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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 4 - 2019
Ukuboza, 2019



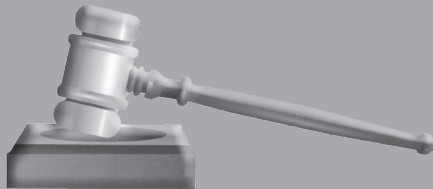
RWANDA LAW REPORTS

Law Report, V. 4 - 2019
December, 2019



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**ICYEGERANYO CY'IBYEMEZO
BY'INKIKO**

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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
BUKUBA Claire	:	Umunyamabanga wa Komite Umugenzuzi w’Inkiko
Dr. KARIMUNDA M. Aimé	:	Perezida w’Urukiko rw’Ubujurire
RUKUNDAKUVUGA F. Regis	:	Umucamanza mu Rukiko rw’Ikirenga
NDAHAYO Xavier	:	Perezida w’Urukiko Rukuru
RUTAZANA Angeline	:	Umugenzuzi Mukuru w’Inkiko
KALIWABO Charles	:	Umucamanza mu Rukiko rw’Ubujurire
Dr. KAYIHURA Didas	:	Umuyobozi wa ILPD

BWIZA N. Blanche	:	Umugenzuzi w'Inkiko
KIBUKA Jean Luc	:	Umucamanza mu Rukiko Rukuru rw'Ubucuruzi
HABARUREMA Jean Pierre	:	Umushinjacyaha ku Rwego rw'Igihugu
BUNYOYE Grace	:	Umushinjacyaha ku Rwego rw'Igihugu
KABIBI Specioza	:	Intumwa ya Leta
MUREREREHE Saouda	:	Umucamanza mu Rukiko Rukuru
Lt. col. MADUDU A. Charles	:	Umucamanza mu Rukiko rwa Gisirikare
GIRANEZA Clémentine	:	Umucamanza mu Rukiko Rwisumbuye
UWANTEGE Yvette	:	Perezida wu Rukiko Rwisumbuye
BAGABO Faustin	:	Avoka mu Rugaga rw'Abavoka

IRIBURIRO

Basomyi bacu,

Iyi nimeru IV [2019] niyo isoza umwaka wa 2019. Muri uyu mwaka, twishimiye uburyo mwagiye mugaragaza ko icyegeranyo cy'Ibyemezo by'Inkiko kibageraho kandi kikabagirira akamaro mu mirimo yanyu ya buri muni.

Muri iyi numero murasangamo imanza esheshatu (6) zikubiyemo ebyiri (2) z'imbonezamubano, ebyiri (2) z'ubucuruza, rumwe (1) rw'ubutegetsi na rumwe (1) rw'inshinjabyaha.

Tuboneyeho no kubibutsa ko imanza ziri muri iki Cyegeranyo ziboneka no ku rubuga rwa murandasi rw'Urukiko rw'Ikirenga ruborohera kubona urubanza mukeneye mu buryo bwihuse, kuri <http://decisia.lexum.com/rlr/kn/nav.do>.

Dr NTEZILYAYO Faustin

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, Urukiko rw’Ubujurire n’Urukiko Rukuru rw’Ubucuruzi zikoreshwa hakurikijwe inyito ivugwa hasi.

INYITO

Imanza ziri muri iyi volime zikoreshwa muri ubu buryo:

[2019] 4 RLR

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MININTCO Ltd v. DOBUSJES Ltd.....75

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MININTCO Ltd v. DOBUSJES Ltd.....75

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ABAZUNGURA BA MUKAGAHIMA v. NGARAMBE.....1

Amasezerano – Inenge y’imyandikire ntiyashingirwaho mu gutesha agaciro amasezerano impande zombi zumvikanyweho

EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd(ECU) v. ROYAL HASKONING DHV(Pty) Ltd...53

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UMUJYI WA KIGALI v NDAKENGURWA GASANA.....99

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UMUJYI WA KIGALI v NDAKENGURWA GASANA.....99

Amategeko agenga imiburanishirize y'imanza z'inshinjabyaha – Ikirego cy'indishyi – Gutanga ikirego cy'imbonezamubano gisaba guteshya agaciro inyandiko ntaho gihuriye n'ikirego cy'indishyi gitanzwe hisunzwe ubushinjacyaha – Itegeko N° 30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha (ryarahiduwe), ingingo ya 139.

