone shall have the right to hold opinions without interference.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (ordre public), or of public health or morals.

[96] As stipulated in Article 19 of the international convention mentioned in the preceding paragraphs, all people have the right to express their opinions without interference or fear. Freedom of expression encompasses seeking and receiving information and expressing one's opinions without interference, whether orally, in writing, or through any other medium of one's choice. The International Covenant on Civil and Political Rights (ICCPR) stresses that these rights are restricted by the respect for the rights

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¹⁴ International Covenant on Civil and Political Rights (ICCPR).

and reputations of others and by the exigencies of national security, public order (*ordre public*), and public health or morals.

[97] This Court finds that the Article penalizing humiliation, either verbally, by gestures or threats, or in writings or cartoons, violates constitutionally protected freedoms, since someone may fear that if he or she expresses his or her opinion by publishing an article criticizing a member of Parliament, a member of the Cabinet, security officers or any other person in charge of a public service, he or she risks prosecution if the criticised leader is not pleased with the opinion or information. Freedom of press, of expression and of access to information about the activities of national leaders and any other person covered by Article 233 should not in any circumstance be prejudiced by the fear that an opinion critical of a leader shall be construed as humiliation.

[98] Freedom of expression, and the freedom to impart information on the activities of national leaders, underscores the democratic principle of transparency and accountability by the leaders who serve the people. This was the sentiment expressed by the U.N. Human Rights Committee when it wrote: "freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights." ¹⁵

[99] Article 4 of the Constitution of the Republic of Rwanda states: "The Rwandan State is an independent, sovereign, democratic, social and secular Republic." The same Article

¹⁵ United Nations ("UN") Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (12 September 2011) ("General Comment No. 34"), par. 3.

proceeds: "The founding principle of the Republic of Rwanda is 'Government of Rwandans, by Rwandans and for Rwandans'". Freedom of expression is one of the principles of any democratic state and should not be restricted for certain people. A similar view was expressed by the European Court of Human Rights in the case Handyside v. United Kingdom in the following words: "Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society". 16 This suggests that opinions or information need not gratify those in power to merit protection. On the contrary, ideas of those critical of both the administration and some of the citizens should be allowed to be brought to light. When there are no diverse opinions, tolerance, "thinking big", and even democracy become unrealistic. That is the reason that the Article penalizing humiliation of national leaders and person in charge of a public service should be understood to violate the principle of freedom of expression in a democratic country.

[100] Freedom of expression and the freedom to seek and impart information should be exercised without threats or harassment. The U.N. Human Rights Committee has adopted the position that "intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of

¹⁶ European Court of Human Rights, Handyside v. United Kingdom, Judgement of 7 Dec. 1976, Series A no. 24.

the opinions they may hold, constitutes a violation of Article 19". Therefore, the Court finds that the fact that Article 233 provides for the imprisonment of anyone who humiliates national leaders, security officers and persons in charge of a public service would hamper people from expressing their views freely; therefore, the Article violates the right to critically examine and disseminate information on the conduct of those leaders.

[101] The Court further finds that Article 233 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, which provides that "[a]ny person who, verbally, by gestures or threats, in writings or cartoons, humiliates national authorities and persons in charge of public service mentioned in this Article", is contrary to Article 38 of the Constitution of the Republic of Rwanda. This Article states: "Freedom of press, of expression and of access to information are recognized and guaranteed by the State." As expounded above, Article 233 impedes people from exercising those freedoms, since people may fear that if they criticize or publish any information about the people protected under Article 233, they will be prosecuted for humiliating national leaders and persons in charge of public service.

iv. Whether Article 236 of the of Law $N^068/2018$ of 30/08/2018 determining offences and penalties in general is contrary to Articles 15 and 38 of the Constitution of the Republic of Rwanda

[102] Richard Mugisha avers that Article 236 which provides that any person who insults or defames the President of the

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¹⁷ Communication No. 414/1990, Mika Miha v. Equatorial Guinea, Views adopted on 8 July 1994.

Republic, commits an offence, may be used as a pretext for interfering with the freedom of press, considering that the crime of defamation is itself unclear. He further argues that Article 236 is contrary to Article 15 of the Constitution since it does not protect people equally because it punishes only those who insult or defame one particular person.

[103] State Attorney Kabibi Speçiose's position is that Article 236 does not cover the crimes likely to be committed by journalists only, but rather by all people, and that it is nowhere provided in the Article that it specifically concerns journalists. She contends that the freedom of press is limited by the honour and security of the leader. Besides, Article 236 does not prevent the press from publishing anything on the President of the Republic; rather, it prohibits only insulting or defaming him or her.

[104] Advocate Musore Gakunzi Valery, representing the Rwanda Journalists Association (ARJ) concurs that given the nature of his or her responsibilities, the President of the Republic should receive the highest level of respect. However, publishing information on him or her must not be criminalized, because such a law would undermine the principle of accountability. Accordingly, the fact that the crime of general defamation is omitted from the penal code means also that it should not be retained only in the case of the President of the Republic, especially since Article 161 already punishes whoever insults another person. Therefore, to assert that writing about the President of the Republic is synonymous with insulting him or her is to insinuate that no one is allowed to publish anything about the President of the Republic.

[105] Bikesha Denis, Ruvebana Etienne and Sezirahiga Yves argue that Article 236 addresses the crime of insults or defamation against the President of the Republic. Whereas Article 161 punishes the crime of insult only if it is committed in public, Article 236 penalizes insults against the President wherever they may occur. Were such protection extended to the general public, any person might falsely accuse another of insulting him or her in private and in a secret place and that person may be prosecuted for the same.

[106] They proceed to contend that Article 236 concerns defaming only the President of the Republic, a crime that was omitted from the penal code for other people on the grounds that it was ambiguous and a threat to freedom of expression and freedom of press. They argue that Article 236 is contrary to the principle set out in Article 15 of the Constitution of the Republic, which states that "[a]ll persons are equal before the law, and they are entitled to equal protection of the law", and the same grounds that occasioned the repealing of this crime for other people should be applied in repealing the crime of defaming the President of the Republic.

THE FINDING OF THE COURT

[107] Article 15 of the Constitution of the Republic of Rwanda states: "All persons are equal before the law. They are entitled to equal protection of the law." Article 38 of the same law states: "Freedom of press, of expression and of access to information are recognised and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of

personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law."

[108] Article 236 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states: "Any person who insults or defames the President of the Republic, commits an offence. Upon conviction, he/she is liable to a term [of] imprisonment of not less than five (5) years and not more than seven (7) years and a fine of more than five million (FRW 5,000,000) Rwandan francs and not more than seven million (FRW 7,000,000) Rwandan francs."

a. Whether Article 236 violates equal protection

[109] Article 236 provides that insulting or defaming the President of the Republic is a crime punishable by imprisonment up to five (5) years and a fine of up to seven million Rwandan francs (FRW 7,000,000). Much as this Article penalizes a person who insults the President of the Republic, there is another provision of Law N° 68/2018 of 30/08/2018 which penalizes public insult of any person.

[110] Article 161 of Law N° 68/2018 of 30/08/2018 states: "Any person who publicly insults another person, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than fifteen (15) days and not more than two (2) months; a fine of not less than one hundred thousand Rwandan francs (FRW 100,000) and not more than two hundred thousand Rwandan francs (FRW 200,000); community service for a period of not more than fifteen (15) days or only one of these penalties. [....]". Both Articles 161 and 236 envisage insulting as a crime. The Court is persuaded to believe that Mugisha Richard's argument that Article 236 only protects the President of the

Republic is immaterial, on the basis that, according to Article 161, any person who publicly insults another person commits an offence. Hence, insulting is a crime, regardless of who the victim is.

[111] However, the Court finds that there is a disparity between the penalties imposed by the two Articles that criminalize insulting. He who publicly insults another person shall be liable to an imprisonment term of not less than fifteen (15) days and not more than two (2) months; a fine of not less than one hundred thousand Rwandan francs (FRW 100,000) and not more than two hundred thousand Rwandan francs (FRW 200,000); whereas he who insults the President of the Republic shall be liable to a term of imprisonment of not less than five (5) years and not more than seven (7) years and a fine of more than five million (FRW 5,000,000) Rwandan francs and not more than seven million (FRW 7,000,000) Rwandan francs.

[112] These penalties are clearly different. The penalties for the crime of insulting the President of the Republic is heavier compared to those for the crime of insulting other people. The Court cannot determine whether Article 236 should be repealed just because it provides for penalties different from those provided in Article 161, since this matter is not the subject matter of the case and thus it was not argued by the parties. Nonetheless, the Court is convinced that this difference in penalties should be narrowed so that the penalties for one who insults the president of the Republic is proportionate to the gravity of the crime. Therefore, the Court hereby requests the competent organs to attend to this matter.

[113] Another difference between Article 236 and 161 is that Article 236, applying only to the President of the Republic,

criminalises not only insult but also defamation. Defaming the President of the Republic, foreign heads of states or the representatives of foreign countries or international organizations while they are in Rwanda are the only acts of defamation penalized with criminal sanctions in Rwanda. Humiliating leaders other than those mentioned in this paragraph in not a crime; instead, a person who is humiliated may lodge a claim seeking damages. It is thus in the finding of the Court that, concerning the impugned Article 236, particularly the paragraph on the crime of humiliation, a distinction is made between defaming the President of the Republic and any other person. The Court finds that this disparity is valid, as it is based on the unique position of the President of the Republic.

[114] The Supreme Court held in the Uwinkindi case (N° RS/INCONST/PEN0005/12/CS), which was decided on 22/02/2013, that legal distinctions between classes of people are not discriminatory when the differentiation intends to achieve a goal that is valid, licit and clear to everyone, and when the rationale for the distinction serves the public interest. The Court recalls that a similar view was expressed by the U.N. Human Rights Committee in its resolution adopted at the Thirty-Seventh Session of the Human Rights Committee with the following words: "finally, the committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant". ¹⁸ Following this reasoning, the Court acknowledges that there are grounds that may justify the criminalization of

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¹⁸ Human Rights Committee, General Comment XVIII, Non-discrimination (1989), www.unhcr.org/refworld/type.

defaming the President of the Republic while holding a different standard for the defamation of other people.

- [115] The Constitution of the Republic of Rwanda grants the President of the Republic diverse responsibilities, chief among them being the following:
 - The President of the Republic is the Head of State. (Article 98)
 - The President of the Republic is the defender of the Constitution and the guarantor of national unity. (Article 98)
 - The President of the Republic ensures the continuity of the State, the independence and sovereignty of the country, and respect for international treaties. (Article 98)
 - Executive Power is vested in the President of the Republic and in the Cabinet. (Article 97)
 - The President of the Republic is the Commander-in-Chief of the Rwanda Defence Force. (Article 108)
 - The President of the Republic represents Rwanda in its foreign relations. He or she may also designate his or her representative. (Article 111)
 - The president also has a legislative role as he or she adopts laws and is vested with the authority to enact presidential decrees.
- [116] As the head of state, the President of the Republic ensures, preserves and represents the unity of the nation. Defaming the president would adversely affect this unity if people give credence to disparaging and untrue publications about him or her.

Thus, any person who would like to publish anything about the President of the Republic should meticulously and diligently ensure the truth of any statements so as not to publish allegations that would mislead the public.

[117] The Constitution of the Republic provides for many procedures that are manifestly different for the President of the Republic from those for other national appointed or elected leaders. These include procedures for appointment, removal from office, prosecution (in case he or she commits a crime) and immunity. The uniqueness of the President's office is only compounded by the immense responsibilities explained above. It is in the finding of this Court that the President of the Republic is so distinctive that establishing special laws protecting or governing him or her is reasonable and material. Therefore, the fact that Article 236 envisages defamation as a crime when perpetrated against the President of the Republic and not a crime against other persons accords with the singularity of the President's responsibilities. Article 236 is thus valid and material.

b. Whether Article 236 violates the freedom of press, expression and access to information

[118] The foregoing paragraphs analyse whether punishing defamation of the national authorities and persons in charge of public service violates the freedom of press, expression and access to information. The rights to express, seek and impart information are important rights that should not be prejudiced unduly. Freedom of press, expression and access to information are provided in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). In its General Comment Number 34 which expounds more on this topic, the Human Rights Committee (the Committee) requested that the state parties to the

Convention decriminalize defamation, and declared that any sentence of imprisonment is not proportional to the crime: "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others." The second part of this provision denotes that decriminalization of defamation of the President of the Republic has not vet become an international principle. It is thus that the U.N. Committee suggested that laws criminalizing defamation should be abolished while allowing that, in cases where they are still in application, they should be applied diligently and only in serious cases.

[119] The Court finds that there is a difference between defaming the President of the Republic and defaming other people. Even the effects of defamation on the two categories of people are different. When defamation is committed against other people, the offended can seek damages by lodging a civil case in the court. The number and the gravity of presidential responsibilities attract many opinions and much coverage in the press. Therefore, if insulting or defaming the President of the Republic were not prosecuted as a crime, he or she would be forced to resort to civil procedures to obtain redress for every instance of defamation. The Court is of the stance that it would impede the president's responsibilities and the respect due to his

¹⁹ U.N. Human Rights Committee, General Comment 34, on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression, Paragraph 47, July 2011.

or her office if the president were forced to divert attention from his or her heavy responsibilities and divert attention to seeking justice.

[120] The fact that insulting or defaming the President of the Republic is a crime should be understood as protecting his or her responsibilities and the people he or she represents, rather than as a violation of the freedom of press, expression and access to information. For this reason, everyone should be diligent when sharing opinions and imparting information, in order to not unnecessarily insult, defame or humiliate anyone. Insulting and humiliating any person, let alone the President of the Republic, is not appropriate. Nevertheless, prosecuting a person accused of insulting and defaming the President of the Republic should not be a hasty matter. It must be examined and determined with care that the matter is manifestly a serious case before the prosecution initiates a case before the court. In case the accused is before the court, the prosecution should prove beyond reasonable doubt that all the elements of the crime are fulfilled, as with any other criminal case 20

[121] Article 41 of the Constitution of the Republic states: "In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people's rights and freedoms, as well as public morals, public order and social welfare which generally characterize a democratic society." According to this Article, in

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²⁰This serves to remind us that the burden of proof in criminal cases is different from the one in civil ones. In criminal matters, the standard of the burden of proof is high, as there should be no reasonable doubt. In civil matters, by contrast, only a preponderance of the evidence is required, or what one may call "the balance of probabilities".

exercising his or her rights and freedoms, every person is restricted by the law which intends to preserve matters like **public morals** and **public order**. The Court notes that the existence of an article that penalizes whoever defames the President of the Republic serves to protect the public order, given that the president represents the public.

[122] Laws criminalizing insult or defamation of the President of the Republic are not exclusive to Rwanda. Various states that adhere to democratic principles have, among their laws, provisions that penalize whoever insults the nation's head of state. These countries include, inter alia, Germany, Greece, Iceland, Italy, Netherlands, Portugal, Spain and Sweden. Nonetheless, in all these countries, as reported by the Organization for Security and Cooperation in Europe, both the minimum and maximum penalties for such an offense are less than those provided in Article 236.²¹

[123] Following the reasoning expounded in the preceding paragraphs, the Court finds that criminalizing defaming and insulting the President of the Republic does not in any way violate the freedom of press, expression and access to information. The uniqueness of the President's responsibilities merits special protection.

Organization for Security and Cooperation in Europe "Defamation and Insult Laws in the OSCE Region: A Comparative Study" March 2017.

General Conclusion

[124] In light of the findings above on each legal issue in this case, this Court finds that paragraphs 1 and 2 of Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are not contrary to Article 18 of the Constitution of the Republic of Rwanda. As expounded, penalizing adultery does not violate the flourishing of the family. Rather, the law intends to protect the family.

[125] As elucidated above, the last two paragraphs of the same Article do not grant full discretion to the offended spouse to terminate the proceedings at any stage of the procedure. The Court finds that the last two paragraphs should be repealed and the third paragraph should be amended as follows: "[....] The offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint. Stopping the proceedings or the execution of the judgement has effects on the co-offender."

[126] The Court finds that Articles 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general do not contravene Article 18 of the Constitution. As expounded, penalizing those crimes does not endanger the flourishing of the family.

[127] The Court finds that Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 38 of the Constitution since it violates the freedom of press, expression and access to information.

[128] The Court finds that Article 233 of Law No 68/2018 of 30/08/2018 determining offences and penalties in general is

contrary to Articles 15 and 38 of the Constitution of the Republic of Rwanda. Article 233 does not equally protect the people and it violates the freedom of press, expression and access to information.

[129] The Court finds that Article 236 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to Articles 15 and 38 of the Constitution of the Republic of Rwanda as alleged because of the unique presidential responsibilities that accord him or her the prerogative of being protected by the laws in an exclusive manner.

III. THE CONCLUSION

As a result, this Court makes the following declarations and orders:

- [130] Declares that the petition lodged by MUGISHA Richard seeking the order to declare that Articles 136, 138, 139, 154 and 233 of Law No 68/2018 of 30/08/2018 determining offences and penalties in general are contrary to the Constitution of the Republic, especially Articles 15, 18, and 38 of the Constitution, succeeds in part.
- [131] Declares that paragraphs 1, 2 and 3 of Article 136 of Law N^{o} 68/2018 of 30/08/2018 determining offences and penalties in general are not contrary to Article 18 of the Constitution.
- [132] Declares that paragraph 3 of Article 136 is hereby reframed in the following manner: "The offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint.

Stopping the proceedings or the execution of the judgement has effects on the co-offender."

- [133] Declares that paragraphs 4 and 5 of Article 136 of Law N^{o} 68/2018 of 30/08/2018 determining offences and penalties in general are invalid and of no effect.
- [134] Declares that Articles 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are not contrary to Article 18 of the Constitution.
- [135] Declares that Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 38 of the Constitution and thus is hereby repealed.
- [136] Declares that Article 233 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Articles 15 and 38 of the Constitution. This Article is hereby repealed.
- [137] Declares that Article 236 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to Articles 15 and 38 of the Constitution.
- [138] Orders that this judgment be published in the official gazette of the Republic of Rwanda.

PROCEDURAL CASES

CASE RELATING TO CIVIL, COMMERCIAL, LABOUR AND ADMINISTRATIVE PROCEDURE

NISHIMWE v. MUGENGA ET.AL

[Rwanda Supreme Court – RCAA00031/2016/SC (Mugenzi P.J., Cyanzayire and Nyirinkwaya, J.) 09 November 2018]

Civil procedure – Appeal – Suing someone who shares the same interests in the case – For a person to sue another on the appeal, he has to establish the interests he is pursuing, it is impossible to pursue interests against someone with whom you share the same case (whether you are both plaintiffs or respondents), while on the first instance they did not have a claim against each other.

Civil procedure – Litigants who share interests on the same subject matter – When many parties share interests in the subject matter, the appeal of one of them has consequences on all even though they were not summoned in the case.

Facts: Mugenga had a sales contract of the house with Kabagema, which was annulled by the first instance Court of Kigali, on the ground that Kabagema sold another person's property because that house belonged to his brother Rwamanywa, thus he sold it unlawfully.

Mugenga after giving back the house he had bought, he filed a case at Nyarugenge Intermediate Court against Nishimwe and Mashami the heirs of Rwamanywa, stating that he gave the house back to them but he was not refunded the value he added on that house, he requested to be paid the profit he would have got from the money he spends on that house, the rent they got from that house and compensation for the loss due to inflation. That Court decided that there is value added to that house by Mugenga on that house, he even erected some buildings in that plot, thus, he

should be refunded the value added determined in Court's discretion; it ordered the defendants to refund to Mugenga the court and procedural fees.

Mugenga and the heirs of Rwamanywa were not contented by that judgment, both appealed before the High Court, their appeals were combined and the Court ruled that the appeal of Mugenga as well as that one of the heirs of Rwamanywa has no merit, and thus sustained the appealed judgment.

Nishimwe appealed against that decision before the Supreme Court stating that she is suing Mugenga and Mashami. She explained that she appealed because there was a contradiction which led the Court to misinterpret the law, that the Court ordered to refund Mugenga the value he added on the house while he is the one who was at fault, and the evidence based on to determine the added value are uncertain.

The hearing was on 27/03/2018 and Mugenga raised an objection that Nishimwe, the appellant lost the case on same grounds at first and second instance, and the value of the subject matter is less than 50,000,000Frw, thus, the appeal should not be admissible because it is not in the jurisdiction of the Supreme Court. In the interlocutory judgment, the court overruled that objection.

Mugenga raised another objection, stating that Nishimwe changed the role of parties on appeal level because Mashami is now a respondent while she was on the side of Nishimwe on the first instance. In this case, on its motion, the Court examined whether the appeal of Nishimwe has no consequences to other heirs. Mugenga states that as Mashami was the claimant as Nishimwe in the first instance, it is impossible that she becomes a respondent with him on appeal, thus, if Nishimwe changed the role of parties, her appeal is not admissible.

Nishimwe states that nothing prevents parties who were plaintiffs before to be respondents on appeal. And Mashami on appeal being a respondent doesn't matter, because she remains a party to the case as she was on the first instance. Mashami states that it doesn't matter to be respondent because she was a party to the case even on the first instance and she is an heir of Rwamanywa too

As regards to whether the appeal of Nishimwe has no consequences to other heirs, which was raised by the Court, Nishimwe states that she appealed before the Supreme Court on her interests, but she appealed for the properties originating from Rwamanywa's inheritance. She states that the decision of the Court concerns all heirs.

Mashami states that at the time of filing the claim at first instance, the defendant was Rwamanywa inheritance, she emphasizes, that Nishimwe did not appeal representing the heirs, but appealed on her own. Mugenga states that before the intermediate Court the defendant was Rwamanywa heirs which also appealed, meaning that the decision was taken concerns the heirs, he states that before the Supreme Court Nishimwe appealed as a representative of the heirs, therefore she has to produce the power of attorney from the Rwamanywa's heirs, otherwise her appeal is not admissible.

Held: 1. For a person to sue another on the appeal, he has to establish the interests he is pursuing, it is impossible to pursue interests against someone with whom you share the same case (whether you are both plaintiffs or respondents), while on the first instance they did not have a claim against each other.

2. When many parties share interests in the subject matter, the appeal of one of them has consequences on all even though they were not summoned in the case.

The objection of not changing the role of parties in appeal sustained. Summons Mashami in the case on the side of the appellant.

Statutes and statutory instrument referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 9,147,153.

No cases referred to.

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Judgment

L BACKGROUND OF THE CASE

- [1] In 1994, Mugenga Joseph bought a house from Kabagema Ferdinand. The sells contact was nullified by the first instance Court of Kigali in a judgment RC36.294/01 rendered on 12/02/2003. In that case, the Court found that Kabagema Ferdinand sold someone else's property because the property belonged to his brother Rwamanywa Jérémie, for that reason the Court annulled the sells contract concluded between Kabagema Ferdinand and Mugenga Joseph.
- [2] After Mugenga Joseph gave back the house, he filed a claim to Intermediate Court of Nyarugenge against the heirs of Rwamanywa Jérémie who are Nishimwe Claudine and Mashami Gisèle, stating that he gave back the house but he was not refunded the value added on that house, thus, he requests for the profit he would have got from the money he spent renovating that house, the rent received by Rwamanywa Jérémie's heirs from that house and the money he lost due to the inflation, all amounting to 137,056,112Frw.
- [3] In the judgment rendered by the Intermediate Court, it ruled that Mugenga Joseph added value on that house, he even erected new buildings on that compound, thus it ordered the heirs of Rwamanywa Jérémie who are Nishimwe Claudine and Mashami Gisèle to refund 15,591,362Frw to Mugenga Joseph and also to pay 800,000Frw for counsel fee and 100,000Frw for procedural fee.

- [4] Mugenga Joseph and the heirs of Rwamanywa Jérémie were not contented by the rulings and they both appealed before the High Court, their appeals were combined in case RCA0517/15/HC/KIG -0538/15/HC/KIG, which was decided on 22/04/2016. The Court decided that the appeal of Rwamanywa Jérémie's heirs and that of Mugenga Joseph have no merit, and therefore, sustained the appealed judgment.
- [5] Nishimwe Claudine appealed again for that before the Supreme Court, her claim was registered on RCAA00031/2016/SC, she stated that her appeal is lodged against Mugenga Joseph and Mashami Gisèle. She explained that she appealed because there was contradiction which led the Court to misinterpret the law, that the Court ordered to refund Mugenga the value added on the house while he is the one who committed faults and even the evidence based on to determine the value added on the house are doubtful.
- [6] The hearing of the case in public was on 27/03/2018, Nishimwe Claudine represented by Counsel Rwabukumba Moussa and Counsel Nsengiyumva Abel, Mashami Gisèle represented by Counsel Abasa Fazil, whereas Mugenga Joseph was assisted by Counsel Nzabahimana Augustin.
- [7] At the opening of the hearing, Mugenga Joseph recalled the objection he raised related to the fact that the appellant, Nishimwe Claudine lost the case on first and second instance on the same grounds and also the value of the subject matter is less than 50,000,000Frw, thus, based on article 28 paragraph 2, *litera* 7° and in paragraph 5 of the Organic Law N°03/2012 of 13/06/2012 determining the organization, functioning, and jurisdiction of the Supreme Court, the appeal is inadmissible because it is not within the jurisdiction of the Supreme Court.

- [8] In the interlocutory judgment of 20/04/2018, the Court overruled the objection raised by Mugenga Joseph, and the case was scheduled on 12/06/2018, on that date the hearing was postponed due to reforms in the judiciary and was heard on 09/10/2018, whereby Nishimwe Claudine was represented by Counsel Rwabukumba Moussa and Counsel Nsengiyumva Abel; Mugenga Joseph was assisted by Counsel Nzabahimana Augustin, while Mashami Gisèle was represented by Counsel Abasa Fazil.
- [9] Mugenga Joseph raised again an objection stating that Nishimwe Claudine changed the parties at appeal level, because Mashami Gisèle is now a respondent while she was on the side of Nishimwe Claudine at first instances, this objection was the subject of hearing as well as the issue raised by the Court of whether the appeal of Nishimwe Claudine has no consequences to the other heirs.

II. ANALYSIS OF LEGAL ISSUES

A. Whether Nishimwe Claudine can file a claim in an appeal against Mashami Gisèle who was on her side at first instance.

[10] Mugenga Joseph states that Mashami Gisèle, as well as Nishimwe Claudine, were the plaintiffs at the first instance, hence it is impossible that she becomes a respondent as him on the appeal level, thus, if Nishimwe Claudine changed the parties, her claim would be inadmissible. He continues stating that Mashami Gisèle refused to pay court fees, and that has legal consequences in case the heirs of Rwamanywa Jérémie lose the case and ordered to pay costs, he requests that Nishimwe Claudine remains the plaintiff while Mashami Gisèle is removed from the case.

- [11] Counsel Nzabahimana Augustin assisting Mugenga Joseph states that based on article 169 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure¹ the status of parties does not change on appeal.
- [12] Counsel Rwabukumba Moussa representing Nishimwe Claudine states that the plaintiffs on the first instance can be respondents on the appeal level. He states that Nishimwe Claudine and Mashami Gisèle at first instance were plaintiffs and defendants, Mashami Gisèle became the respondent was because she gave unsatisfactory testimony to Nishimwe Claudine which led her to lose the case and be ordered to pay.
- [13] Counsel Nsengiyumva Abel assisting also Nishimwe Claudine states that summoning Mashami Gisèle on appeal as a respondent has no legal consequences because she remains a party to the case as it was in first instance Courts.
- [14] Counsel Abasa Fazil assisting Mashami Gisèle states that there is no problem if his client was summoned as a respondent because she was a party to the case in the first instance and she is also part of Rwamanywa Jérémie's heirs. He also states that she is in this case as a respondent because she did not pay court fees and she is ready to defend herself on an allegation made against her whatever they claim to her is ready to answer it. He added that it is before the Supreme Court, he has heard that she was sued because of the testimony she gave before the High Court, and what he was prepared to respond to, is the rights of Mashami

¹ An appeal shall have the effect of returning to the situation a case as it was before, but only as to issues that are the subject matter of appeal.

Gisèle as the heir of Rwamanywa Jérémie, but it does not prevent her from replying to this claim.

VIEW OF THE COURT

- [15] The Court finds that there is no provision in the law that stipulates whether it is possible or not to sue in appeal someone who was on your side in the first instance (someone with whom you sue or you are sued together). Article 147 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure in its paragraph one, only provides that "a person who was a party to the proceedings in the first instance may appeal the judgment if that person has an interest therein, except when the law provides otherwise".
- [16] Article 9 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure in it's paragraph one, provides that "a judge adjudicates a case on the basis of relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine."
- [17] A legal scholar called Jacques Englebert, explains that, the requirements for some one to appeal include:

Being a party to the appealed judgment case;

His accused in appeal has been party to the appealed judgment;

The subject matter in first instace has an instance link between him and whom he accuses in appeal²

He states also that, for some one to be accused in appeal, there should be an instance link with the appellant in appealed judgment³

[18] This legal scholar also states that, the principle is that, the appeal concerns your opponent in first instance, he explains also that the opponents in first instance, means that there is an accusation from one to another or has some facts to rebuttal on⁴. Based on the judgment rendered by the Court of Cassation of Belgium on 10/10/2002, he states that it is enough that one of the parties has sued another in first instance for one or more grounds of the claim.⁵

⁻avoir été partie au procès en première instance ;

⁻diriger son appel contre une partie qui était elle-même à la cause [......]

⁻avoir eu un "lien d'instance", devant le premier juge, entre la partie qui interjette appel et la partie contre laquelle l'appel est interjeté "; Jacques ENGLEBERT, « Les pièges de la procédure civile », in Les pièges de la procédure, Editions Jeune Barreau, Bruxelles, 2005, pp. 7 à 68

³ « Pour être valablement intimé, il faut avoir eu avec l'appelant au principal un lien d'instance dans le cadre de la procédure ayant donné lieu au jugement dont appel » ; Ibidem

⁴ « On enseigne traditionnellement que le recours ne peut, en principe, être dirigé que contre une partie dont on est l'adversaire en première instance, et en la qualité en laquelle elle avait été mise à la cause". « Avoir été adversaires en première instance, c'est avoir conclu l'un contre l'autre ou encore avoir développé des prétentions à l'encontre d'une partie défenderesse ou avoir opposé des défenses à l'égard d'une partie demanderesse » ; Ibidem

⁵il suffit [...] que ces parties aient pris des conclusions l'une contre l'autre en première instance et aient été, ainsi, l'adversaire l'une de l'autre à propos d'un ou de plusieurs points litigieux. L'existence d'un lien d'instance est rencontrée par l'existence, au premier degré de juridiction, d'une contestation sous-

[19] The statement of this legal scholar is emphasized by the fact that, if one person wants to sue another in appeal, he has to indicate the interest he pursues, as it is provided by article 147 of the Law N°22/2018 of 29/04/2018 mentioned above, it is impossible to persue interests to some one with whom you have the same case (whether you sue or you are sued together), while during their pleadings in first instance, there was no litigation among them.

[20] Legal scholars headed by Georges de Leval, explain that, the interests mean the outcome expected from the judgment at time of filing a claim⁶ Law schoolers Jean Vincent and Serge Guinchard⁷, as well as another Law schooler Mélina Douchy-Oudot⁸, they explain also that, the accuser has to indicate that he/she will gain something from her/his the claim he/she filed.

[21] In this case Nishimwe Claudine and Mashami Gisèle had same claim in first instance and had same interests as the heirs of Rwamanywa Jérémie, there was no claim between them. Basing on motivations provided, Nishimwe Claudine can not sue

jacente entre les parties concernées qui a été exprimée dans les conclusions"; Ibidem

⁶ L'intérêt consiste en tout avantage matériel ou moral - effectif mais non théorique- que le demandeur peut retirer de la demande au moment où il la forme »; Hakim BOULARBAH, Olivier CAPRASSE, Georges de LEVAL, Frédéric GEORGES, Pierre MOREAU, Dominique MOUGENOT, Jacques Van COMPERNOLLE, Droit judiciaire, Manuel de procédure civile, T.2, 2015, P. 80

^{7 «} Celui qui agit doit justifier que l'action qu'il exerce est succeptible de lui procurer un avantage » ; Jean VINCENT et Serge GUINCHARD, Procédure Civile, Précis Dalloz, 25ème édition, 1999, p. 140.

⁸ « La personne doit justifier que la saisine de la juridiction est faite en vue de l'obtention d'un avantage » ; Mélina DOUCHY-OUDOT, Procédure Civile, l'action en justice, le procès, les voies de recours, 2 ème édition, 2007, P. 104.

Mashami Gisèle in appeal mostly because document instituting proceedings in appeal before the Supreme Court even in her submissions does not indicate for what she sues her. It is in the hearing of the case of 09/10/2018 where Counsel Nsengiyunva Abel assisting Nishimwe Claudine indicated to the Court that his client sued Mashami Gisèle because she gave out unsatisfactory testimony to her while she did not sue her for that same ground in the first instance.

- [22] Based on the motivations provided, the Court finds that Nishimwe Claudine's claim in an appeal concerning Mashami Gisèle is inadmissible.
- B. Determining the consequences of Nishimwe Claudine's appeal on the other heirs sued together with her in the first instance and with whom they share interests on the subject matter.
- [23] Counsel Rwabukumba Moussa representing Nishimwe Claudine states that his client appealed before the Supreme Court on her behalf, but she appealed for the properties originating from Rwamanywa Jérémie's inheritance. He states that the outcome of the case will be upon the whole inheritance. He added that, at the intermediate Court, the judge made a decision over the whole inheritance while each of its heirs sued on her behalf, he believes that it is a mistake because everyone would have been ordered to pay on her behalf though the subject matter is shared by all Rwamanywa Jérémie's heirs.
- [24] Counsel Abasa Fazil assisting Mashami Gisèle states that at the time of filing a claim in the first instance, the heirs of Rwamanywa Jérémie were the defendants. He states that, the appellant before the Supreme Court was Nishimwe Claudine

alone, as part of the inheritance and who has interested in it. He emphasizes that Nishimwe Claudine did not appeal on behalf of the inheritance but appealed on her behalf.

[25] Mugenga Joseph states that in the first instance before the intermediate Court the defendants was Rwamanywa Jérémie's inheritance and it is the one which appealed, meaning that, the decision was taken on the whole inheritance, he states that Nishimwe Claudine appealed before the Supreme Court on behalf of the inheritance, thus has to produce the power of attorney given to her by other heirs of Rwamanywa Jérémie, otherwise her appeal would be inadmissible.

VIEW OF THE COURT

- [26] Article 153 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that, "if some of the parties appealed the judgment and others have not done so, it does not prevent the court to summon all of them in appeal. In that case, those who have not appealed can take part in proceedings to protect their interests. They can also make an incidental appeal to make some claims, as well they may lose those to which they are entitled to the first judgment".
- [27] The subject matter in this case and which was also appealed before the Supreme Court is related to the house left by Rwamanywa Jérémie, which was sold by Kabagema Ferdinand, which is shared by Nishimwe Claudine and Mashami Gisèle as heirs of Rwamanywa Jérémie.
- [28] At first instance at the Intermediate Court, the heirs of Rwamanywa Jeremie, were the defendants, these are Mashami

Gisèle and Nishimwe Claudine. The decisions of that court concerned those heirs. In High Court, each of the heirs of Rwamanywa Jeremie, appealed on her own. Their appeal was found with no merit, thus the decision of the Intermediate Court was sustained.

[29] Before the Supreme Court, as it is clear in the case file uploaded on the integrated electronic case management system (www.iecms.gov.rw), Nishimwe Claudine appealed on her behalf, without representing the heirs of Rwamanywa Jeremie, but she states that she shares with other heirs the properties she is suing for. The Court finds that the decisions taken basing on the subject matter do not concern only Nishimwe Claudine who appealed but have consequences to all heirs who share with her interests on the subject matter.

[30] Legal scholars Jean Vincent and Serge Guinchard, explain that, if many parties share interests in the subject matter, the appeal of one of them has consequences to others, though they don't appear in the hearing. 9they base this, on the provision of the French Civil Code (article 553).

[31] In the writings of Christophe L hermitte of 19/04/2016, basing on the motivations of Court of Cassation in France¹⁰ he explains that sharing interests in the subject matter (indivisibility)

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^{9«} En cas d'indivisibilité entre plusieurs parties, l'appel de l'une produit effet à l'égard des autres, même si celles-ci ne se sont pas jointes à l'instance »; Jean VINCENT et Serge GUINCHARD, Procédure civile, 25ème édition, 1999, p. 937.

¹⁰ Cass. civ.2e, 7 avril 2016, N°15-10126

is when it is quite impossible to execute the judgment in different ways to each of the parties¹¹

[32] These explanations of Legal scholars, emphasize the provision of article 153 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure cited above, because this article provides the procedure in general when there are many parties, whereby some appeal and others don't, it demonstrates that it can not prevent summoning others the hearing although it is not a rule. The explanations of Legal scholars as it was recalled above, indicate in particular that when parties share interests, the decision taken regarding one has consequences on all who share the interests. In that case, the provisions of article 153 would not be a choice, rather is mandatory to summon all parties who share interests in the case, so that the Court decision can be executed.