ABAZUNGURA BA MUKAGAHIMA v. NGARAMBE.....1

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MUTONI v NIWENSHUTI N'UNDI.....23

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MUTONI v NIWENSHUTI N'UNDI.....23

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UBUSHINJACYAHA v. Col. BYABAGAMBA N'ABANDI.....127

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y'ubukemurampaka, iba ari imwe mu mpamvu zashingirwaho zatumye icyemezo cy'ubukemurampaka cyatashywe agaciro – Itegeko N° 005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, ingingo ya 9 n'ya 31.

EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd(ECU) v. ROYAL HASKONING DHV(Pty) Ltd...53

Ubwishingizi bw'indwara – Ubwishingizi bw'indwara bukoreshwa ku muntu ufunze – Ku byerekeye ubwishingizi bukoreshwa mu kwivuka icyangombwa si ubwoko bw'ubwishingizi bukoreshwa ahubwo icyangombwa ni ukumenya niba ufunze avurwa uko bikwiye, kuba hadakoreshwa ubwishingizi ufunzwe yifuza gukoresha, ubwabyo ntibyafatwa nk' impamvu yo gufungurwa by'agateganyo.

UBUSHINJACYAHA v. Col. BYABAGAMBA N'ABANDI.....127

IMANZA ZACIWE MU MIZI



**IMANZA
Z'IMBONEZAMUBANO**

ABAZUNGURA BA MUKAGAHIMA v. NGARAMBE

[RWANDA URUKIKO RW'IKIRENGA – RCAA0039/15/CS
(Mugenzi P.J, Nyirandabaruta na Gakwaya J.) 06 Nyakanga
2018]

Amategeko agenga imiburanishirize y'imanza z'inshinjabyaha – Ikirego cy'indishyi – Gutanga ikirego cy'imbonezamubano gisaba gutesha agaciro inyandiko ntaho gihuriye n'ikirego cy'indishyi gitanzwe hisunzwe ubushinjacyaha – Itegeko N° 30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 139.

Amategeko agenga amasezerano – Amasezerano y'impano – Impano ishobora gukorerwa inyandiko mpamo cyangwa inyandiko bwite cyangwa igashyikirizwa gusa nyirayo – Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 27.

Incamate y'ikibazo: Ngarambe yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge, asaba gutesha agaciro ibyangombwa by'ubutaka byashyingiweho Mukagahima ahabwa “acte de notoriété” y'inzu Ngarambe avuga ko ari iye, asaba Urukiko gutegeka ko iyo nzu imwandikwaho, na Mukagahima akamuha indishyi, inyungu yahombye n'igihembo cya Avoka.

Mukagahima we akavuga ko ikirego cya Ngarambe kidakwiye kwakirwa kuko ibyo amurega yabiburanye mu rundi rubanza nshinjabyaha ararutsinda, Ngarambe nawe yari yaruregeyemo

indishyi ariko ikirego cye nticyasuzumwe kubera ko Mukagahima yagizwe umwere. Urukiko Rwisumbuye rwa Nyarugenge rwaciye urubanza rwemeza ko ikirego cya Ngarambe nta shingiro gifite.

Ngarambe yajuririye mu Rukiko Rukuru, avuga ko Urukiko rwanze gusuzuma ikirego cye rushingiye ku rubanza rw'inshinjabyaha kandi rutagomba guhuzwa n'urw'imbenezamubano kuko ababuranyi n'ikiburanwa atari bimwe. Urwo Rukiko rwaciye urubanza rwemeza ko ubujurire bwa Ngarambe bufite ishingiro.

Mukagahimana ntiyishimiye imikirize y'urubanza, arujuririra mu Rukiko rw'Ikirenga, avuga ko Urukiko Rukuru rutagombaga kwakira ikirego, ko rwirengagije ibimenyetso bihamya inkomoko y'umutungo ndetse ko rwirengagije ko yabanye na Ngarambe nk'umugore n'umugabo.

Mukagahima yaje kwitaba Imana, Urukiko rubanza gusuzuma ikibazo cy'abana be batarageza ku myaka y'ubukure, ku bijyanye n'uburyo bagomba bahagararirwa mu rubanza. Urukiko rwemeje ko abana batarageza ku myaka y'ubukure bashakirwa umwishingizi mu buryo buteganywa n'Itegeko rigenga abantu n'umuryango.

Ngarambe avuga ko ingingo ya 139 y'Itegeko ryerekeye imiburanishirize y'imanza z'inshinjabyaha itabuza umuntu gutanga ikirego cy'imbenezamubano ku mpamvu zitandukanye n'izo yashingiyeho atanga ikirego cy'indishyi mu rubanza nshinjabyaha. Avuga kandi ko abajuriye bivuguruza, kuko bavuga ko Ngarambe yatanze impano, kandi bagahakana aho yakuye umutungo.

Incamake y'icyemezo: 1. Gutanga ikirego cy'imbonezamubano gisaba gutesha agaciro inyandiko ntaho gihuriye n'ikirego cy'indishyi gitanzwe hisunzwe ubushinjacyaha, bityo iki kirego kigomba kwakirwa.

2. Impano ishobora gukorerwa inyandiko mpamo cyangwa inyandiko bwite cyangwa igashyikirizwa gusa nyirayo.

**Ubujurire bufite ishingiro;
Urubanza rwajuririwe ruhindutse kuri byose**

Amategeko yashingiweho:

Itegeko N°43/2013 ryo ku wa 16/06/2013 rigenga ubutaka mu Rwanda, ingingo ya 10.

Itegeko N°30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 139.

Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 106 n'iya 162.

Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'Urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 27 n'iya 28.

Itegeko ryo ku wa 10/07/1888 rigenga amasezerano cyangwa imirimo nshinganwa, ingingo ya 258.

Nta manza zifashishijwe.

Urubanza.

I. IMITERERE Y'URUBANZA

[1] Ngarambe Jean yaregeye Urukiko Rwisumbuye rwa Nyarugenge, asaba gutesha agaciro ibyangombwa by'ubutaka byatanzwe n'Ubuyobozi bw'Inzego z'Ibanze byashingiweho Mukagahima Génèreuse ahabwa “acte de notoriété” y'umutungo ugizwe n'inzu Ngarambe Jean avuga ko ari uwe, asaba Urukiko ko rwategeka ko iyo nzu imwandikwaho, na Mukagahima Génèreuse akamwishyura indishyi, inyungu yahombye n'igihembo cya Avoka.

[2] Mukagahima Génèreuse yatanze inzitizi yo kutakira ikirego cya Ngarambe Jean kubera ko ibyo amurega babiburanye mu rubanza N° RP0295/14/TGI/NYGE, rwaciye ku wa 10/07/2014, aho Mukagahima Génèreuse yaregwaga icyaha cyo kwihesha ku bw'uburiganya ibyemezo bitangwa n'inzego zabigenewe no gukoresha inyandiko zitavugisha ukuri, Ngarambe Jean nawe akaruregeramo indishyi ariko ikirego cye ntigisuzumwe kubera ko Mukagahima Génèreuse yagizwe umwere ku byo yaregwaga bisa n'ibyo aregwa mu rubanza mbonezamubano.

[3] Urukiko Rwisumbuye rwa Nyarugenge rwaciye urubanza RC0742/14/TGI/Nyge ku wa 24/03/2015, rwemeza ko ikirego cya Ngarambe Jean nta shingiro gifite, kubera ko rwasanze mu rubanza N° RP0295/14/TGI/NYGE, Urukiko rwaremeje ko Mukagahima Génèreuse atagize uburiganya mu kwihesha ibyemezo no gukoresha inyandiko itavugisha ukuri, rwanzura ko ntaho rwahera rwemeza ko biteshwa agaciro kandi byaratanzwe mu buryo bukurikije amategeko, rutegeka Ngarambe Jean guha

Mukagahima Génèreuse 500.000 Frw y'igihembo cya Avoka, indishyi zo gushorwa mu manza no gukurikirana urubanza.