[33] Based on the provisions of article 153 of the Law N°22/2018 of 29/04/2018 mentioned above, together with the explanations of the legal scholars indicated in previous paragraphs, also basing on the fact that Nishimwe Claudine and Mashami Gisèle share interests in the subject matter as heirs of Rwamanywa Jérémie, and put into consideration that any decision will have consequences on both of them, the Court finds that Mashami Gisèle has to be summoned in the case even though she did not appeal.

« L'indivisibilité se caractérise par l'impossibilité d'exécuter séparément

les dispositions du jugement concernant chacune des parties » ; posté par Christophe LHERMITTE, Blog du Cabinet Gauthier & Lhermitte, le 19 Avril 2016

III. DECISION OF THE COURT

- [34] Decides that the appeal of Nishimwe Claudine regarding Mashami Gisèle is inadmissible,
- [35] Decides that Mashami Gisèle as a respondent is removed from the case;
- [36] Orders to summon Mashami Gisele in this case on side of Nishimwe Claudine who appealed.
- [37] Orders that the hearing of this case will be resumed on 08/01/2019;
- [38] Orders to suspend the Court fees.



CIVIL CASE

MUKARWEGO ET.AL v. NGIRIYABANDI

[Rwanda SUPREME COURT – RS/REV/INJUST/CIV0009/14/CS, (Rugege P.J., Kayitesi R. and Mutashya, J.) September 14, 2018]

Evidence law – Summary of judgment – Summary of judgment is not a copy of judgment but it is irrefutable evidence that judgment was truly rendered between parties and it indicates the decision taken in that case.

Civil procedure – A judgment which acquired the force of res judicata – Rendering a judgment on the object which had already been the object of the claim in the final judgment, it is an irregularity which shall be corrected by the annulment of that judgment.

Facts: Ngiriyabandi sued Nyiringango before Kanto Court of Nyaruguru stating that he appropriated his land basing on forged document which demonstrates that this land was object of litigation between them before the first instance Court of Gikongoro which is not the case, then Kanto Court of Nyaruguru held that the land in litigation originates from Sekidende who bequeathed it to Ngiriyabandi, thus the latter has right to live in and exploit it, Gumiriza and Nyiringango have to hand it over because they forcibly appropriated it, that court also ordered Nyiringango to give Ngiriyabandi damages.

Nyiringango appealed to the Court of Gikongoro province, stating that the land belongs to Sekidende who bequeathed it to his child Gumiriza, he adds that a house was built in that land in

1960, and that land was litigated against Ngiriyabandi before the first instance Court of Gikongoro but the latter lost the case though he has no copy of judgment. The Court rendered the judgment holding that the appeal of Nyiringango lacks merit and ordered him to pay damages to Ngiriyabandi.

Nyiringango appealed before the High Court, chamber of Nyanza, this Court decided to **strike off the case from the register because of** Nyiringango's **default to appear**, it also held that the appealed judgment will be executed even if the case is reintroduced

Nyiringango died, and his children represented by Mukarwego Josepha, applied for a case review before Nyamagabe Intermediate Court, they produced a summary of judgment RCA5799/13 as a proof that Nyiringango had a court case against Ngiriyabandi about that land and that Nyiringango won the case, they stated, that summary of judgment could not be found when their father pleaded. The intermediate Court of Nyamagabe decided that the document produced by the claimants cannot be considered as a reason for the case review and concluded that the document produced, is not related to the case for which the review is sought.

After that decision, Mukarwego wrote to the office of Ombudsman requesting for review the case rendered by the intermediate Court of Nyamagabe because it is vitiated by injustice, then the Ombudsman wrote to the President of the Supreme Court requesting to review the case of Mukarwego due to injustice, that the grounds of injustice are based on the decision of the Intermediate Court of Nyamagabe which disregarded the summary of the judgment RCA5799/13 rendered on 27/07/1983 by the First instance Court of Gikongoro, issued on 20/10/2011 by the registrar of the Intermediate Court of Nyamagabe, while

that summary of judgment is a proof that the land in litigation was object of the claim for which Ngiriyabandi André lost in 1983,. He continues stating that, for the Intermediate Court of Nyamagabe to disregard that proof, it is an injustice.

In the interlocutory judgment, the hearing before the Supreme Court first examined whether the summary of judgment RCA5799/13 would have been considered as a reason for the case review before the intermediate Court. The Supreme Court rendered the interlocutory judgment holding that the summary of judgment RCA5799/13 rendered on 27/07/1983 between Nyiringango and Ngiriyabandi, originates from a case which was truly rendered.

The case was resumed by hearing the grounds of injustice in the case RC135/3 rendered on 11/03/2004 by Nyaruguru Kanto Court and the case RCA0275/05/TP/GIRO-RCA 2880/7/04 rendered on 05/05/2005 by Nyamagabe Intermediate Court, the claimants state that Ngiriyabandi could not file a claim for the land which had already been adjudicated before court because the judgment acquired the force of res judicata, the defendant states, the fact that the summary of the judgment was accepted by the Court as reason for the case review, what is remaining is to examine its merit in accordance with the Law.

- **Held:1.** Summary of judgment is not a copy of judgment but it is irrefutable evidence that judgment was truly rendered between parties.
- 2. Rendering a judgment on the object which had already been an object of the claim in the final judgment, it is an irregularity which shall be corrected by the annulment of that judgment.

Application for the case review due to injustice has merit;

Statutes and Statutory instruments referred to:

- Law N°22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure, article 14.
- Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 81.
- Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3.
- Law N°18/2004 of 20/6/2004 relating to civil, commercial, labour and administrative procedure article 360.
- Minister of justice's order N°002 of 06/01/2005 regulating Court fees in civil, commercial, labour, and administrative cases, article 2.

No cases referred to.

Authors cited:

Serge GUINCHARD, Droit et Pratique de la Procédure Civile, p. 1225

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started before Nyaruguru Kanto Court with number RC135/3, whereby Ngiriyabandi André sued Nyiringango Faustin, that he appropriated his land basing on

fogged documents indicating that there was a Court case of Gikongoro First Instance Tribunal opposing them, while it is not, then on 11/03/2004, Nyaruguru Kanto Court decided that the land in litigation originates from Sekidende who bequeathed it to Ngiriyabandi André when he was still child, thus he has right to live in and exploit it, and ordered Gumiriza and Nyiringango Faustin to hand it over because it has been proven that they forcibly occupied it, that Court also ordered Nyiringango Faustin to give Ngiriyabandi André damages equal to 25,000Frw for delaying and removing him in his property.

- [2] Faustin appealed before Nviringango Gikongoro Province Court. the claim was registered on N°RCA0275/05/TP/GIRO-RCA 2880/7/04, stating that the land belongs to Sekidende who bequeathed it to his child Gumiriza, that the house was built for him in 1960, and he won the case which opposed him to Ngiriyabandi André about that land, although he has no copy of judgment. On 05/05/2005, this Court decided that the appeal of Nyiringango Faustin has no merit, and ordered him to pay damages to Ngiriyabandi André equal to ten thousand (10.000Frw) for removing him in his property.
- Nyiringango Faustin appealed before the High Court, [3] of Nyanza, his claim was given N°RCAA 0725/05/HC/NYA, on 04/06/2008 this Court decided to strike off the case from the register because of Nyiringango's default to appealed appear, it also held that the RCA0275/05/TP/GIRO-RCA 2880/7/04 rendered on 05/05/2005 by Gikongoro Province Court will be executed in its entirety even if the case is reintroduced.
- [4] After the death of Nyiringango Faustin, his children Mukamana Donatha, Nyirabutoragurwa Médiatrice and

Mukarwego Josepha, represented by Mukarwego Josepha applied for reviewing the case N°RCA0275/05/TP/GIRO-RCA2880/7/04 before the Intermediate Court of Nyamagabe, indicating that the summary of the judgment RCA5799/13 is a proof that Nyiringango Faustin won the case of land he had against Ngiriyabandi André, they stated that when their father pleaded before Court, that summary could not be found, they pray to consider it as a reason of case review, their claim was recorded on RCA0261/11/TGI/NYBE

- [5] On 16/03/2012, the Intermediate Court of Nyamagabe rendered the judgment, and held that the document produced by the claimants is not a reason for case review, because it relates to the issue of money, it does not indicate who won the land while it is the one in litigation in the case being reviewed, it also held that the document produced cannot be considered as a judgment, rather it demonstrates that there is an issue of money which was settled between Nyiringango Faustin and Ngiriyabandi André, and the Court concluded that the case RCA0275/05/TP/GIRO-RCA2880/7/04 can not be reviewed, because the document produced by the claimants is not related to the case which is sought to be reviewed.
- [6] When Mukarwego Josepha received this decision, she wrote to the office of Ombudsman requesting for review of the case RCA0261/11/TGI/NYBE due to injustice, then on 27/03/2013, the ombudsman wrote to the President of the Supreme Court requesting the review of the case of Mukarwego Josepha who also represents her sisters Mukamana Donatha and Nyirabutoragurwa Médiatrice,
- [7] The Ombudsman states that the grounds of injustice are based on the decision of the Intermediate Court of Nyamagabe

which did not consider the summary of the judgment RCA5799/13 rendered on 27/07/1983 by First Instance Court of Gikongoro, delivered by that Court on 20/10/2011, while that summary is a proof that the land claimed by Ngiriyabandi André is the one he lost in the case rendered in 1983, he states that the summary of judgment is a sine qua none proof as provided by article ya 184,3° of the Law N°18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, that for The Intermediate Court of Nyamagabe to disregard that document, it is injustice as.

- [8] He further states that the Intermediate Court of Nyamagabe was mistaken, whereby it decided that the document produced by Mukarwego Josepha cannot be considered as a judgment, rather it demonstrates that there is an issue of money which was settled between Nyiringango Faustin and Ngiriyabandi André while in that document, the subject matter was not the money, but the land as it is clear in that summary of judgment.
- [9] The hearing of the case happened in public on 18/12/2017, Mukamana Donatha and Nyirabutoragurwa Médiatrice represented by Mukarwego Josepha assisted by Counsel Kayirangwa Marie Grâce, Ngiriyabandi André was represented by Counsel Sindayigaya Abson, that day they argued on the issue to know whether the summary of the judgment RCA5799/13 would have been considered as a reason for the case review in the case RCA0261/11/TGI/NYBE, and the court decided that the decision will be pronounced on 19/01/2018.
- [10] On 19/01/2018, the Supreme Court decided that it is needed to conduct investigations in the Intermediate Court of Nyamagabe and where the Kanto Court of Nyaruguru was

located, to verify whether the judgment RCA5799/13 was rendered.

- [11] The investigation was conducted on 02/04/2018, the Court after checking the court register found in the Intermediate Court of Nyamagabe where the case RCA5799/13 was registered, the court found its content is the same with the summary of judgment written by the chief registrar of that Court on 20/10/2011.
- [12] The Court also went to the Primary Court of Nyaruguru to check whether there was a case between Nyiringango Faustin and Ngiriyabandi André in 1983, it only found the case with N° RC135/3 rendered on 11/03/2004, but the case rendered before Genocide was not found, the personnel of Primary Court told those in investigation that the court registers of that time were burnt and others damaged.
- [13] The Court decided to resume the hearing on 22/05/2018, so that the parties argue on the outcome of the investigation, on that date, parties appeared and the hearing took place, parties argued on the outcome of the investigation conducted in the Intermediate Court of Nyamagabe and former Kanto Court of Nyaruguru, the Court decided that the decision on whether the case RCA5799/13 really happened, will be pronounced on 18/06/2018.
- [14] On that day, the Supreme Court rendered an interlocutory judgment and held that the summary of the judgment RCA5799/13 rendered on 27/07/1983 between Nyiringango Faustin and Ngiriyabandi André, originates from a case which was truly rendered, thus, it would have been considered in the judgment RCA0261/11/TGI/NYBE as reason for the case review

of the judgment RCA0275/05/TP/GIRO-RCA2880/7/04 which opposed Nyiringango Faustin to Ngiriyabandi André.

- [15] In that interlocutory judgment, the Supreme Court reversed the judgment RCA0261/11/TGI/NYBE rendered on 16/03/2012 by the Intermediate Court of Nyamagabe, in which the Court did not admit the application for review of the case RCA0275/05/TP/GIRO-RCA2880/7/04 rendered on 05/05/2005 by the Intermediate Court of Nyamagabe, it decided to resume the hearing on the date to be communicated later to the parties to hear the grounds of injustice which vitiates the case RC135/3 rendered by Kanto Court of Nyaruguru on 11/03/2004, and the case RCA0275/05/TP/GIRO RCA2880/7/04 rendered on 05/05/2005 by the Intermediate Court of Nyamagabe.
- [16] The public hearing of the case was resumed on 24/07/2018, whereby Mukarwego Josepha who represents her sisters Mukamana Donatha and Nyirabutoragurwa Médiatrice, was assisted by Counsel Kayirangwa Marie Grâce, whilst Ngiriyabandi André assisted by Counsel Sindayigaya Abson.
- [17] Counsel Kayirangwa Marie Grâce assisting Mukarwego Josepha and her sisters, states that Ngiriyabandi André should not file a claim of land which had been an object of the claim because the judgment has force of res judicata, she adds, the fact that the Intermediate Court of Nyamagabe disregarded the summary of the judgment, it is injustice because it ignored that most of the documents were damaged after Genocide, Counsel Sindayigaya Abson states, the fact that the summary of the judgment was accepted by the Court as reason for the case review, what is remaining is to examine its merit in accordance with the Law.

II. ANALYSIS OF THE LEGAL ISSUE

Whether the Land litigated in the judgment RCA0275/05/TP/GIRO- RCA2880/7/04 rendered on 05/05/2005 was already adjudicated on in final judgment.

- [18] Kayirangwa Marie Grâce, the counsel for Mukarwego Josepha who represents her sisters Mukamana Donatha andNyirabutoragurwa Médiatrice, states that the land claimed by Ngiriyabandi André before former Kanto Court of Nyaruguru was litigated between Ngiriyabandi André and Nyiringango Faustin and the former lost the case, he appeared before the First Instance Court of Gikongoro and again he lost the case in the judgment RCA5799/13 rendered on 27/07/1983, but after Genocide against the Tutsi in 1994, he filed again a claim before Kanto Court of Nyaruguru, and before the Intermediate Court of Nyamagabe because he believed that all documents were lost.
- [19] She continues stating that, the summary of the decision of the intermediate Court of Nyamagabe in the judgment RCA5799/13 rendered on 27/07/1983 found in Court's archives, must be considered to decide that the land in litigation was adjudicated on in the final judgment between Nyiringango Faustin and Ngiriyabandi André, thus, it should not be brought before the Court any more. Mukarwego Donatha who represents her sisters Mukamana Donatha and Nyirabutoragurwa Médiatrice, states that she requests for justice.
- [20] Ngiriyabandi André, the defendant, states that it is not true that the documents have disappeared, because he had no case against Nyiringango Faustin, rather he had a case against Ruboneza who had appropriated that land when he was a soldier, that the land belongs to his uncle, thus, he could not have a case

against Nyiringango Faustin while he has no blood relation with him. Therefore, he adds that he should not suffer from injustice basing on the summary of the judgment delivered by the Intermediate Court of Nyamagabe in circumstances he does not know.

[21] Counsel Sindayigaya Abson assisting Ngiriyabandi states that the case being heard is based on the summary of the judgment delivered by the intermediate Court of Nyamagabe which the Supreme Court already admitted in an interlocutory judgment, that he believes that what is remaining is to examine its merit in accordance with the Law.

VIEW OF THE COURT

- [22] Article 81,2° of the organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court provides that "the review of a final decision due to injustice shall only be applied for, on any of the following grounds: (...) when there are provisions and irrefutable evidence that the judge ignored in rendering the judgment".
- [23] Article 14 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that: "a case having been definitively decided cannot again be litigated for the same facts, between the same parties acting for the same cause".
- [24] Article 3 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that "each party has the burden of proving the facts it alleges".

- [25] With regarding to this case, the Supreme Court finds that the summary of the judgment produced by Mukarwego Josepha in the case RCA0261/11/TGI/NYBE, indicating that the First Instance Court of Gikongoro rendered in appeal the case RCA5799/13 on 27/07/1983 between Nyiringango Faustin and Ngiriyabandi André, in which land was the subject in litigation, that Court decided that Ngiriyabandi André lost the case while Gumiriza representing Nyiringango Faustin won the case, Ngiriyabandi André was also ordered to pay various fees which include court fees, damages, and State fees. That summary of judgment was delivered by the registrar of the Intermediate Court of Nyamagabe on 20/10/2011, the pieces of information were extracted from court register 13.
- [26] The Court finds that this summary of judgment demonstrates without doubt that there was a case of land between Nyiringango Faustin and Ngiriyabandi André as Mukarwego Josepha and her sisters were arguing, it is an element of evidence to prove that both parties had ever pleaded on that land before the first instance Court of Gikongoro whereby the judgment RCA5799/13 was rendered on 27/07/1983, thus, no any other judgment should have been rendered on that piece of land basing on the principle of the force of res judicata, as provided, by article 14 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure mentioned above.
- [27] The Court further finds, the fact that a summary of judgment was produced instead of a copy of judgment, the reason is that the judgment itself cannot be found as observed by the Supreme Court in its investigation of 02/03/2018 whereby the chief registrar of the Intermediate Court of Nyamagabe

confirmed that, the copy of judgment cannot be found except court register N°13 in which he copied the decision taken in the case RCA5799/13, but he also confirmed that, the whole judgment cannot be found¹ because the judgments and some of the registers of the period prior to genocide against Tutsi of 1994 disappeared, this was also the statement of the chief registrar of the Primary Court of Kibeho where all judgments and registers of former Kanto Court of Nyaruguru were shifted to, after restructuring of the judiciary.

[28] The Court finds without merit the statements of that who represents Ngiriyabandi André that the summary of the judgment is not a judgment because it does not indicate the owner of the the land, because even though it is not a copy of judgment but it is an irrefutable evidence that there was a court case between these both parties, and it was delivered by competent authority indicating the decision taken, that summary also has its value because it is one of the documents which were provided by the article 2 litera 6² of the Ministerial Order N°002 of 06/01/2005 related to court fees in civil, commercial, labour and administrative cases, which enumerated it among the documents to be delivered by the registrar of the Court. This document was also provided by article 360 of Law N°18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative

¹ See investigation affidavits established on 2th /03/2018 from page 2 to page 3 of the case file

² Court fees for documents established in civil, commercial, labour and administrative cases are set as follows:

A document which enforceable title, a complete copy of the judgment, a summary of judgment or a summary of any other document established by a Court registrar:

First two pages

Every additional page

procedure which was in force when that document was issued. This article provides that in case of indigence noted by the President of the court that rendered the judgment, orders that an expedition, an extract or a copy is issued.³.