[4] Ngarambe Jean yajuririye Urukiko Rukuru, avuga ko Urukiko rwanze gusuzuma ikirego cye rushingiye ku rubanza rw'inshinjabyaha kandi rutagomba guhuzwa n'urw'imbonezamubano, kandi ko ababuranyi n'ikiburanwa atari bimwe. Urwo Rukiko rwaciye urubanza RCA0174/15/HC/KIG, ku wa 23/10/2015, rwemeza ko ubujurire bwa Ngarambe Jean bufite ishingiro, rutegeka ko ibyemezo byatanzwe n'Inzego z'Ibanze harimo icyemezo cyo ku wa 30/02/2009, icyo ku wa 28/08/2004, icyemezo cy'umutungo N° 1253//2004 na "*acte de notoriété*" yo ku wa 27/07/2010, byatanzwe mu izina rya Mukagahima Génèreuse biteshejwe agaciro, inzu iburanwa ikaba igomba kwandikwa kuri Ngarambe Jean, rutegeka Mukagahima Génèreuse guha Ngarambe Jean 1.225.000 Frw y'indishyi n'amagarama y'urubanza.

[5] Mukagahimana Génèreuse ntiyishimiye imikirize y'urubanza, arujuririra muri uru Rukiko, avuga ko Urukiko Rukuru rutagombaga kwakira ikirego ndetse ngo rwirengagize ibimenyetso bihamya inkomoko y'umutungo no kuba yarabanye na Ngarambe Jean nk'umugore n'umugabo, indishyi yaciwe zikaba zidafite ishingiro kuko hari ibyo yakoze ku nzu.

[6] Urubanza rwaburanishijwe mu ruhamwe ku wa 11/10/2016, ku wa 10/01/2017 no ku wa 18/4/2017, hasuzumwa ikibazo cy'abagomba gukomeza urubanza ku ruhande rwa Mukagahima Génèreuse witabye Imana ku wa 31/07/2016, Me Mugabonabandi Jean Maurice ahagarariye bamwe mu bazungura ba Mukagahima Génèreuse, naho Ngarambe Jean yunganiwe na Me Kayitana Evode, impaka zikomereza ku buryo abana batarageza ku myaka y'ubukure bahagararirwa mu rubanza.

[7] Ku itariki ya 19/05/2017, Urukiko rwafashe icyemezo ko abana Ngarambe Bruce Kevin na Ngarambe Chris, batarageza ku myaka y'ubukure bashakirwa umwishingizi mu buryo buteganywa n'Itegeko n° 32/2016 ryo ku wa 28/08/2016, rigenga abantu n'umuryango, babifashijwemo n'Ubuyobozi bw'Umurenge wa Remera.

[8] Iburanisha ry'urubanza mu mizi ryabereye mu ruhame ku itariki ya 22/05/2018, Me Mugabonabandi Jean Maurice ahagarariye Mugabo Aimé Fernand, Umulisa Murielle na Ndayisenga Sandrine (Umwishingizi wa Ngarambe Bruce Kevin), Me Bizimana Emmanuel na Me Safari Kizito bahagarariye Ngarambe Jean naho Me Uwamahoro Marie Grâce ahagarariye Nzabandora Ildephonse, umwishingizi wa Ngarambe Chris. Abazungura ba Mukagahima Génèreuse basobanuye impamvu z'ubujurire, abahagarariye Ngarambe Jean bazireguraho. Kuri uwo munsu, Urukiko rwemeza ko iburanisha ribaye risubitswe kugira ngo ruzagere aho ikiburanwa kiri.

[9] Iperereza ryabaye ku itariki ya 21/03/2018, mu Mudugudu w'Amajyambere, Akagari ka Rukiri I, Umurenge wa Remera, Akarere ka Gasabo, Umujyi wa Kigali, ahari ikiburanwa, Urukiko rukaba rwarabajije abatangabuhamya bo ku mpande zombi, iburanisha ry'urubanza risubukurwa ku wa 22/05/2018, ababuranyi bunganiwe nka mbere, bahabwa umwanya kugira ngo bagire icyo bavuga ku byavuye mu iperereza no ku mvugo z'abatangabuhamya.

II. BIBAZO BIRI MURI URU RUBANZA N'ISESENGURWA RYABYO

1. Kumenya niba ikirego cya Ngarambe Jean kitaragombaga kwakirwa

[10] Me Mugabonabandi Jean Maurice, uhagarariye Mugabo Aimé Fernand, Umulisa Murielle na Ndayisenga Sandrine (Umwishingizi wa Ngarambe Bruce Kevin), bavuga ko ikirego cya Ngarambe Jean kitagombaga kwakirwa n'inkiko zibanza kuko ingingo ya 139 y'Itegeko ryerekeye imiburanishirize y'imanza z'inshinjabyaha ibuza umuntu gutanga ikirego mu rukiko ruburanisha imanza z'inshinjabyaha ngo anagitange mu ruburanisha imanza z'imbonezamubano, ikindi akaba ari uko muri dosiye harimo urubanza N° RP0295/14/TGI/NYGE rwabaye itegeko, aho Urukiko Rwisumbuye rwa Nyarugenge rwashingiye ku bimenyetso by'amakuru yatanzwe n'abari Abayobozi b'inzego z'ibanze bemeza ko umutungo wanditswe kuri Mukagahima Génèreuse bisabwe na Ngarambe Jean, ibyo bituma Mukagahima Génèreuse agirwa umwere, bituma n'indishyi Ngarambe Jean yari yasabye zidasuzumwa.

[11] Me Mugabonabandi Jean Maurice avuga ko initizi batanze atari ikirego gishya bayitanze no mu nkiko zo hasi, kandi ko iyo nzitizi ishobora gutangwa aho urubanza rwaba rugeze hose; ko Ngarambe Jean yategereje ko urubanza ruba itegeko ntarujuririre, nyuma akajya gutanga ikirego gisa n'icyo yaregeye mu rubanza rw'inshinjabyaha mu Rukiko mbonezamubano kandi itegeko ribimubuza.

[12] Me Uwamahoro Marie Grâce, uhagarariye Nzabandora Ildephonse avuga ko ingingo ya 139 y'Itegeko ryerekeye imiburanishirize y'imanza z'inshinjabyaha ikoreshwa igihe

ikirego cy'indishyi cyakiriwe kigasuzumwa, ikirego cya Ngarambe Jean kikaba kitarasuzumwe kuko Mukagahima Génèreuse yari yagizwe umwere, akaba yumva nta cyabuza ko gitangwa mu rubanza mbonezamubano, kuko amategeko mbonezamubano n'ay'inshinjabyaha buri kimwe kigenga, kandi umucamanza w'imbonezamubano akaba adategetswe gukora ibyo umucamanza w'imanza z'inshinjabyaha yakoze, ko ikirego cy'indishyi kigomba gukurikiza amategeko agenga imiburanishirize y'imanza z'imbonezamubano.

[13] Me Bizimana Emmanuel, uhagarariye Ngarambe Jean, avuga ko iyi ngingo y'ubujurire bw'abazungura ba Mukagahima Génèreuse idakwiriye gusuzumwa kuko ari ikirego gishya gitanzwe mu bujurire kitigeze kiburanwaho mu rwego rwo hasi, akabihuza n'ingingo ivuga ko umuburanyi ajurira inenge iri mu rubanza, kuba mu nkiko zabanje nta cyemezo cyafashwe cyo kutakira ikirego, akaba atabona inenge iri mu rubanza, ko Urukiko rubibonye ukundi, rwakwemeza ko iyi ngingo y'ubujurire nta shingiro ifite kuko ababuranyi mu rubanza nshinjabyaha batandukanye n'ababuranyi mu rubanza rw'imbonezamubano, ndetse ko ikirego cy'indishyi kitigeze gisuzumwa.