[29] The court finds without merit the statement of Ngiriyabandi André that the summary of judgment does not indicate whether the land in litigation in the judgment RCA5799/13, is the same land litigated in the judgment RC135/3 rendered by Kanto Court of Nyaruguru and the judgment RCA0275/05/TP/GIRO - RCA2880/7/04 rendered by the Intermediate Court of Nyamagabe because he does not prove that this land is different from the one litigated in the case RCA5799/13 while that case demonstrates a land as object in litigation between Nyiringango Faustin and Ngiriyabandi André, therefore, he loses the case due to lack of evidence of what he alleges as provided by article 3 of the Law relating to evidence and its production mentioned above.

[30] The Court finds irregularities in the fact that former Kanto Court of Nyaruguru and former Court of Gikongoro Province rendered the judgment deciding on the land which was already adjudicated on in the final judgment, because of those irregularities, the judgments should be quashed. This is also the opinion of legal scholars Serge Guinchard in his book titled "Droit et Pratique de la Procédure Civile" on page 1225,

³ When the president of the Court which rendered the judgment found a party to the case with extreme poverty, he orders to give him a copy of the judgment, or a summary of judgment free of charge, and on the bottom of that document

is written that is delivered free of charge.

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paragraph 3⁴, where he explains that annulment of the judgment is one of possible consequences in case a judgment is rendered disregarding that the object in litigation was already adjudicated on in final judgment.

III. DECISION OF COURT

- [31] Decides that the application for review of the case RCA0261/11/TGI/NYBE rendered on 16/03/2012 by the Intermediate Court of Nyamagabe due to injustice, has merit;
- [32] Decides that the judgment RC135/3 rendered on 11/03/2004 by former Kanto Court of Nyaruguru, and the judgment RCA0275/05/TP/GIRO- RCA2880/7/04 rendered on 05/05/2005 by the Intermediate Court of Nyamagabe are quashed;
- [33] Sustains the rulings of the judgment RCA5799/13 rendered on 27/07/1983 by the First Instance Court of Gikongoro on 27/07/1983.

⁴ Le prononcé d'un jugement auquel est conferée l'autorité de la chose jugée entraîne deux séries d'effets : d'une part, le juge est dessaisi et ne peut plus revenir sur sa décision, d'autre part, s'il arrive qu'un autre juge rende une décision méconnaissant la chose précédemment jugée, une sanction pourrait

être prononcée tendant à l'annulation de cette decision.

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COMMERCIAL CASES

ARLCOM Ltd v. ECOBANK RWANDA Ltd

[Rwanda SUPREME COURT – RCOMAA0020/15/CS (Mukamulisa, P.J., Hitiyaremye and Karimunda, J.) May 21, 2018]

Contract – Loan agreement – Computation of interests – Interests and late fees should not continue to be charged after the loan contract has been cancelled in case the debtor conveyed a mortgage for that loan which should have been sold and get the payment of the loan.

Facts: Arlcom Ltd was given a loan by Ecobank Rwanda Ltd and that loan was guaranted by Uwamahoro Florent de la paix, the Direcor of that company, he also furnished a mortgage, that loan was restructured three times. Thereafter the company failed to repay the loan and subsequently, Ecobank Rwanda Ltd called off the loan contract and later sued that compant together with its guarantor to the Commercial Court of Nyarugenge requesting for the payment of the principal loan, the accumulated interests, late fees and procedural fees. The Court found the claim with merit and ordered the defendants to repay the loan, interests and procedural fees.

Arlcom Ltd and its Director were not contented with the ruling of the case, thus they appealed to the Commercial High Court, that court found the appeal with no merit and held that the rulings of the appealed case are only reversed concerning the amount of the loan. It ordered Arlcom and its guarantor to jointly repay the loan, refund the fees paid to the expert and the court fees.

They appealed again to the Supreme Court requesting arguing that Uwammahoro should not have been sued together with that company because he is not connected with that loan a part from conyeying the mortgage and he never objected to selling it.

In its defense, Ecobank argues that the reason Uwamahoro is required and Arlcom Ltd to jointly pay that loan is because he signed two documents indicating that he acknowledges the loan, one is "joint guarantee" stating that in case the company fails to pay he will sell the mortgage and pay the loan the second one is "attestation de consentement" stating that in case the company defaults on payment as its guarantor will pay.

Regarding the amount of the loan and the accumulated interests which the debtors have to pay the bank Uwamahoro states that he does not accept the report made by the expert because it had a lot of errors regarding the restructuring of the loans and that on 24/10/2012 the bank wrote to the copany cancelling the loan contract and copied RDB, implying that it had begun the procedures of auctioning the mortgage but it did not go further, this affected him because he would have paid lesser than what the bank demands now.

On the exact loan it has to be paid, the Bank argues that the laon was restructered three times on the agreement of both parties, the last restructuring was on 14/06/2012 which was totaling to 611,893,224Frw, but it continued to accumulate both intersts and late fees up to now.

Held: 1. Interests and late fees should not continue to be charged after the loan contract has been cancelled in case the debtor conveyed a mortgage for that loan which should have been sold and get the payment of the loan.

The appeal has merit in parts.
The cross-appeal has merit in parts.
Appellants to jointly pay the loan and the interests accrued from it.

Court fees to the appellants.

Statutes and statutory instruments referred to:

Decree-Law of 30/07/1888 relating to contracts or convetional obligations, article 33 and 552.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE

- [1] This case started at the Commercial Court of Nyarugenge whereby Ecobank Rwanda Ltd, sued Uwamahoro Florent de la Paix and Arlcom Ltd requesting the court to order them to pay the loan, interests and procedural fees.
- [2] That Court rendered the Judgment RCOM0164/13/TC/NYGE holding that the claim of Ecobank Rwanda Ltd has merit and ordered the defendants to pay the loan, interest and procedural fees.
- [3] Arlcom Ltd and Uwamahoro Florent de la Paix were not contented with the rulings and appealed to the Commercial High Court, it rendered the judgment RCOMA0213/14/HCC, finding the appeal with no merit, sustained the rulings of the judgment

RCOM 0164/13/TC/Nyge rendered by the Commercial court of Nyarugenge except amount of the loan. It ordered Arlcom Ltd and Uwamahoro Florent de la Paix to jointly pay Ecobank Rwanda Ltd 786.356.789Frw they owe it, 2,600,000Frw for expertise fees, it also ordered them to pay court fees.

- [4] Arlcom Ltd and Uwamahoro Florent de la Paix appealed to the Supreme Court claiming that the court decides that Ecobank Rwanda had no status and interests to sue Arlcom Ltd and Uwamahoro Florent de la Paix because the role of Uwamahoro, is that she furnished the mortgage to secure the loan. They also criticized the Commercial High Court for relying on expertise which had errors.
- [5] The case was heard in public on 24/11/2015, Ecobank raised a preliminary objection of inadmissibility of the appeal lodged by Uwamahoro Florent de la Paix and Arlcom Ltd because they lost the case on the same grounds on both previous instances. In the interlocutory judgment of 24/11/2015, the court overruled that objection and the hearing was scheduled on 03/05/2016, however it was postponed various occasions mainly and because Uwamahoro Florent de la Paix was abroad and he requested to be present in his case because he has a lot of information on it and his advocate had only mandate of assisting him.
- [6] The last hearing was held on 13/06/2017, Uwamahoro Florent de la Paix and Arlcom Ltd represented by Counsel Kazeneza Théophile while Ecobank Rwanda Ltd represented by Kayigirwa Télesphore, after the court session, the Court orders that the decision will be pronounced on 21/07/2017, meanwhile the court received a letter from Uwamahoro Florent de la Paix diswoning Counsel Nkurunziza Francois Xavier who was

assisting him and representing Arlcom Ltd, this led to the adjournment of the hearing to 31/10/2017 so that Uwamahoro Florent de la Paix can submit to the Court the submissions containing his claim of diswoning his counsel, it was also postponed on that date on the request of Counsel Kazeneza Théophile, because they waited for the report from the disciplinary committee of the Bar Association on the issue of disowning Counsel Nkurunziza François Xavier, the case was heard on 12/12/2017

[7] On 12/01/2018, The court found Uwamahoro Florent de la Paix's diswonig his counsel with merit and held that Counsel Nkurunziza Francois Xavier pays him 500,000Frw for the counsel fees and that the hearing of the case on merit will be resumed on 27/03/2018. On that day in the hearing Counsel Habinshuti Yves was assisting Uwamahoro Florent de la Paix and representing Arlcom Ltd while Ecobank Rwanda Ltd was represented by Counsel Nkundabarashi Moïse together with Counsel Kayigirwa Télésphore.

II. ANALYSIS OF THE LEGAL ISSUES

Whether Uwamahoro Florent de la paix should not be jointly sued with Arlcom Ltd

[8] Uwamahoro Florent de la Paix argues that Ecobank should produce a separate loan contract he concluded with it because he does not have any connection with the loan sought to be paid apart from furnishing the mortgage and he never objected to selling that mortgage. He also argues that in the submissions of the counsel for Ecobank while lodging the claim he requested Uwamahoro Florent de la Paix to pay 657 million and procedural

fees but in the judgment, the Court ordered Uwamahoro Florent de la Paix together with Arlcom to pay, while it was not requested by the other party.

- [9] Counsel Habinshuti Yves argues that Uwamahoro Florent de la Paix gave Arlcom Ltd the mortgage, nothing else he should be held reliable, because Ecobank does not prove that he agreed to pay with Arlcom Ltd jointly, that is the reason he should be removed from the case especially that Ecobank Rwanda Ltd does not demonstrate the faults of Uwamahoro Florent de la Paix in the Arlcom's failure to performe the contract which it concluded with the bank. He further states that the Commercial High Court ordered Uwamahoro Florent de la Paix and Arlcom to jointly pay Ecobank, but it did not indicate the amount each one has to pay.
- [10] Nkundabarashi Moïse, the counsel for Ecobank explains the reason why Uwamahoro has to jointly pay with Arlcom Ltd is because on 14/12/2009 he signed a document titled joint guarantee whereby he accepted to be a personal guarantee for Arlcom Ltd and on 31/02/2009 he signed another document titled "attestation de consentement" again acknowledging the loan.
- [11] He continues arguing that the first document indicates that if Arlcom Ltd defaults on payment Uwamahoro Florent de la Paix will sell the mortgage and pay, whereas the second one indicates that in case Arlcom Ltd defaults on payment, Uwamahoro Florent de la paix will pay. He adds that another reason Uwamahoro Florent de la Paix and Arlcom Ltd are sued jointly is because there is a loan agreement between Arlcom Ltd and Ecobank Rwanda Ltd on 14/06/2012 which was restructuring of the loans given to Arlcom Ltd and Uwamahoro Florent de la Paix, which all amounting to 611.893.224Frw, hence he wonders

why Uwamahora can disassociate himself from the loan which Ecobank sought for payment.

[12] Regarding the document Joint Guarantee" and "attestation de consentement" stated above by Ecobank, Uwamahoro Florent de la Paix agrees that he signed them but according to its contents he was not the one to sell the mortgage, that was the responsibility of Ecobank, and also it does not require a permission from him to sell the mortgage

VIEW OF THE COURT

- [13] Article 552 Civil Code Book III provides that any person who stands as a guarantor for another person is only obliged to honour what he guaranteed in case the guarantee fails to honour the obligation, whereas article 560 provides that any person who stands as a guarantor for the loan of another person is obliged to pay the creditor if the principal debtor fails to pay unless the guarantor demonstrates that he will pay without any hesitation or if he accepted to pay with the principal debtor in solidum. In that case, the principles regarding the payment in solidum shall apply.
- [14] Article 33 of Book III of the Civil Code provides that, contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith.
- [15] Concerning this case, the case file indicates that since 2009, Arlcom Ltd was given by Ecobank Rwanda Ltd various loans, thereafter, three restructuring contracts were concluded between Ecobank Rwanda Ltd and Arlcom Ltd whereby

Uwamahoro Florent de la Paix signed on behalf of Arlcom Ltd as Managing Director. Again in that contract in the section titled security/Support, on No 6, Uwamahoro again agreed that he becomes a personal guarantee for the loan or any loss which may be accrued from it ("Renewal of the Personal Guarantee of promotor Mr. Uwamahoro Florent de la Paix with Ecobank listed as loss payee").

The case file also contains another document titled "Convention d'ouverture de crédit avec d'hypothèque" dated 10/12/2009, concluded between Ecobank and Uwamahoro Florent de la Paix, as a client carrying out activities under the commercial commercial name "Arlcom"Ltd¹. The case file also contains "acte notarié" dated 10/12/2009 signed by Ecobank Rwanda Ltd and Uwamahoro Florent de la Paix, his wife Uwamahoro Amina Arlette also signed as a witness, it is obvious that it is for the loan litigated in this case

[17] The Court further finds, the fact that in the case file there are various documents of correspondence between Ecobank Rwanda Ltd and Uwamahoro Florent de la Paix, from the time of all contracts restructuring the loan that the bank offerd Arlcom Ltd, the latter was always represented by its Managing Director Uwamahoro Florent de la Paix, this implies that if this company defaults on the loan it was given by Ecobank Rwanda Ltd, the loan must be reimbursed by Uwamahoro Florent de la Paix as its personal guarantee

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¹ Uwamahoro Florent de la Paix "opérant ses activités commerciales sous le nom de "Arlcom", ci-après dénommé "Le Client"

- [18] During the hearing, Uwamahoro Florent de la Paix acknowledged again that he signed a document titled "joint guarantee" and "Acte de consentement" which all of them relates to the loan which Ecobank Rwanda Ltd gave to Arlcom Ltd whereby he accepted that in case it defaults on the payment he will pay.
- [19] In light of the motivations given above, the Court finds without merit the arguments of Uwamahoro Florent de la Paix that Ecobank Rwanda Ltd should not sue him together with Arlcom Ltd since that company may have failed to pay the loan while he is its personal guarantee

Determining the amount of the loan and its interest that Uwamahoro Florent de la Paix and Arlcom Ltd has to pay to Ecobank Rwanda Ltd

- [20] Uwamahoro Florent de la Paix argues that the expert appointed by the Court, as indicated on page 45 of his report, he found errors in the first restructuring of the loan because there is no explanation on the loan which was offered by Ecobank Rwanda Ltd, this implies that the other contracts of the loan restructuring concluded after, had errors because they were based on the first one which had errors.
- [21] He also adds that he criticises that the expert demonstrated that the loan was 408,000,000Frw while it has to be 248,000,000Frw and also that the expertise has other imperfections like whereby the expert found that letter of credit and credit line ("lettre de crédit" and "ligne de crédit") Ecobank Rwanda Ltd considered them as a loan but he does not indicate their effects. He further states that the fact that the calculations made by Ecobank are erroneous has effected him but the

Commercial High Court disregarded it for him to get justice. That also stating that he signed on the restructuring is not enough to conclude that he acknowledges the loan which Ecobank Rwanda Ltd states that it gave him especially that the contract which is signed between the client and the bank is a standard form contract (contrat d'adhésion), he prays to Court to render him justice.

- [22] Uwamahoro Florent de la Paix again states that the in the report the expert drew a table indicating that the signature of the director of Arlcom Ltd should be examined, to make sure that the operations made on its account were done by the company itself, in that circumstances, for 252 operations that were made there is no signature of Arlcom Ltd but the Court ignored it. He finds the motivations of the Commercial High Court not sufficient, that is the reason why he prays for another expert, so that counter expertise can be carried out to get the correct calculation. He states in addition that for the Ecobank Rwanda Ltd refusing to issue the bank statement is because it intended to conceal some information, therefore he prays the court to consider that, and declares that it has lost the case. He also adds that the loan he acknowledges is that of 284,093,675Frw.
- [23] He further argues that on 24/10/2012 Ecobank Rwanda Ltd wrote to Arlcom for termination of the contract and copied RDB, this mean that the bank had begun the procedure of auctioning the mortgage through RDB, however it did not proceed to auction that mortgage while nothing prevented to do so, this affected them because by then the bank would have been paid 657 million francs only, but now it is claiming to be repaid a loan of more than a billion francs.
- [24] Uwamahoro Florent de la Paix and Counsel Habinshuti Yves again argue that on 02/06/2011 ECOBANK withdrawn

500,000Frw from Arlcom's account without any explanations and there are other amount of money paid by Sotra Tour & Travel Agency to Arlcom Ltd with two cheques (one was N°36855080 of 9.552.043 Frw dated 28/04/2011 and another one N°36855081 of 6.102.882 Frw) which had to be deposited on the account of Arlcom Ltd in Ecobank Rwanda Ltd, but that bank delayed 45 days to withdraw that money to repay a part of loan , while this would have reduced the loan, Ecobank Rwanda Ltd does not give any reason it delayed to withdraw that money . He further criticizes the expert for not indicating the loss accrued from that delay for him and failed to make compensation.

- Counsel Habinshuti Yves argues that Arlcom Ltd and [25] Uwamahoro Florent de la Paix on several occasions tried to write to the President of the Commercial High Court demonstrating the irregularities contained in the report of the expert, among them there are some which the Court acknowledged but failed to nullify that report. He gave examples where the expert indicated that in the loan restructuring Ecobank Rwanda Ltd altered the interest rate contrary to the clauses of the contract, like on page 48 where he indicated that the rate they agreed on when restruring the loan of 408.000.000Frw was 16% but it charged 16,49%, on page 52 he indicated that on the structured loan of 611.893.294, Ecobank Rwanda Ltd charged 16,02% instead of 15%, therefore, he states that if all those irregularities were considered by the court the loan would have reduced, but the court disregarded them
- [26] He further states that on page 49 the expert indicated that Ecobank miscalculated the loan when it made a loan restructuring of 559,279,335Frw instead of 493,852,705 Frw and the bank did not give any explanations and even the restructuring of

- 611,893,224Frw indicated on page 54 of that report, the expert demonstrated that it should have been 504,809,709Frw however the court was silent on all those irregularities.
- [27] Counsel Habinshuti Yves adds that the Court gave insufficient motivations whereby the performance guarantee was considered as a loan which generates interests, which is not possible especially that the expert ordered by the Court indicated that those guarantees are always signature commitments (engagement par signature), that is not a loan offered by the bank to the client. He also criticizes the expert for only revealing the irregularities without indicating its effects and the Court also for not examining the irregularities raised in the expertise but instead held that those irregularities are not related to the contract or the principles of credit instead of holding that the loan and the related interests were miscalculated, hence they must be deducted from the loan.
- [28] He further adds that the expert indicated that there are some amount of money withdrawn from Arlcom Ltd's account using cheques having wrong figures as its indicated on page 34 whereby instead of withdrawing 17,324,152Frw, Ecobank Rwanda Ltd withdrew 173,224,152Frw but the expert did not make any recommendation.
- [29] Counsel Nkundabarashi Moïse representing Ecobank Rwanda Ltd first responded on the difference between 17.324.152Frw and 173.224.152Frw raised by the adversary, whereby he stated that it was a typographic error but on page 34, the expert indicated that it was rectified. He adds that it is now better since Uwamahoro Florent de Paix acknowledges that he owes Ecobank Rwanda Ltd a loan because before he did not acknowledge it.

- [30] Regarding the exact loan which Ecobank demands to be repaid, he argues that the bank restructured the loan three times on the agreement of both parties, the last restructured loan was that of 611,893,224Frw done on 14/06/2012 but it continued to accrue interests and late fees up to now.
- [31] He adds that the issue of using the interest rate different from the one they agreed on, Ecobank Rwanda Ltd believes that it should not be an issue because in the agreement of restructuring the loan of 14/06/2012, they agreed on 15% as the rate interest, they also agreed on 2% per month as late fees and those are the ones Ecobank Rwanda Ltd applied since 2012 up to now, because the interests are calculated on 15% since 14/06/2012 up to 31/08/2015, that is three years and two months, which equals to 374.157.837Frw, plus the late fees of 2% per month, all amounting to 242.242.109Frw.
- [32] Therefore, he states that the total amount of the loan which Ecobank Rwanda Ltd seeks its payment is 611.893.224 Frw + 74.157.837Frw (interests) + 224.22.249.109 Frw (late fees), all amounting to 1.283.862.819Frw.
- [33] Counsel Kayigirwa Télésphore also representing Ecobank Rwanda Ltd states that there is no evidence proving the claims of the adversary that 500,000Frw was withdrawn from the account Arlcom Ltd, he adds that the money might be from the current account, hence they are not related to that loan which Ecobank Rwanda Ltd is claiming to be repaid and also that the cheques for that money may have been lost in the archives.
- [34] He further states that the deposit of two cheques from Sotra Tours & Travel Agency to Arlcom Ltd, delayed 42 days, the expert stated that he was told that those cheques were without

provisions, the moment they were issued, with regard to the issue that Ecobank refused to reveal the state of Sotra Tours & Travel Agency account when he wanted to find out whether those cheques were issued without provisions it was because that account was not related to the expertise because the bank has the duty to keep the privacy of its client (Sotra Tours & Travel Agency).

VIEW OF THE COURT

- [35] The Court finds that both parties agreed that the loan which Ecobank demands to be repaid was restructured three times and the last time it was restructured Ecobank computed it and demonstrated that it was 611.893.224Frw but the expert appointed by the Commercial High Court, explained in his report that the loan should be 610.166.856Frw. Since Ecobank does not dispute the calculation of the expert, that amount should be the one considered in determining the interests being calculated by Ecobank because Uwamahoro and Arlcom Ltd do not acknowledge how the interests were calculated. On the other hand, the court finds that it can not base on 284.093.675Frw which Uwamahoro Florent de Paix acknowledges as the loan he owes the bank because he does not prove it.
- [36] The Court finds that on 24/10/2012, Ecobank Rwanda Ltd wrote to Arlcom Ltd and Uwamahoro Florent de la Paix calling off the loan (dénonciation du credit) and consequently requested to be repaid 657.788.007Frw (that is 610.166.856Frw of the depreciable loan + interests of 8.340.713Frw+ late fees: 11.509.852 Frw + debit from the current account: 27.270.586Frw).

- [37] The Court finds, considering loan contract, that bank was furnished a mortgage worth 750.000.000Frw. As Uwamahoro Florent de la Paix states, it is not reasonable how after the cancellation of the contract of the restructured loan of 610.166.866Frw on the dates mentioned above, the loan which was affirmed by the expert, Ecobank Rwanda Ltd opted to continue calculating the interests and the late fees and also basing on 611.893.224Frw instead of selling the mortgage it was furnished especially that its value was higher than the loan it claimed at that time. The Court finds that Ecobank should be liable for such behaviors because if not, it would lead to the debtor to be charged excessive interests which would cause him to have a loss for the faults which are not his/her.
- [38] Among the explanations given by the expert on page 67 of his report, indicated that he found issues of the money from two cheques dated 28/4/2011 issued by Sotra Tours & Travel Agency, one of 9.552.043Frw and another of 6.102.882Frw (both worth 15.654.925Frw) given to Ecobank Rwanda Ltd on 4/05/2011 which it had to deposit on the Arlcom account but it deposited that money on 16/6/2011 after 42 days. That expert also states that Ecobank told him that the reason it delayed to deposit them on Arlcom Ltd's account, was that those cheques were without provisions by that time but the bank did not produce proof for that. He concludes stating that if there is other truth with reasonable grounds on those cheques, the amount of the loan would change up to 4/05/2011
- [39] In the hearing of Uwamahoro Florent de la Paix and his advocate, as explained above, among what they criticize with regard to how Ecobank calculated the loan which it is claiming to be repaid, includes the money indicated in the previous

paragraph because they argue that if it credited on time that amount of money on Arlcom Ltd's account ,this would have reduced the loan. For the Ecobank, it continued to argue that it is possible that those cheques were without provisions and that it also has to keep the privacy of their clients's accounts.

[40] The court finds that those explanations of Ecobank Rwanda Ltd are groundless, because among the amount it is claiming, includes the late fees whereas it also delayed to credit on Arlcom Ltd account the amount of money mentioned above which increased the amount of the interests, therefore, the interests of that amount of money have to be calculated and deducted from the late fees computed by Ecobank. That amount is hereby calculated as follows: 6.102.882 Frw + 9.552.013

$$Frw = \frac{9.566.283 Frw}{360 \times 100} = 9.566.283 Frw.$$

- [41] The Court further finds that the expert explained that there are 500.000Frw for which Ecobank does not prove how they were withdrawn on 02/06/2011from Arlcom Ltd's account, he adds that in case it fails to prove it, this would also reduce the loan of Arlcom Ltd.
- [42] The Court finds, considering how the expert explains as well as Uwamahoro Florent de la Paix and Arlcom Ltd's concerns raised in the hearing, when this is linked to the fact that Ecobank failed to explain the withdrawal of that money from Arlcom Ltd's account, the Court finds that it should be deducted from the initial loan which is claimed to be repaid by Ecobank Rwanda Ltd in the letter dated 24/10/2012 when it was calling off the loan (dénonciation du credit). That is to say that it should be deducted from the initial loan of 610.166.856Frw for which the late fees

were calculated, the balance of that loan shall be: 610.166.856Frw - 500.000Frw = 609.666.856Frw.

- [43] With regard to performance guarantees, which Uwamahoro Florent de Paix argues that it was considered as a loan which is contrary to the reality, the Court finds that the expert gave enough explanations about it on page 67 of his report, whereby he explained that those performance guarantees are considered as a loan even though they are not offered in cash to the client. Concerning the irregularities which Uwamahoro Florent de la Paix and Arlcom Ltd argue that they are found in calculations of Ecobank Rwanda Ltd, the court finds that apart from the issues demonstrated by the expert which were also considered, they do not prove the other amount of money to be deducted
- [44] Basing on the motivations above, the loan and its interests are as follows: 609.666.856Frw (rectified loan) + 8.340.713Frw (interest) + late fees: 1.943.569Frw (11.509.852Frw-9.566.283Frw) + 27.270.586Frw (Debit on the current account): = 647.221.724Frw.

- Regarding the cross-appeal.

- [45] Counsel Nkundabarashi Moïse representing Ecobank Rwanda Ltd prays that Uwamahoro Florent de la Paix and Arlcom Ltd jointly pay the bank, the procedural and counsel fees of 2 000 000Frw
- [46] Uwamahoro Florent de la Paix and Arlcom Ltd believe that the cross appeal of Ecobank Rwanda Ltd is groundless because they do not acknowledge the loan they are requested to pay.

VIEW OF THE COURT

[47] The Court finds that since Uwamahoro Florent de la Paix and Arlcom Ltd have been ordered to pay to Ecobank Rwanda Ltd some of those requested, they must pay the procedural fees of 500.000Frw and counsel fees of 500.000Frw on this level considering the time spent on this case.

III. DECISION OF THE COURT

- [48] Decides that the appeal of Uwamahoro Florent de la Paix and Arlcom Ltd has merit in parts;
- [49] Decides that the cross appeal of Ecobank Rwanda Ltd has merit in parts,
- [50] Declares that the rulings of RCOMA0213/14/HCC rendered on 25/04/2014 by the Commercial High Court, is reversed with regard to the amount of the loan Uwamahoro Florent de la Paix and Arlcom Ltd have to pay to Ecobank Rwanda Ltd;
- [51] Orders Uwamahoro Florent de la Paix and Arlcom Ltd to jointly pay Ecobank Rwanda Ltd the debt and the interests all equivalent to 647.221.724Frw and 1.000.000Frw of the procedural and counsel fees on this instance;
- [52] Declares that the fees deposited by Uwamahoro Florent de la Paix and Arlcom Ltd as court fees cover the expenses incurred in this case.

NYIRANJANGWE v. BPR Ltd ET.AL

[Rwanda SUPREME COURT – RCOMAA0019/15/CS (Hatangimbabazi, P.J., Gakwaya and Mukamulisa, J.) April 13, 2018]

Mortgage – Nullification of the auction – The auction based on the valuation which was invalidated by Council of Real Property Valuation is null and void because it is deemed to be unlawfully conducted – Law N°17/2010 of 12/05/2010 establishing and organising the real property valuation profession in Rwanda, article 36.

Fact: Nyiranjagwe concluded a loan contract with Banque Populaire du Rwanda (BPR Ltd), they agreed that if she fails to perform the conctract, the house which she furnished as mortgage will be auctioned without recourse to judicial proceedings. Nyiranjagwe defaulted on the performance of that contract thus; the Registrar General of RDB issued an order to auction that mortgage.

Nyiranjagwe filed an exparte application to the Commercial Court of Huye requesting to suspend that auction of her house because the valuation of which that auction is based is inconsistent with the general principles of valuation on immovable property, that court ruled that the claim has no merit.

Nyiranjagwe filed another claim in that Court suing the court bailiff and BPR Ltd, stating that the auction was unlawfully conducted because her house was auctioned at lower price than the actual value, thus, she requests to declare that auction null and void. The Court rendered the judgment and nullified the auction and all related contracts thereof.

The court bailiff and BPR Ltd were not satisfied with the rulings of the court and appealed to the Commercial High Court, B.E.S. & Supply Ltd voluntarlly intervened as the buyer of that house; this court ruled that the auction was lawfully conducted, therefore it sustained it.

Nyiranjangwe appealed to the Supreme Court arguing that the Commercial High Court disregarded the main ground on which she relied requesting the termination of that contract. Court bailiff, BPR Ltd and B.E.S & Supply Ltd raised a preliminaryobjection of inadmissibility of the appeal basing on the value of the subject matter which they contend that it is not equal to 50,000,000Frw provided by the law; the Court held that before ruling on that objection, it is necessary first to appoint the valuer to determine the value of that house, thereafter, the Court overruled that objection; BPR Ltd again raised another objection stating that the appeal of Nyiranjagwe should not be admitted because the grounds of her appeal were ruled upon in another binding judgment, that objection was also overruled.

Nyiranjangwe explains that Commercial High Court disregarded the main ground of her appeal that the auction was carried out on her house was based on valuation report which was invalidated by Council of Real Property Valuation, that caused her house to be sold at a lower price compare to its value, therefore, she requests for the annulment of that auction and to awarded the costs.

In their defence, the Court bailiff, BPR Ltd and B.E.S & Supply Ltd state that the ground of Nyiranjagwe's appeal lacks merit because in appealed judgment, the Commercial Court motivated

that ground and the requested costs should not be awarded because she does not demonstrate who should pay them and the reason, thus, they find that they are ones to be awarded those costs.

- **Held:** 1. The auction based on the valuation which was invalidated by Council of Real Property Valuation is null and void because it is deemed to be unlawfully conducted.
- 2. Costs of the case are awarded in the discretion of the court when the applicant did not demonstrate how they were calculated.

Appeal has merit. The court fees to the respondents.

Statute and statutory instruments referred to:

Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedure, article 208 and 267.

Law N°17/2010 of 12/05/2010 establishing and organising the real property valuation profession in Rwanda, article 36.

Law N°10/2009 of 14/5/2009 on mortgage, article 19 and 24.

Decree-law of 30/07/1888 relating to contract or conventional obligation, article 258.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] Nyiranjagwe Zura concluded a loan contract with Banque Populaire du Rwanda (BPR), she furnished a house as mortgage and they agreed that it will be sold without recourse to judicial proceedings in case she fails to perform the contract. Nyiranjangwe Zura did not perform that contract; then on 27/1/2014, Registrar General in Rwanda Development Board (RDB) authorised to sale in auction the house of Nyiranjangwe Zura located in South Province, Nyanza District, Busasamana Sector, Gahondo cell, and appointed Ruganda Cryspin to sell that mortgage and that his mandate will be terminated on 24/04/2014.
- [2] On 5/03/2014, Nyiranjangwe Zura filed an exparte application to the Commercial Court of Huye requesting to suspend that auction of her house because it was being conducted contrary to the certificate from Rwanda Development Board (RDB). On 07/03/2014, that court rendered the judgment RCOM0084/14/TC/HYE, found her claim with no merit.
- [3] Nyiranjangwe Zura filed another claim to the Commercial Court of Huye, suing Ruganda Cryspin, the court bailiff and BPR Ltd stating that they unlawfully auctioned the mortgage she provided to this bank because they sold it at less value than the right value. Thus, she is requesting to declare it null and void. On 07/11/2014, that Court rendered the judgment RCOM0166/14/TC/HYE, and decided to nullify the auction of

Nyiranjangwe Zura's house carried on 24/3/2014 and all related contracts.

- [4] Ruganda Cryspin and BPR Ltd were not satisfied with the rulings of the Commercial Court of Huye, and appealed to the Commercial High Court. B.E.S. & Supply Ltd voluntary intervened as the buyer of that house in litigation. On 13/02/2015, that Court rendered judgment RCOMA0606/14/HCC RCOMA0608/14/HCC, and ruled that the auction of the mortgage mentioned in this judgment was lawfully conducted; therefore, it is valid.
- [5] Nyiranjangwe Zura was not contented with the rulings of that judgment and appealed to the Supreme Court stating that the Commercial High Court failed to examine her main ground for which she requested the nullification of the auction which took place on 24/3/2014.
- Ntwali Justin, the counsel for BPR Ltd, Murutasibe [6] Joseph, the counsel for B.E.S. & Supply Ltd and Nkundabatware Bigimba Félix, the counsel for Ruganda Cryspin raised an objection of lack of the jursidiction of the Supreme Court on the basis of article 28, paragraph 4 of the organic law determining the organization, functioning and jurisdiction of the Supreme Court which provides that in order to admit the second appeal, the subject matter should have at least the value of 50,000,000Frw, but in this judgment the auctioned house does not have the value worth 50,000,000Frw. They explain that the house was given the value of 42, 000,000Frw as it is indicated in valuation report that was used for auctioning the house which is also accepted by RDB. Therefore, the fact that the value of subject matter does not equal to 50, 000,000Frw at least, the appeal of Nyiranjangwe Zura does not fall into the jursidiction of the Supreme Court.

- [7] On 24/02/2017, this court found that before ruling on the objection of lack of jursidiction of the Supreme Court, it is necessary to appoint the valuer so that he determines the current value of the house in litigation; it adjourned the hearing, that it will resumeon 15/03/2017 so that the parties Nyiranjangwe Zura, BPR Ltd and B.E.S & Supply Ltd inform the court the valuer they aggred on, if not, he will be appointed by the court.
- [8] On 15/03/2017, the case was not heard because one of the judges of the bench was on official mission abroad and it was postponed on 16/05/2017. On 20/04/2017, the Supreme Court informed the parties that their case will be heard on 2/5/2017 instead of 16/05/2017.
- [9] On 2/05/2017, the Supreme Court appointed Ir. Nkabije Alphonse Marie as property valuer in this case, it ordered him to submit his report not later than 22/05/2017, and ordered the parties to argue on it not later than 30/5/2017; the hearing will be resumed on 27/06/2017. On that day the case was not heard because one judge of the bench was on official mission abroad and postponed it on 18/07/2017, but on 29/06/2017, Supreme Court notifyied the parties that the case will be heard on 25/07/2017 instead of 18/07/2017 as it was confirmed during the hearing of 27/06/2017.
- [10] The case was held in public on 25/07/2017, Nyiranjangwe Zura assisted by Counsel Kabasenga Berthilde and Mugabo Pio; BPR Ltd represented by Counsel Ntwali Justin; Ruganda Cryspin represented by counsel Nkundabatware Bigimba Félix, whereas B.E.S. & Supply Ltd represented by Counsel Kiloha Olivier. On that date, the Court heard the arguments of the parties on the report of valuer Ir. Nkabije Alphonse Marie, which indicates that the value of the house in litigation equals to 79, 250,670Frw.

- [11] On 22/09/2017, the Supreme Court rendered the interlocutory judgment and overruled the objection of lack of the jurisdiction of the Court raised by BPR Ltd based on the fact that the value of the subject matter does not worth 50, 000,000Frw, that the appeal of Nyiranjangwe Zura falls into the jurisdiction of the Supreme Court.
- [12] After that decision, Ntwali Justin, the counsel for BPR Ltd raised another objection of inadmissibility of Nyiranjangwe Zura's appeal basing on article 142 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, because her ground of appeal is about the valuation report of her house while there is a binding judgment RCOM0084/14/TC/HYE which examined that the same valuation report.
- [13] On 29/12/2017, the Supreme Court rendered an interlocutory judgment and overuled the objection of inadmissibilty raised by BPR Ltd because the grounds of her appeal were heard in another binding judgment; that her appeal is admitted and the hearing of the judgment will be resumed on 20/2/2018
- [14] On that date, the hearing on merit was conducted in public, Nyiranjangwe Zura assisted by Counsel Kabasenga Berthilde and Mugabo Pio; BPR Ltd represented by Counsel Ntwali Justin; Ruganda Cryspin represented by Counsel Ndagijimana Ignace while B.E.S. & Supply Ltd represented by Counsel Busogi Emmanuel.