[14] Me Bizimana Emmanuel akomeza avuga ko ingingo ya 139 y'Itegeko ryerekeye imiburanishirize y'imanza z'inshinjabyaha ibuza umuntu wasabye indishyi yisunze ubushinjacyaha, kuba na none yasaba indishyi zishingiye kuri cya cyaha mu rubanza rw'imbonezamubano, ariko ko idashobora kubuza umuntu gutanga ikirego ku mpamvu zitandukanye n'iza mbere. Naho ku cy'uko urubanza rw'inshinjabyaha rwabaye itegeko kandi batigeze barujuririra, Me Bizimana Emmanuel

avuga ko atari ibyo kuko ibyo basaba Urukiko mu rubanza rw'inshinjabyaha bitigeze bisuzumwa ngo bifatweho icyemezo.

UKO URUKIKO RUBIBONA

[15] Ingingo ya 139 y'Itegeko N°30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha iteganya ko "Uwangirijwe n'icyaha wifuza kuregera indishyi ashobora guhitamo kuregera urukiko ruburanisha imanza z'inshinjabyaha cyangwa urukiko ruburanisha imanza z'imbenezamubano. Icyakora, iyo yahisemo urukiko aregera, yaba urw'inshinjabyaha cyangwa urw'imbenezamubano, ntashobora guhindukira ngo atange nanone ikirego cye mu rundi rukiko ku kirego kimwe".

[16] Ingingo ya 106 y'Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko "Ububasha bw'urubanza rwabaye indakuka bugarukira gusa ku cyaburanwe kigakiranurwa. Ikintu cyaburanywe kigomba kuba kimwe, ikirego kigomba kuba gishingiye ku mpamvu imwe, icyo kirego kigomba kuba cyerekeye ababuranyi bamwe kandi bakiburana mu izina ryabo rya mbere".

[17] Dosiye y'urubanza igaragaza ko mu rubanza N° RP0295/14/TGI/NYGE, Mukagahima Génèreuse yarezwe mu Rukiko Rwisumbuye rwa Nyarugenge, icyaha cyo kwihesha ku bw'uburiganya ibyemezo bitangwa n'inzego zabigenewe no gukoresha abizi inyandiko itavugisha ukuri, Twiringiyimana Célestin nawe aregwa muri urwo rubanza icyaha cyo kwiha ububasha ku mirimo itariye, muri urwo rubanza kandi Ngarambe Jean akaba yararuregeyemo indishyi, Urukiko mu gufata

icyemezo ku itariki ya 10/07/2014, rwemeza ko Mukagahima Génèreuse na Twiringiyimana Célestin badahamwa n'ibyaha baregwa, runemeza ko ikirego cy'indishyi cyatanzwe na Ngarambe Jean kidasuzumwe.

[18] Dosiye y'urubanza igaragaza na none ko Ngarambe Jean nyuma y'urwo rubanza yaregeye Urukiko Rwisumbuye rwa Nyarugenge, mu rubanza RC0742/14/TGI/NYGE, asaba gutesha agaciro ibyangombwa byo mu Buyobozi bw'Ibanze biha uburenganzira bwo kwandikwaho umutungo ugizwe n'inzu ye kuri Mukagahima Génèreuse, asaba ko inzu ishyirwa mu mazina ye, kwishyurwa indishyi zijyanye no kuvutswa uburenganzira ndetse n'inyungu yahombye zo kutagira uburenganzira ku nzu ye n'igihembo cya Avoka.

[19] Urukiko rurasanga icyo ingingo ya 139 y'Itegeko N° 30/2013 ryo ku wa 24/05/2013 ryavuzwe haruguru ibuza, ari uko iyo umuntu afashe inzira yo gutanga ikirego cy'indishyi mu Rukiko ruburanisha imanza z'inshinjabyaha, adashobora guhindura ngo agitange mu Rukiko ruburanisha imanza z'imbonezamubano, ibi akaba atari byo Ngarambe Jean yakoze, kuko ikirego yatanze mu Rukiko Rwisumbuye rwa Nyarugenge mu rubanza rw'imbonezamubano cyo gutesha agaciro ibyangombwa byo mu Buyobozi bw'Ibanze, ntaho gihuriye n'ikirego cy'indishyi yatanze yisunze ubushinjacyaha mu rubanza N° RP0295/14/TGI/NYGE, igihe Mukagahima Génèreuse yari akurikiranyweho n'Ubushinjacyaha mu Rukiko Rwisumbuye rwa Nyarugenge, ku cyaha cyo kwihesha ku bw'uburiganya ibyemezo bitangwa n'inzego zabigenewe no gukoresha abizi inyandiko itavugisha ukuri. Rurasanga rero ibyo Me Mugabonabandi Jean Maurice avuga ko ikirego cya Ngarambe Jean kitagombaga kwakirwa n'inkiko zibanza kuko