II. ANALYSIS OF THE LEGAL ISSUES

- a. Whether the Commercial High Court disregarded to examine the main ground of Nyiranjangwe Zura's appeal of nullifying the auction carried out on her house
- [15] Nyiranjangwe Zura states that the Commercial High Court diregarded the main ground of appeal which she relied on to request the annulment of the auction; she adds, that ground was relied on by Commercial Court of Huye in deciding that her claim has merit and consequently the auction was annuled
- [16] Nyiranjangwe Zura explains that she prayed for declaring null and void the auction since it was based on valuation report which is not valid, and this led her house to be auctioned on less value. She further explains that this ground does not appear anywhere in appealed judgment. She explains again that the fact that Commercial High Court disregarded to examine it while it is a ground she uses in her pleadings, it would be considered as lack of motivation in this case. Therefore she finds that the appealed judgment should be quashed and the rulings of the judgment RCOM0166/14/TC/HYE rendered by the Commercial Court of Huye on18/06/2014 be sustained.
- [17] Nyiranjangwe Zura adds that article 8 of the instructions $N^{o}03/2010/org$ of 16/11/2010 of the registrar general on modalities of lease, sale, public auction and possession of the mortgage which Commercial High Court based on, does not allow to rely on valuation report which is not valid, that the content of this article concens this valuation report.
- [18] Counsel Kabasenga Berthilde and counsel Mugabo Pio argue that the main ground which their client Nyiranjangwe Zura

used in her pleadings on the first instance was the annulation of the auction because her house was auctioned on less value, because it was given the value of sixty eight millions rwandan franc(68) but it was sold at eighteen millions only (18), the beneficiary sold it at thirty six millions (36), this demonstrates how court baillif auctioned it at the less price. They further argue that their opponents state in part article 36 of the Law N°17/05/2010 of 12/5/2010 mentioned above because it further provides that in case of disputes, the matter shall be submitted to competent organ, that is the reason why the court baillif cannot auction the property as he/she wants. They also state that the other proof which demonstrates that the court baillif was intetionally devaluated the house of Nyiranjangwe Zura is that he declared that the house was built with mudbricks while it is fired bricks, this proves that he did not act professionally.

- [19] Ntwali Justin, the counsel for BPR Ltd states that this ground of appeal is groundless because the Commercial High Court examined the grounds of appeal of BPR Ltd and Ruganda Cryspin, that the Court could not examine her grounds while she did not appeal. He further explains that it is not true to state that there is lack of motivation since from paragraph 4 to paragraph 7 of the appealed judgment, the Commercial High Court motivated it, and also examined the voluntary intervention of B.E.S Supply Ltd
- [20] Nkundabatware Bigimba Félix, the counsel for Ruganda Crispin states that this ground of appeal is groundless because the Commercial High Court motivated enough its decision.
- [21] In his submissions, Murutasibe Joseph, the counsel for B.E.S & Supply Ltd also states that this ground of appeal is groundless because from paragraph 4 to paragraph 7 of the

appealed judgment, the Commercial High Court motivated it enough and demonstrated the provisions of the law it relied on.

VIEW OF THE COURT

- [22] Article 36 of the Law N°17/2010 of 12/05/2010 establishing and organising the real property valuation profession in Rwanda provides that "where a party does not agree with a real property valuation, he/she shall refer the matter to the Council. In such case, the Council shall select other certified valuers who shall decide other valuation methods to be used. In case the dispute is not settled, it shall be submitted to competent court of Law"
- [23] Article 19, paragraph one of the Law N°10/2009 of 14/5/2009 on mortgage as it was amended to date, provides that "the receiver shall be responsible for the selling of the mortgage at an appropriate market price after informing the two parties thereon".
- [24] Article 267, paragraph one of the Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedure, provides that "when it is obvious that the seized property under sale is likely to be sold at a too low price, the court bailiff, upon request by the distrainer, the distrainee, may postpone the auction to another day." Whereas paragraph 2 of this article provides that "in that case, the public auctioneer shall set another day of auction not to exceed fifteen (15) days and shall take all necessary precautions to protect the interests of the parties."

[25] As it is indicated in paragraph 7,8,9 and 10 of the judgment RCOM0166/14/TC/HYE of 18/06/2014 rendered on the first instance by Commercial Court of Huye, Nyiranjangwe Zura filed a claim requesting to declare null and void the auction of her house done on 24/03/2014 because it was relied on the valuation report of 29/09/2013 that was invalidated by the institute of real property valuers, this was informed to RDB, BPR Ltd and Ruganda Cryspin, the court baillif as it is affirmed by the letter of the executive director of the institute of real property valuers of 20/03//2014. That Court held that auction of Nyiranjangwe Zura's house on 24/3/2014 is nulled, it motivated that, as it abvious in paragraph 28 of its judgment, the fact that court baillif was informed that the valuation which he was going to rely on in auction, was invalidated by the competent organ, despite this, he based on it, that contract of the public auction which was concluded basing on the document which was declared null, hence that contract is not valid because it was unlawfully concluded.

[26] As it is indicated in the submissions, B.P.R. Ltd appealed to the Commercial High Court stating that the Commercial Court of Huye disregarded the objection of the inadmissibility of claim of Nyiranjangwe Zura because the object in litigation in this case was heard in the judgment RCOM 0084/14/TC/HYE which became binding whereby it held that Nyiranjangwe Zura knew the second valuation report, which confirmed that her house has the value of 42,000,000Frw after the auction, while that valuation report was heard in the judgment RCOM0084/14/TC/HYE, that basing on article 19, paragraph 2 of the Law N°10/2009 of 14/5/2009 on mortgage and article 208 of the Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedure, that it would not declare that

Nyiranjangwe Zura has the right to file a claim to the court requesting for the annulment of the auction, because even if she had that right, it shall not remove that the auction was lawfullly conducted and the disputes provided under article 208 of the Law N°21/2012 of 14/06/2012 are not related with the issue of valuation. B.P.R. Ltd also appealed stating that the Commercial Court awarded Nyiranjangwe Zura damages while she did not prove them.

- [27] The case file demonstrates that Ruganda Cryspin also appealed against the judgment RCOM0166/14/TC/HYE stating that the Commercial Court should not have overruled the objection of inadmissibility of Nyiranjangwe Zura's claim because she was not the one who should be sued, that the Commercial Court disregarded the laws and wrongful interpreted provisions of law, moreover, it contradicted itself on whether the instructions were respected.
- [28] In the appealed judgment, Commercial High Court examined three issues related to whether the objection of inadmissibility of Nyiranjangwe Zura'claim raised by Ruganda Cryspin because she was wrongly sued, whether Ruganda Cryspin devaluated the house of Nyiranjangwe Zura during the auction and whether the claim of Nyiranjangwe Zura should not have been admitted because it was decided upon in the judgment RCOM0084/14/TC/HYE.
- [29] As it is indicated in paragraphs 4,5,6 and 7 of the appealed judgment, the Commercial High Court motivated that basing on article 8,11,12 of the instructions of the registrar general N° 03/2010/ORG of 16/11/2010 on modalities of lease, sale, public auction and possession mortgage, the receiver shall have the obligation of conducting the valuation of mortgage, and report it

to the registrar general for approval in instructions of auction, which means that the valuation carried out on request of mortgagor shall not have binding force, even if it was carried out by authorized experts. It also motivated that the fact that Nyiranjangwe Zura failed to prove that her house was auctioned on the price which is very different from those on the market, that during the auction there was a buyer who could pay more than what that mortgage was sold on and that on collusion of Ruganda Cryspin and B.P.R. Ltd that mortgage was auctioned on low price, Ruganda Cryspin and B.P.R. Ltd should not be liable for the devaluation of the mortgage furnished by Nyiranjangwe Zura.

- [30] The instructions of the auction of Nyiranjangwe Zura's house indicate that the auction will take place on 24/02/2014, and if it will not take place due to the absense of bidders or in case they offer a little bid, that public auction shall be postponed for the first time on 3/03/2014, for the second time on 10/03/2014, for the third time on 17/03/2014 and last on 24/03/2014.
- [31] The letter of the Registrar General dated 28/02/2014 indicates that on 5/02/2014, Nyiranjangwe Zura wrote to her office requesting to declare nul and void the order to auction her house because the valuation in that order devaluates her property, then the Registrar General informed her that since she was not satisfyied with the conducted valuation, she may submit her claim to the council of valuers, basing on article 36 of the Law N°17/2010 of 12/05/2010 mentioned above.
- [32] The case file demonstrates that on 20/03/2014, the Acting Chairperson of the Regulatory Council of Real Property Valuation wrote to the Registrar General of RDB a letter which he received on 24/03/2014 and copied to Institute of Real Property Valuers, Managing Director of B.P.R. Ltd, Ruganda

Cryspin and Nyiranjangwe Zura informing her that the valuation report on the immovable property of Nyiranjangwe Zura based on order nº 14-003881 for the auction of the mortgage dated on 27/1/2014 is invalid because it is inconsistent with the general principles of valuation on immovable property, for the interest of both parties on the conducted auction, the council finds that the value of the property should not be considered as the initial value since it is difficult to determine whether that value corresponds withthe prices on market.

- [33] As it is indicated in the case file, in reply to the letter dated 20/03/2014 mentioned above, on 08/04/2014, the Registrar General of RDB wrote to Regulatory Council of Real Property Valuation and copied to CEO of BPR Ltd, Ruganda Cryspin and Nyiranjangwe Zura informed it that basing on article 24 of the Law No 10/2009 of 14/5/2009 on mortgage, she requests the concerned person to seize the compentent court to settle that issue.
- [34] The Supreme Court finds that the examination of the appealed judgment indicates that in quashing the judgment rendered on the first instance, the Commercial High Court did not examine the main issue which was submitted by Nyiranjangwe Zura of annulling the auction conducted on her house on 24/03/2014 because during the auction of the mortgage in litigation, the court baillif used the valuation report which was invalidated by Institute of Real Property Valuers on 20/03/2014, but instead, it only examined the issue of determining whether the court baillif Ruganda Cryspin devalued the house of Nyiranjangwe Zura during the auction.
- [35] Supreme Court finds that the court had to examine the issue which was submitted by Nyiranjangwe Zura at the first

instance, especially that in its submission at appeal level, B.P.R. Ltd argued that the Commercial Court could not rule on whether Nyiranjangwe Zura had the right to file a claim to the court, requesting for the annulment of the auction because even if she had that right, it does not mean that the auction was not lawful conducted.

[36] Supreme Court further finds that the interpretation of article 36 of the Law N°17/2010 of 12/5/2010 mentioned above, together with article 19, paragraph one of the Law N°10/2009 of 14/5/2009 mentioned above and article 267 of the Law N°21/2012 of 14/6/2012 mentioned above, is that in case the mortgage could be auctioned at a lower price than that is on the market, on the request of mortgagor or mortgagee, receiver suspends the auction and postpones it to another day, and makes sure that no one is prejudiced.

[37] Supreme Court finds that since 5/02/2014, Nyiranjangwe Zura wrote to the Registrar General requesting to declare null and void the order to auction her house because the valuation which is indicated in that order devalues her property, therafter, in accordance to the response of the Registrar General, she reffered the matter to the council of valuers, then that council wrote a letter on 20/3/2014 to the Registrar General and copied the Institute of Real Property Valuers, Managing Director of B.P.R. Ltd, Ruganda Cryspin and Nyiranjangwe Zura, informing them that the valuation report of Nyiranjangwe Zura's immovable property is invalid due to the fact that it is inconsistent to the regulations governing the valuation of immovable property, but instead of suspending the auction of 24/3/2014, the court baillif disregarded it, and auctioned the mortgage basing on invalidated

valuation, therefore, that auction should be annuled because it was unlawful conducted.

[38] Basing on the motivations provided above, the Supreme Court finds the appeal lodged by Nyiranjangwe Zura with merit.

b. Whether the parties should be awarded damages requested in this case

- [39] Counsel Kabasenga Berthilde and Counsel Mugabo Pio state that their client Nyiranjangwe Zura prays for 1,500,000Frw in damages for being dragged into unnecessary lawsuits and the counsel fees she paid in previous cases, 3,000,000Frw of the procedure damages, 12,960,000Frw of the loss she incurred due to not living in her house while those they rented her house while she is sheltered in the house of benefactor, her demands are based on the fact that her house was rented at 270,000Frw per month for four years, she also requests 10,000,0000Frw in moral damages.
- [40] Counsel Kabasenga Berthilde and counsel Mugabo Pio further state that Ruganda Cryspin can not request for any cost since he played a big role in all this, and the house which was valued at sixty eight millions (68,000,000Frw) by the time registering the mortgage, the experts in valuation put it at the value of fourty two millions (42,000,000Frw) and in addition to this when the court baillif was auctionning it he decribed it wrongly.
- [41] Ntwali Justin, the counsel for B.P.R. Ltd argues that damages which Nyiranjangwe Zura requests for are groundless especially that she does not indicates whom she requests them from and reason; that the bank cannot pay them because till now

she failed to reimburse the loan and it's interests were halted since the beginning of the case whichcaused a loss to the bank, moreover, what happened the bank had no role in it. He further states that the other reason that the bank should not be asked to pay damages is that if the court declares that the auction is cancelled, the house will not be given to the bank rather it will be given to Nyiranjangwe Zura, therefore she is the one who must pay the value added on the house.

- [42] Ndagijimana Ignace, the counsel for Ruganda Cryspin argues that they lodged a cross appeal requesting 3, 000,000Frw in damages, which includes 1,000,000Frw of the counsel fees and 2,000,000Frw of the procedural fees, also they should be awarded 2,500,000Frw of the counsel fees in all the previous cases. He states in addition that the court baillif should not be held liable for the value added on the house, rather the one who is given the house, especially that in case of reimbursment of the money, it will not be given to the court baillif, that is the reason why Ruganda Cryspin should not be held liable.
- [43] Busogi Emmanuel, the counsel for B.E.S. Supply Ltd states that they bought the house at the price of thirty five millions (35,000,000Frw) and used 16,735,800Frw to renovate it, the last valuation report indicated that it has the value of seventy nine millions two hundreds and fifty thousand six hundred and seventy francs (79,250,670Frw), therefore they request that Ruganda Cryspin and B.P.R. Ltd be reimbursed the value added on it and the one who will be found liable to pay the counsel fees of 1,000,000Frw.

VIEW OF THE COURT

- [44] Article 258 of the civil code book three provides that "any act of a man, which causes damage to another obliges the person by whose fault it happened to be held liable"
- [45] Regarding 1, 500,000Frw of the counsel fees that she paid in the previous cases and on this instance, Nyiranjangwe Zura requests for its reimbursement by B.P.R. Ltd and Ruganda Cryspin, the Supreme Court finds that she should be awarded it because it became necessary to hire a laywer from the first instance till to this court
- [46] Regarding 3,000,000Frw of the procedural fees from the first instance to this court which Nyiranjangwe Zura requests to be paid by B.P.R. Ltd and Ruganda Cryspin, the Supreme Court finds that they should be awarded since she followed up her cases, but the fact that she does not indicates how they are culculated, in its discretion it awarded 300,000Frw for the Commercial Court, 500,000Frw for Commercial High Court and 500,000frw for this instance, all together equal to 1,300,000Frw.
- [47] Regarding 10,000,000Frw in moral damages which Nyiranjangwe Zura requests to be paid by B.P.R. Ltd and Ruganda Cryspin, the Supreme Court finds that she should be awarded, but the fact that what she requests are excessive, she is awarded in the discretion of the court 2,000,000Frw.
- [48] Regarding 12,960,000Frw which Nyiranjangwe Zura demands from B.P.R. Ltd and Ruganda Cryspin, of the loss she suffered due the fact that she did not live in her house, while they rented it and for her she is sheltered in the house of benefactor, the Supreme Court finds that even if it is obvious that

Nyiranjangwe Zura was renting that house 120.000Frw of the rent per month before it was auctioned as it is indicated in lease contract she concluded with Ecobank Rwanda Ltd on 1/10/2012 and the receipt n°03/06/2013 that was submitted to that bank on 8/6/2013; but can not be awarded them because she requested those damages for the first time before this court.

- [49] Concerning the costs B.P.R. Ltd and Ruganda Cryspin requests to be paid by Nyiranjangwe Zura, Supreme Court finds that they should not be awarded it because they lost the case.
- [50] Regarding costs which B.E.S. Supply Ltd requests for renovating the house that was auctined and 1,000,000Frw of the counsel fees, the Supreme Court finds that it should not be awarded because it voluntarlly intervenned in this case at the second instance with the purpose of praying to the High Court to hold thatthe claim of Nyiranjangwe Zura should not have been admitted at the first instance because the grounds that are based on are *res judicata* and to rule that the mortgage in litigation was lawful auctined, but as it is indicated in its defense submission before this Court, it supported the defense of B.P.R. Ltd and Ruganda Cryspin, therefore it should not request for the first time on this level that B.P.R. Ltd and Ruganda Cryspin be orded to reimburse that amount of money while from the beginning it supported their pleadings.

III. DECISION OF THE COURT

[51] Finds the appeal of Nyiranjangwe Zura with merit;

- [52] Holds that the auction of Nyiranjangwe Zura's house that was took place on 24/03/2014 and the related contracts are nullified;
- [53] Orders B.P.R. Ltd and Ruganda Cryspin to jointly pay to Nyiranjangwe Zura 1,500,000Frw of the counsel fees, 1,300,000Frw of the procedural fees for the first instance up to this court and 2,000,000Frw in moral damages, all together amounting to 4,800,000Frw;
- [54] Orders B.P.R. Ltd and Ruganda Cryspin to jointly pay 700,000Frw for the valuation which was ordered by this court;
- [55] Orders B.P.R. Ltd and Ruganda Cryspin to jointly pay the court fees worth 100,000Frw.

CRIMINAL CASES

PROSECUTION v. DUSABIMANA

[Rwanda SUPREME COURT – RPAA0066/15/CS (Rugege, P.J., Kayitesi Z. and Kayitesi R., J.) January 04, 2019]

Evidence Law – Admission of the offence – Admission is not an irrefutable proof to be considered in all circumstances in convicting the accused – The fact that the accused admitted the offence and later denies it, puts the onus on the Prosecution to produce other elements of evidence to support the statement of the guilty plea of the accused.

Facts: This case started at the Intermediate Court of Ngoma where the Prosecution accused Dusabimana for infanticide stating that together with Hategekimana, she killed her two years oldson called Sibomana, the accused pleaded not guilty arguing that she didn't kill her child, instead, he died natural death and that she possesses medical documents proving it, the court rendered the judgment and decided that the accused are guilty and sentenced each of them to life imprisonment.

The accused appealed to the High Court, chamber of Rwamagana, Dusabimana pleaded guilty requesting for pardon but that court did not consider her admission of the offence on ground that it found her admission incomplete because she contradicts herself that she took the child to the hospital and died on the way and on the other hand she states that she killed the child out of anger, consequently, the Court did not reduce the penalty.

Dusabimana again appealed before the Supreme Court arguing that she pleaded guilty and sought for pardon but the court refused to reduce the penalty of life imprisonment, she adds that in previous courts she pleaded guilty for the offence she did not commit because she was told that she will be immediately released if she admits it, but she did not kill her son, instead, he fell sick they took him to the hospital and died later, she adds that he was buried at his paternal grandfather's place and that he was the only child she gave birth to. She further explained that the contradiction in her statement was due to the fact that she had no advocate but there is no proof that she murdered her child.

After the court heard the grounds of appeal and the response of the Prosecution, the Court found that before adjudicating the case, it is necessary to conduct its own investigation with regard to the child she is accused to have killed, the court also ordered that Dusabimana be examined to determine whether she does not suffer from the neuro psychiatric illness, it also ordered the Prosecution to conduct further investigation to demonstrate the number of children the accused gave birth to, the place where the child was killed and where he was buried. The Court also found, it is necessary that the remains buried at the child's grandfather place be exhumed to make DNA test to determine the sex of the child buried in that grave and his/her relationship with Dusabimana.

With regard to the issue of mental illness, Ndera Neuro Psychiatric Hospital submitted its medical report demonstrating that she was mentally normal, whilst the DNA test which was conducted, revealed that the body which was examined was of a girl with no parental relationship to Dusabimana.

The hearing resumed and Dusabimana argued that since the DNA test revealed that the child alleged to be hers is not, implies that there is no ground to substantiate that she killed her own child,

rather, the Prosecution should demonstrate other cause of the child's death.

The Prosecution contends that the fact Dusabimana Jeanette pleads not guilty in appeal while she admitted the offence before the previous courts, it should incriminate her and that Dusabimana and her counsel pleadings should not be considered because their statements contradict the elements of evidence contained in the case file. On the issue of locating the place where the body of Sibomana Samuel was buried, the Prosecution stated that it is unknown because the accused refused to reveal it.

- **Held:** 1. Admission is not an irrefutable proof to be considered in all circumstances in convicting the accused, therefore the statements relied on by the previous courts are not sufficient to convict Dusabimana for the offence of infanticide because those statements do not clearly demonstrate the offence for which she admitted.
- 2. The fact that the accused admitted the offence and later denies it, puts the onus on the Prosecution to produce other elements of evidence to support the statement of the guilty plea of the accused.
- 3. The benefit of doubt is given in favour of the accused, therefore, the fact that the dead body which was examined has no parental relationship with the accused and differs from the one cited by the Prosecution on the basis of statements of witnesses and basing on the fact that the Prosecution failed to prove its case beyond reasonable doubt, the accused is aquitted.

Appeal has merit; Court fees to the public treasury.

Statute and statutory instruments referred to:

Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 143.

Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, article 85 and 165.

Case referred to:

Prosecution v. Nyirahabimana, RPA0229/10/CS rendered on 19/09/2014 by Supreme Court.

Prosecution v. Ndungutse, RPA0042/14/CS rendered on 02/06/2017 by Supreme Court.

Authors cited:

Adrien Masset, Ann Jacobs & Michel Franchimont, Manuel de procedure pénale, Maison d'édition Larcier, 2009, P 1174

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] This case started at the Intermediate Court of Ngoma whereby the Prosecution accused Dusabimana Jeannette together with Hategekimana Léonard of having killed her son called Sibomana Samuel who was 2 years old, so that they could cohabit
- [2] Dusabimana Jeannette pleaded not guilty stating that she didn't kill that child, instead, the death was succumbed to illness

and that she possesses the supporting medical documents. The Intermediate Court of Ngoma rendered the judgment RP0678/13/TGI/NGOMA on 21/11/2013 deciding that Dusabimana Jeannette and Hategekimana Léonard are guilty of the offence which they are prosecuted for, hence It sentenced each of them to life imprisonment. Both appealed to the High Court, chamber of Rwamagana which rendered the judgment RPA0385/13/HC/RWG-RPA394/13/HC/RWG on 12/06/2014 deciding that their appeal lacks merit.

- [3] In the examination of the grounds of Dusabimana Jeannette's appeal, where she stated that she appealed seeking for the pardon on the offence she committed, the Court found her admission not complete because even if she admits having committed the offence, she is not remorseful, rather she contradicts herself stating that she took the child to the hospital being accompanied by Hategekimana Léonard who held the child in his arms and when they reached the forest he told Dusabimana that the child has passed away while he was the one choking the child, on the other hand she stated that she murdered the child out of anger caused by her husband who took her family's estate, consequently, she collaborated with Hategekimana Léonard to kill that child
- [4] Dusabimana Jeannette appealed to the Supreme Court stating that she pleaded guilty seeking for pardon but the court did not reduce the penalty and upheld the sentence of life imprisonment, she adds that she discharged Hategekimana Léonard demonstrating that he was not involved in the commission of the offence but the court disregarded it, she further requests that Hategekimana Léonard be acquitted since the criminal liability is personal.Her appeal was recorded N°RPAA0066/15/CS.

- [5] The hearing of the case was held in public on 22/01/2018, Dusabimana Jeannette assisted by Counsel Ndayambaje Gilbert whereas the Prosecution represented by Munyaneza Nkwaya Eric, the National Prosecutor. Dusabimana Jeannette begun her pleadings by disowning the contents of the document relating to the appeal which were brought before the Supreme Court arguing that she is not the one who prepared it because she was sick, she states that in lower courts she pleaded guilty for the offence she did not commit because she was told that she would be immediately released if she pleaded guilty, that she did not murder her son Sibomana Samuel, rather, he got sick and he was taken to the hospital and died, that he was buried at his paternal grandfarther.
- [6] After the Court heard Dusabimana Jeannette explaining her grounds of appeal and the Prosecution's response, the Court decided to conduct its own investigation on the child whom Dusabimana Jeannette is accused of murdering. Duringt the investigation conducted on 22/01/2018, witnesses Uwimana Beatrice, Ntirenganya Fabien and Harerimana Damascene testified that Tuyisenge and Dusabimana gave birth to two children, but they do not know whereabout of the second child called Sibomana Samuel and that the child they know who deceased is Uwineza Aline and was buried at his paternal grandfather.
- [7] During the hearing of 19/03/2018, the accused appeared before the court being assisted by a legal counsel and the Prosecution was represented as it was in the previous session. After the court examined how Dusabimana Jeannette explained the facts in comparison to her previous hearings, the Court ordered for supplementary inquiry, that the Prosecution takes

Dusabimana Jeannette to the expert physicians to examine her, if she does not suffer from mental illness. The court also found it necessary that the Prosecution conducts supplementary investigation to determine whether Dusabimana Jeannette gave birth to two children (Uwineza Aline and Sibomana Samuel) or one and also the place where Sibomana Samuel was killed and buried. The court summoned Tuyisenge Emmanuel the husband of Dusabimana Jeannette in order to get some information from him, the court decided to resume the hearing on 25/06/2018.

- [8] On 20/06/2018, Ndera Neuro Psychiatric Hospital submitted the report on examination conducted on Dusabimana Jeannette from 17/05/2018 to 20/06/2018, which demonstrated that she was mentally normal. The only sign noticed was the depression because sometimes she cries saying that she has headache, but the physician explains that this may have been caused by the conditions she lived in before and after incarcelation, the report concluded that she has no sign of neuro psychiatric illness.
- [9] On 25/06/2018, both parties appeared before court and expressed their opinions on outcome of the investigation as well as on the medical report. Among the issues assigned to the Prosecution was to determine whether Dusabimana Jeannette gave birth to two children (Uwineza Aline and Sibomana Samuel) or one. The Prosecution produced photos of the grave where it states that Uwineza Aline is buried, that the place where Sibomana Samuel was buried or thrown is unknown because the accused refused to reveal it
- [10] Dusabimana Jeannette stated that Sibomana Samuel was buried in that grave, that he was the only child she gave birth and

that before she cohabited with Tuyisenge Emmanuel, the latter had a daughter who is still alive.

- [11] The court found that before rendering the judgment, it is necessary that the body buried at the child's grandfather be exhumated to have DNA test conducted in order to find out the sex of the child buried in that grave and the relationship with Dusabimana Jeannette, the Court again summoned Tuyisenge Emmanuel in order to get some information from him. The DNA test was conducted by Dr Christa Augustin who works at UKE Institute of legal medicine, Hamburg, Germany, which indicated that the body which was examined was of a female with no parental relationship to Dusabimana nor Tuyisenge.
- [12] The hearing was resumed in public on 03/12/2018, the accused appeared before court being assisted and the Prosecution was represented by Rudatinya Nyangezi Gaspard, whereas Tuyisenge defaulted to appear though he was legally summoned, the parties were given opportunity to react on the DNA test report.

II. ANALYSIS OF LEGAL ISSUES

Whether there are incriminating elements of evidence to prove that Dusabimana Jeannette murdered her child Sibomana Samuel.

[13] Dusabimana Jeannette states that in previous courts she was convicted for the offence she did not commit because she did not kill her child, rather she took him to the hospital accompanied by Tuyisenge Emmanuel (the child's father) and the child succumed to sickness thereafter. She states that she confessed in judicial police and admitted in lower courts because she was told

that she would be released immediately once she confesses and that she is not the one who wrote the letter of appeal when she appealed to the Supreme Court because she was sick.

- [14] She states that the child she is accused of killing, did not die in 2013 as indicated in the case file, rather, he died in 2011 and buried at his grandfather place in Nyabageni village, Kabazungu cell, Musanze sector, northern province, she adds that he was buried in presence of his father and neighbors, among these, she remembers Ntirenganya Fabien, Harerimana Damascne, Ntawiha and Uwimana Nirere.
- [15] When she was asked about the statements of those whom she mentioned that they escorted her to the hospital whereas they denied having known about the death of Sibomana Samuel and that he is not recorded in appropriate registers, she replied that the physician who treated him may have forgotten to record in that book, while the fact that those who were interrogated have refuted her statement, she explained that she does not know the reason behind that because what happened was in the broad daylight.
- [16] With regard to outcome of the supplementary investigation, Dusabimana Jeannette again affirmed that she and Tuyisenge Emmanuel gave birth to one child called Sibomana Samuel, that before she cohabited with Tuyisenge Emmanuel, the latter had another child who is still alive, she believes that this is the reason why they are those who stated that she had two children, the child she had with Tuyisenge died at 3 years old and buried at his grandfather's place, and by the time they moved to Kirehe, the child was already dead.

- [17] Her Counsel Ndayambaje Gilbert states that the reason Dusabimana Jeannette was contradicting herself in her pleadings was because she had no advocate, but there is no proof that the child was murdered by her mother and that in addition, those who were interrogated in investigation did not assist the court, but they all stated that the cause of the child's death is unknown.
- [18] Counsel Ndayambaje Gilbert states that DNA test carried out, shows that there is no parental relationship between the dead body examined and Dusabimana and Tuyisenge as well, that the fact that DNA proves that the child alleged to be theirs is not, it should be questioned the basis to affirm that Dusabimana murdered her child whilst nothing proves the place in which he died, rather it is obvious that they gave birth to child who dies later due to natural cause, if it is not considered as such,the Prosecution should prove other cause of the death. He concludes by requesting that his client be acquitted pursuant to article 165 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure because of benefit of doubt.
- [19] The Prosecution states that Dusabimana Jeannette made false declaration in stating that she went together with the child's father to the hospital and that the child died in hospital because in judicial police Tuyisenge Emmanuel explained that he asked Dusabimana where the child was but she kept quiet and later she told him that he had died, this proves that the father was not present at the moment of the child's death.
- [20] It further states that even if Dusabimana Jeannette disowns her document of appeal but its contents include the fact that she explained how the child cried, hence she was depressed and choked him, threw the body in sand quarry, thus the statements found in that document demonstrate that they cannot

be written by someone else especially that in that appeal she discharges Hategekimana Léonard.

- [21] The Prosecution further states that the fact that Dusabimana Jeanette pleads not guilty in appeal while she admitted the offence before the previous courts, this incriminates her basing on article 104 of the evidence law and that Dusabimana Jeannette and her counsel pleadings should not be considered because their statements contradict the elements of evidence found in the case file and they are sufficient.
- [22] It also states that the outcome of the investigation reveals the truth of the facts because all witnesses stated that the child they know is Aline who was buried at the place of Dusabimana Jeannette's father in law, and their common declaration was that Dusabimana's second child was of two years old, and that child is different from the one called Sibomana treated at the health center of Bisate on 25/05/2011.It concludes stating that the document written by Dusabimana Jeannette herself when lodging appeal, it is the one which contains her truth even if she argues that it was written by someone else.
- [23] With regard to the issue of determining the time and the place where Sibomana Samuel was murdered, the Prosecution states that it was not possible because all those with information stated that they got it from Dusabimana, but they indicated that the child died either in Kirehe or Musanze. It adds that with regard to whether Dusabimana Jeannette is not the one who prepared her submissions of appeal because she was sick, witness Nyirabarima Florida(she is among those who prepare court submissions to other prisoners in prison of Ngoma) who is detained in prison of Ngoma was interrogated, explained that she prepared Dusabimana's court submissions when she was not sick

and that they discussed about the case, that she demonstated to her the negative effect of concealing the truth and in the course of preparing that court submissions, Dusabimana was remorseful for wrongly accusing Hategekimana Léonard.

[24] The Prosecution contends that DNA test indicated that the child who was buried was a girl, and it is a proof that the accused murdered her son called Sibomana Samuel which is different from what the accused declares that he died and buried at his grandfather's place, therefore this element of evidence corroborates with other elements of evidence produced before, and it shows that the child was not buried at his grandfather's place.

THE VIEW OF THE COURT

- [25] Dusabimana Jeannette was accused of infanticide which is provided by article 143 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which states that a person who kills his/her biological or adopted child shall commit infanticide. Infanticide shall be punishable by life imprisonment.
- [26] Article 85 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that the burden of proof shall be on the Public Prosecution or, in case of a claim for damages or private prosecution, on the victim of an offence or his/her rightful beneficiaries. The case file demonstrates that Dusabimana Jeannette was found guilty of infanticide by previous courts basing on the fact that she might have admitted the offence.

- [27] The case file also demonstrates that when Dusabimana Jeannette was interrogated in judicial police on 06/08/2013 (identification mark 17-20), she denied the offence, she explained that her child died from stomach illness and that she took him for treatment On 12/08/2013 before the Prosecution Dusabimana Jeannette contradicted her statement and confessed the offence and stated that the child was strangled by Hategekimana when the latter brought her to the traditional healer. She again changed her statement before the Intermediate Court of Ngoma whereby she pleaded not guilty of the infanticide saying that she didn't kill her child, that he died from illness. Dusabimana Jeannette again changed her statement before the High Court whereby she pleaded guilty stating that together with Hategekimana Léonard murdered her child and buried him in the forest and before the Supreme Court, she pleaded not guilty.
- [28] The confession of Dusabimana before the Prosecution is formulated as follows I confess the offence I am accused of. "It was on 22/06/2013 around 3pm, when we were in Musanze the child fell sick, Hategekimana took me to the traditional healer, at that moment, Hategekimana was the one carrying the child and on our way he told me that the child has passed away. I believe that he might have strangled him and concealed it [...]" in addition to this statement of Dusabimana before the Prosecution, there is also her statement before judicial police (identification page 7) where she stated "I seek pardon for concealing the offence of killing our child and failed to reveal the truth[...]." Despite pleading not guilty before the Intermediate Court, that Court relied on those statements to convict her.
- [29] The other declaration in which Dusabimana confessed the offence was before the High Court. She stated "I admit the offence and ask for pardon because I pleaded not guilty before. I

conspired for murdering my child. He told me that he does not want that child and he took and choked him[...]. I am requesting for reducing the penalty [...]. As it is obvious in paragraph 9 of the judgment RPA0385&394/13/HC/RWG rendered by the High Court, Dusabimana's declaration was considered as an element of incriminating evidence, however, that court found that she failed to explain clearly how she committed the offence.

- The statements relied on by the previous court to convict Dusabimana Jeannette for the infanticide, this Court finds them to be not sufficient for convicting her because in judicial police and before the Prosecution, those statements do not clearly demonstrate the offence which Dusabimana confessed since she stated herself that she suspects that her child was killed by Hategekimana. Pursuant to the provisions of article 85 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, the burden of proof is on the Public Prosecution to prove the offence Dusabimana is prosecuted for. The Prosecution should have based on those statements for which it relies her confession, to get the corroborating evidence. It is not convincing how she informed the judicial police the place wherethe child's dead body was dumped and it failed to take her there to show that place whereas the corpse is considered as one of the elements of the offence
- [31] Admission of the offence is one of the elements of evidence which can be relied on by the court to convict the accused for having committed offence. However, Admission is not an irrefutable proof to be considered in all circumstances in convicting the accused. The legal schoolars Adrien Masset, Ann Jacobs and Michel Franchimont in their book *Manuel de procédure pénale* state that admission of the offence is element

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of evidence like others, which can also not be considered because it can be a weak proof, (*l'aveu n'est plus qu'un élément parmi d'autres de la conviction du juge, dont il faut d'ailleurs se méfier, car il peut être une preuve fragile*). ¹

[32] With regard to this case, at the beginning Dusabimana denied that she committed the offence, later she confessed but in an unclear manner. The Court finds that basing on the statements of her confession as an incriminating evidence and disregard her statement denying the commission of the offence has to be corroborated with other elements of evidence especially in this case where the accused is illiterate², who can consent to any thing suggested by others without prior analysis to know the effects of her statement.

[33] The fact that the admission of offence alone is not sufficient to prove the accused guilty of the offence in absence of other corroborating evidence was also decided so in the case between the Prosecution and Nyirahabimana Esperance, RPA0229/10/CS rendered on 19/09/2014 by the Supreme Court, and also in the case between the Prosecution and Ndungutse Deo, RPA0042/14/CS rendererd on 02/06/2017. In both cases the court held that the fact that the accused admitted the offence and denied it later, puts the onus on the Prosecution to produce other elements of evidence to support the statement of the guilty plea of the accused

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¹ Adrien Masset, Ann Jacobs, Michel Franchimont in their, Manuel de procédure pénale, Maison d'edition Larcier, 2009, p.1174

² Dusamana Jeannette stated that she is illiterate on 06/08/2013 in judicial police and before the Prosecution on 12/08/2013 when she was being interrogated.