yatanze ikirego mu rukiko ruburanisha imanza z'inshinjabyaha nyuma akagitanga mu ruburanisha imanza z'imbonezamubano nta shingiro ifite.

[20] Urukiko rurasanga kandi nk'uko byagaragajwe harugururu, kugira ngo hiyambazwe ihame ry'uko hari urubanza rwabaye itegeko, ari uko haba hari ikirego gishingiye ku kiburanwa kimwe, hagati y'ababuranyi bamwe kandi bakiburana mu izina ryabo rya mbere. Nta wavuga rero ko inkiko zabanje zirengagije iryo hame ku bijyanye n'urwo rubanza, kuko urubanza N° RP0295/14/TGI/NYGE rw'inshinjabyaha Mukagahima Génèreuse yaburanye n'Ubushinjacyaha rutandukanye n'uru haba kuri kamere yazo kuko rumwe ari urw'inshinjabyaha urundi rukaba urw'imbonezamubano, haba ku kiburanwa ndetse no ku baburanyi, bityo, ibyo uhagarariye Mugabo Aimé Fernand, Umulisa Murielle na Ndayisenga Sandrine (Umwishingizi wa Ngarambe Bruce Kevin), avuga ko hirengagijwe urubanza rwabaye itegeko bikaba nta shingiro bifite.

[21] Ku bijyanye n'ibivugwa na Me Bizimana Emmanuel ko iyi ngingo y'ubujurire irebana n'inzitizi yatanzwe n'abazungura ba Mukagahima Génèreuse yo kutakira ikirego cyatanzwe na Ngarambe Jean idakwiriye gusuzumwa kuko ari ikirego gishya, Urukiko rw'Ikirenga rurasanga iyi ngingo atari ubwa mbere isuzumwe, kuko yanagarutsweho mu Rukiko Rukuru, urwo Rukiko rukaba rwarayifasheho umwanzuro mu gika cya 12, bityo rero iyo nzitizi ikaba itafatwa nk'ikirego gishya gitanzwe bwa mbere muri uru Rukiko.

2. Kumenya nyiri umutungo uburanwa

[22] Me Mugabonabandi Jean Maurice avuga ko mu gika cya 18 na 19 cy'urubanza N° RP0295/14/TGI/NYGE, Urukiko

Rwisumbuye rwa Nyarugenge rwagaragaje inkomoko y'umutungo nk'uko byemejwe n'Abayobozi b'Inzego z'Ibanze, ko rero kuba hari urubanza nshinjabyaha rwemeje inkomoko y'umutungo, rutakurwaho n'urubanza rw'imbonezamubano.

[23] Me Mugabonabandi Jean Maurice akomeza avuga ko Urukiko Rukuru rwashingiye icyemezo cyarwo ku nyandiko yo mu mwaka wa 1995 yatanze na Ngarambe Jean nk'inkomoko y'umutungo kandi baragaragaje inenge zitandukanye iyo nyandiko ifite; ko umuntu uvugwa muri iyo nyandiko ari Ngarambe Jean Pierre, akaba atari Ngarambe Jean, ndetse ko n'impano bayinenga kuko uvuga ko yayitanze atigeze asinya ku nyandiko. Asobanura ko aho bavugaga ko ari igikumwe yateye atari byo, kuko ari nk'umuti w'ikaramu wamenetsemo, ndetse nta n'umukono w'uwahawe ugaragara kuri iyo nyandiko, kandi n'uwatanze akaba atagaragaza ikibanza yatanze aho giherereye.