- [34] Before the Supreme Court, Dusabimana Jeannette stated that Sibomana Samuel died due to illness and buried in his grandfather's land. The Prosecution and those who were interrogated during the investigation stated that the child buried at the place mentioned by Dusabimana Jeannette is her other child called Uwineza Aline whom she gave birth together with Tuyisenge. To prove that the child who was buried at the place indicated by Dusabimana Jeannette is her daughter as invoked by the Prosecution, it should have been a proof that it is not Sibomana Samuel (a boy child) buried there.
- [35] DNA test which was conducted demonstrated that the dead body examined was of the girl with no parental relationship to Dusabimana and Tuyisenge as well the test proved that he is not the father. The court finds that there is doubt on the body which was examined because though the test demonstrated that the body was of the girl, but she is not Dusabimana's child as previously stated by the Prosecution.
- [36] It is the Prosecution which sought for the DNA test of the dead body whom it stated to be Uwineza Aline's body who was buried at her grandfather Gakaramu's place who jointly filed a complaint with his son Tuyisenge Emmanuel accusing Dusabimana to have murdered Sibomana. The Test of the dead body which was sought by the Prosecution without Dusabimana to be involved because she is imprisoned. What raises a doubt is that the dead body which was examined differs from the one invoked by the Prosecution basing on the statements of the child's grandfather Gakaramu as well as those of witnesses of the Prosecution who testified that it is a girl child called Uwineza Aline, daughter of Dusabimana who was buried at her grandfather's place instead of being Sibomana Samuel. The

child's grandfather who showed the grave, he should not confuse the location of his grandchild (Uwineza Aline)'s grave. This raises the doubt on the truthfulness of Gakaramu's statements and other witnesses.

- [37] The court finds that the nature of the case file also raises doubt, because it does not explain the facts especially the death of Sibomana Samuel, its cause and the place where he was buried in order to get further information and to remove doubt, the Supreme Court legally summoned Tuyisenge Emmanuel, the father of Sibomana Samuel twice but he refused to appear with no reason whilst he is the one who filed a complaint. It is therefore questionable whether he was right in his statement before judicial police or he intends to conceal the truth.
- [38] Pursuant to the provisions of article 85 of the Law N°30/2013 of 24/5/2013 mentioned above, the burden of proof is upon the Public Prosecution to prove that the accused committed the offence. Also in the present case, the Prosecution had to produce the elements of evidence proving beyond any reasonable doubt that Dusabimana killed her son Sibomana, how and where she killed him, and other relevant evidence. In this case, the court finds that it was insufficiently done, the Prosecution solely relied on the accused's statements which are also not sufficient as motivated above.
- [39] Article 165 of the law mentioned in the above paragraph provides that the benefit of doubt shall be given in favour of the accused. If the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving beyond reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal. The court finds that in light of analysis of the provisions of articles mentioned above, there is

serious doubt, thus Dusabimana Jeannette has to be acquitted for the offence of infanticide because the Prosecution has failed to prove beyond reasonable doubt that she committed that offence.

III. THE DECISION OF THE COURT

- [40] Decides that the appeal lodged by Dusabimana Jeannette has merit;
- [41] Decides that Dusabimana Jeannette is acquitted of infanticide because of doubt;
- [42] Overtunes the rulings of the judgment RPA0385&394/13/HC rendered on 12/06/2014 by the High Court,chamber of Rwamagana.;
- [43] Orders the release of Dusabimana Jeannette with immediate effect after pronouncement of the case;
- [44] Orders that the court fees be charged to the public treasury.

PROSECUTION v. SIBOMANA

[Rwanda COURT OF APPEAL – RPAA00327/2018/CA (Hitiyaremye, P.J.) December 07, 2018]

Evidence Law – Elements of evidence – Suspicion – The fact that the accused and the victim had conflicts cannot be considered as conclusive incriminating evidence.

Facts: This case started at the Intermediate Court of Muhanga whereby Sibomana and his wife Mukanyiriminega were prosecuted after Munyensanga was shot at his boutique by an unidentified person in the night of 16/12/2014, the accused were prime suspects because of the witnesses who testified that they had conflicts with the deceased. The accused pleaded not guilty.

That Court found Sibomana guilty and sentenced him to life imprisonment whilst his wife Mukanyiriminega was acquitted.

The accused was not contented with the rulings of that judgment and appealed to the High Court, chamber of Nyanza stating that he was convicted for the offence he did not commit, that Court found his appeal without merit basing on the testimonies that the accused had vowedto kill the deceased.

He appealed again before the Supreme Court but the case was transferred to the Court of Appeal due to the judicial reform. Among the grounds of the appeal, he demonstrated that the High Court has only considered the witnesses of the Prosecution and refused to hear his defense witnesses, he plays that the Court conducts its own investigation at the place where the deceased was short. The accused also added that he has never vowed to kill

the deceased and that he did not attempt to bewitchhim as alleged by some witnesses.

The Prosecution demonstrates that all witnesses interrogated confirmed that he had hatred against the deceased, and also that what proves that Sibomana participated in shooting of the deceased, is that one of the witnesses testified that before the commission of the offence, he saw Sibomana's motorbike carrying strangers and the victim was shot shortly thereafter.

Held: 1. The fact that the accused and the victim had conflicts cannot be considered as conclusive incriminating evidence.

Appeal has merit; Court fees to the public treasury.

Statute and statutory instruments referred to:

Law N°68/2018 of 30/08/2018 determining offences and penalties in general, article 2 para 1 *litera* 5.

Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, article 165.

Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 62, 65 and 119.

No case referred to.

Authors cited:

Etienne Vergès, Géraldine Vial &Olivier Leclerc, Droit de la preuve, 1^{ère} Edition 2015, p. 552.

Henri-D. Bosly &Damien Vandermeersch, Droit de la procédure pénale, 4ème Edition, Bruxelles, 2005, P. 1316.

Michel Franchimont, Ann Jacobs & Adrien Masset, Manuel de procédure pénale, 2^{ème} édition, p. 1028.

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] On 16/12/2014 at around 8h30 PM, Munyensanga Protegène was shot at his boutique by an unidentified person who was wearing a black jacket and a hat, at the beginning of the investigation by the judicial police, Sibomana Valens and his wife Mukanyiriminega Sylvie were prime suspects due to the conflicts with the deceased, because of the witnesses who testified that they used to boast that they will kill him with a gun, however, the suspects when interrogated denied the offence.
- [2] After the investigation, the Prosecution sued them to the Intermediate Court of Muhanga, before court, they also denied the offence. That court rendered the judgment RP0111/15/TGI/MHG on 12/06/2015 convicting Sibomana Valens of murder and sentenced him to life imprisonment while Mukanyiriminega Sylvie was acquitted because the Prosecution failed to produce irrefutable elements of evidence to prove her role in the commission of the offence.
- [3] Sibomana Valens appealed to the High Court, chamber of Nyanza stating that he was convicted for the offence he did not commit, on 21/01/2016 that court rendered the judgment RPA0389/15/HC/NYA deciding that his appeal lacks merit because all witnesses testified that he plotted to kill Munyensanga

Protegène with bullets or thunder, this was due to the conflicts they had originating on the allegation that he poisoned his child.

- [4] Sibomana Valens appealed to the Supreme Court stating that the High Court refused to hear his defense witnesses, instead, it only considered the statement of the witnesses of the Prosecution, he adds that Munyaneza Florien allegedly to have shot the deceased did not implicate him, he requests that the court seized on appeal conducts its own investigation in Nyabuhuzu center, where Munyensanga Protegène was shot.
- [5] After the establishment of the Court of Appeal, his appeal was transferred to that court pursuant to article 105 of the Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts¹.
- [6] The hearing of the case was held in public on 07/11/2018, Sibomana Valens assisted by Counsel Nkundirumwana Joseph while the Prosecution represented by Rudatinya N.Gaspard, the National Prosecutor.

II. ANALYSIS OF LEGAL ISSUE

Whether there are no irrefutable incriminating evidence based on by the High Court, chamber of Nyanza to convict Sibomana Valens.

[7] Sibomana Valens states that he appealed because the High Court prejudiced him whereby it held that he is the one who

¹ Article 105, paragraph one: From the day this Law comes into force, except cases already under trial, all cases that are no longer in the jurisdiction of the court seized are transferred to the court with jurisdiction in accordance with the provisions of this Law.

shot the deceased Munyensanga Protegène whereas he has never been as a soldier or getting military training, he adds that the court refused to hear his defense witnesses and failed to conduct investigation he requested in order to reveal the truth, that he is not the author of that offence, rather he came to rescue as others.

- [8] With regard to the findings of the High Court that he is the one who earlier manifested hatred against the late Munyensanga Protegène, and that he also said that he will do everything to kill him, that if necessary, he would use bullets, Sibomana Valens argues that he demonstrated to the court thay they had an issue of encroachment, but that dispute was settled by Abunzi committee and decided in his favour, therefore there is no reason of murdering him.
- [9] Sibomana Valens further states that he never boasted to kill Munyensanga Protegène and that he did not try to poison him before he was shot as declared by some of the witnesses of the Prosecution, instead there is a neighbour witchdoctor who asked him 100,000Frw so that the former heals his child because he told him that his house is possessed with demons but he refused to give him that money, that is why he falsely accused him. He concludes stating that he seeks for fair justice because the High Court convicted him on the basis of the rebuttable elements of evidence full of doubt.
- [10] Counsel Nkundirumwana Joseph states that the witnesses who testified against Sibomana Valens, are all related to Munyensanga Protegène and that none of them affirmed that he is the one who shot him, that he requested for further investigation but the court failed to conduct it. He adds that the elements of evidence relied on by the Intermediate Court of Nyarugenge to convict Sibomana Valens, include Munyensanga

Protegène's dying declaration whereby he said that he is shot by someone wearing the black jacket and a hat and that he suspects that he is Nsabimana Valens, the court should not have considered that declaration because it is doubtful, instead, the Prosecution should have gathered sufficient elements of evidence, or otherwise he should be released.

- [11] With regard to the role of Sibomana Valens for which he is accused in this case, Counsel Nkundirumwana Joseph states that Sibomana was prosecuted before the Intermediate Court as an accomplice but that court convicted him as the principal author basing on Munyensanga Protegène's dying declaration that he suspects he has been shot by Sibomana, this is also dubious and doubtful because once he is considered as an accomplice, one may wonder why the principal author was not prosecuted. He concludes playing that his client be acquitted.
- [12] The Prosecution contends that Sibomana Valens was prosecuted as an accomplice because he is the one who incited the murderer of Munyensanga Protegène. In explaining the participation of Sibomana in the commission of the offence, the Prosecution states that the witnesses who were interrogated, have all affirmed that he had hatred against Munyensanga Protegène and that he even tried to poison him, therefore he is the one who got the hit man.
- [13] The Prosecution also states that among the witnesses who were interrogated there is one witchdoctor called Hitabatuma Janvier who accuses Sibomana Valens to have told him that he will kill Munyensanga Protegène, and the chief of the village Ntuyenabo Alexis who also confirmed to have heard those statements and testified that after Munyensanga Protegène knew Sibomana valens's plot, he immediately sought for protection. It

further states that there is a witness who testified that before the commission of the offence, he saw Sibomana's motorbike carrying strangers and the victim was shot shortly thereafter, which also proves that Sibomana valens participated in the murder of Munyensanga Protegène.

[14] Regarding the issue of the judge of the Intermediate Court basing on the dying declaration of the deceased that he was shot by Sibomana Valens and this was also emphasized by the High Court, the Prosecution states, that declaration should not be considered because he was interrogated when he was in critical state as he was about to die, the fact that he said that he was shot by Sibomana Valens, was because he heard that Sibomana plotted to kill him.

THE VIEW OF THE COURT

- [15] Article 62 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that testimonial evidence is a statement made in court by an individual regarding what he or she personally saw or heard wich is relevant to the object of trial.
- [16] Article 65 of that law provides that only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence. It shall not be influenced by the number of witnesses. It shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonies.
- [17] Article 119 paragraph two of the Law N°15/2004 of 12/06/2004 relating to evidence and its production states that the

court rules on the validity of incriminating or discharging evidence and whether they can be considered

- [18] The content of the case file demonstrates that the elements of evidence which were based on in the appealed judgment to convict Sibomana Valens for the murder of Munyensanga Protegène who was shot on 16/12/2014, those elements of evidence are mainly composed of the statements of the witnesses who affirmed that Sibomana Valens told them or those who heard that he will kill the deceased.
- [19] Those witnesses include Hitabatuma Janvier, the witchdoctor who testified that he was told by Sibomana Valens himself that he has a plot of shooting Munyensanga Protegène, that he instantly revealed it to the concerned one and the village authorities, this witness also explained that he went with Sibomana Valens and his wife to Mushishiro sector, Muhanga District to bewitch Munyensanga Protegène on the allegation that the former killed their child.
- The other witness is the chief of the village called [20] Nturanyenabo Alexis who affirmed that Sibomana Valens and Munyensanga Protegène had a severe hatred against each other, that the latter told him that Sibomana Valens was plotting to kill him, he adds that Sibomana Valens and his wife should be responsible for the victim's death, however, he states that he does not know the one who executed the murder, the issue of conflicts testified by numerous witnesses also such Nyirahabimana Emerthe, Karemera Célestin, Bahigabose Eugène, Gahutu Viateur, Ndatimana Vianney, Kayitesi marie Jeanne, Uwitonze Lucie and Musabyimana.

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[21] The Court of Appeal finds that the statements of the witnesses who testified that Sibomana Valens had severe hatred against late Munvensanga Protegène, and that he used to vow that he will kill him, cannot be relied on to convict Sibomana Valens for murder as was the case before the court which rendered the appealed judgment because none of the witnesses testified that he saw him perpetrating the offence or heard it from the one who saw the commission of crime pursuant to article 62 of the Law N°15/2004 of 12/06/2004 mentioned above. This is also the opinion of the legal scholars, whereby they explain that the witnesses are those who narrate what they saw or heard [...](Le témoignage ou preuve testimoniale n'a pas été défini par aucun texte. La doctrine s'accorde cependant pour admettre qu'il s'agit de la preuve résultant des déclarations de personnes qui relatent ce qu'elles ont vu ou entendu [...]. The testimony of those witnesses would be considered as grounds for suspecting Sibomana Valens but they cannot be considered as reliable evidence to be based on to convict him.

[22] With regard to the arguments of the Prosecution that Sibomana Valens was prosecuted as an accomplice in the murder of Munyensanga Protegène, this court finds that the Prosecution fails to produce evidence of any act to prove that he abetted the offender as it is provided by article 2 paragraph one, *litera* 5 of of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general³, concerning the issue that Sibomana Valens

² Etienne Vergès, Géraldine Vial, Olivier Leclerc, Droit de la Preuve, 1ère Edition 2015, p. 552, para. 570.

³ accomplice: a person having aided the offender in the means of preparing the offence through any of the following acts;

a) a person who, by means of remuneration, promise, threat, abuse of authority or power has caused an offence or given instructions for the commission thereof;

got the hitman who murdered Munyensanga Protegène, there is no evidence produced by the Prosecution except suspicion, especially that the Prosecution states that the principal author was not identified, the statements of the witnesses that he had hatred with the deceased, are based on the suspicion as motivated above because though they had hatred, this is not sufficient proof that Sibomana Valens abetted the offender because it is not always necessary that you have to harm someone you detest.

[23] This Court also finds, the other element of the evidence produced by the Prosecution that there is a witness who testified that before the offence was committed, that he saw Sibomana Valens's motocycle carrying strangers and thereafter the deceased was shot instantly, this element of evidence cannot be considered since the witness Ntakirutimana Jean Pierre did not reveal that those are the ones who murdered Munyensanga Protegène, to believe that Sibomana Valens transported them when they went to kill the deceased.

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b) a person who knowingly aids or abets the offender in the means of preparing, facilitating or committing the offence or incites the offender;

c) a person who causes another to commit an offence by uttering speeches, inciting cries or threats in a place where more than two (2) persons gather, or by means of writings, books or other printed texts that are purchased or distributed free of charge or displayed in public places, posters or notices visible to the public;

d) a person who harbours an offender or a co-offender or an accomplice to make it impossible to find or arrest him/her, helps him/her hide or escape or provides him/her with a hiding place or facilitates him/her to conceal objects used or intended for use in the commission of an offence;

e) a person, who knowingly, conceals an object or other equipment used or intended for use in the commission of an offence;

f) a person who steals, conceals or deliberately destroys in any way objects that may be used in offence investigation, discovery of evidence or punishment of offenders;

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[24] The legal scholars Henri-D.Bosly and Damien Vandermeersch, state that the judge cannot convict the accused without the elements of evidence lawfully produced, with no doubt, and those elements of evidence must have been subject to contradiction and those elements of evidence must be analysed in his/her intimate conviction.(Le juge ne peut déclarer un prévenu coupable que s'il a acquis l'intime conviction de sa culpabilité au-delà de tout doute raisonnable sur la base d'éléments de preuve qui lui ont été régulièrement produits et soumis à la contradiction et qu'il apprécie, en règle, souverainement)⁴. This is also the opinion of the legal scholar Michel Franchimont who states that the court freely assesses the elements of evidence which were produced, and that it also relies on its intimate conviction without being influenced by an element of the evidence over another ⁵

[25] Pursuant to article 165 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure provides that the benefit of doubt shall be given in favour of the accused. If the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving beyond reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal. And also on article 119 of the Law N°15/2004 of 12/06/2004 mentioned above as well as to the opinions of the legal scholars, the Court of Appeal finds that the elements of evidence produced by the Prosecution and those which were relied on by the High Court, chamber of Nyanza to convict Sibomana Valens for his role in murder of Munyensanga

⁴ Henri-D. Bosly & Damien Vandermeersch, Droit de la procédure pénale, 4ème Edition, Bruxelles, 2005, P.1316.

⁵ Michel Franchimont, Ann Jacobs & Adrien Masset, Manuel de Procédure pénale, 2ème édition, p.1028 (appréciation des preuves).

Protegène, those elements of evidence are doubtful as motivated above, therefore he has to be aquitted.

III. THE DECISION OF THE COURT

- [26] Decides that the appeal lodged by Sibomana Valens has merit;
- [27] Decides that Sibomana Valens is acquitted of murder because of doubt;
- [28] Overtunes the rulings of the judgment RPA0389/15/HC/NYA rendered on 21/01/2016 by the High Court, chamber of Nyanza;
- [29] Orders the release of Sibomana Valens with immediate effect after pronouncement of the case;
- [30] Orders that the court fees be charged to the public treasury.