[24] Me Mugabonabandi Jean Maurice avuga kandi ko ibivugwa n'abahagarariye Ngarambe Jean ko niba koko Ngarambe Jean yarahaye Mukagahima Génèreuse umutungo uburanwa hagombye kuba hari inyandiko ibigaragaza, atari byo, kuko itegeko ry'izungura rivuga ko impano ishobora gutangwa ishyikirijwe gusa nyiri ukuyihabwa, ko ntaho biteganyijwe ko impano igihe cyose igomba kuba yanditse. Akomeza avuga ko ibyo Ngarambe Jean avuga ko Mukagahima Génèreuse yiyandikishijeho uwo mutungo mu mwaka wa 2009 na 2010, igihe yari yafunzwe, atari byo, kuko kuva mu mwaka wa 2004, iyo mitungo yari yanditse kuri Mukagahima Génèreuse kandi we na Ngarambe Jean babana mu nzu imwe, bityo akaba asaba Urukiko gushingira ku nyandiko yo mu mwaka wa 2000 igaragaza ko umukecuru Ntacyobazi Anastasie yahaye

Mukagahima Génèreuse na Ngarambe Jean icyo kibanza kiburanwa.

[25] Ku mvugo z’abatangabuhamya babajijwe mu iperereza ryo ku wa 21/03/2018, Me Mugobonabandi Jean Maurice avuga ko icyo umutangabuhamya Izere Valentine yavuze cyafasha Urukiko ari uko ibyangombwa Ngarambe Jean asaba ko biteshwa agaciro Mukagahima Génèreuse yabibonye nta manyanga akoreshejwe, bityo ko bidakwiriye guteshwa agaciro mu gihe yabibonye mu buryo bukurikije amategeko; ko umutangabuhamya Twiringiyimana Célestin yavuze neza ko yari muri komite y’Umudugudu kuva mu mwaka wa 2003 kugeza mu mwaka wa 2006, yongera kuyigarukamo mu mwaka wa 2009 kugeza uyu munsu, akaba yarasobanuye ko Ngarambe Jean ubwe yigiriye mu buyobozi asaba ko umutungo wandikwa kuri Mukagahima Génèreuse, bikaba bihuje n’ibiri mu rubanza rw’inshinjabyaha bashyikirije Urukiko; naho Bakina akaba yaragaragaje ko azi amateka y’ahaburanwa kuko yavuze ko hahabwa Ngarambe Jean na Mukagahima Génèreuse abizi ndetse ko yasinye ku masezeranoy’impano.

[26] Me Mugobonabandi Jean Maurice akomeza avuga ko atemera ibyo abandi batangabuhamya bavuze, kuko Nzabandora Jimmy avukana na Ngarambe Jean kuri se na nyina, akaba ashobora kubogama kubera isano y’amaraso bafitanye, ikindi akaba ari uko avuga ko Ngarambe Jean ahabwa ikibanza cyarimo inzu yabanaga na Mukagahima Génèreuse, ariko Ngarambe Jean akavuga ko batabanaga, bakaba bavuguruzanya kandi Ngarambe Jean ariwe wamwitangiye; ko ku mutangabuhamya Kanani icyo Urukiko rwareba ari ukuntu Ngarambe Jean nk’umuntu ujijutse (Ingénieur) yafashe umuyede (aide-maçon) w’imyaka cumi n’itanu (15) y’amavuko, utazi kwandika neza, amugira

umutangabuhamya n'umwanditsi w'inyandiko yita ikimenyetso cy'ibyo aburana; naho ku mutangabuhamya Mukampabuka Hélène akaba avuga ko mu murima harimo ubunyobwa, akanyuranya na Kanani uvuga ko harimo ibyatsi byitwa ibyicamahirwe kandi bose bari bahari; Radjab nawe akavuga ko yatangiye kubaka mu 1999, binyuranye n'ibyo ababuranyi bavuga.

[27] Me Uwamahoro Marie Grâce avuga ko Ngarambe Jean agaragaza ko ubutaka yabuhawe na Ntacyobazi Anastasie, bityo umutungo ukaba ari uwe, naho ku bijyanye n'amazina ya Ngarambe Jean-Pierre, avuga ko habayeho kwibeshya ku mazina, kandi ko bitari gushoboka ko Ngarambe Jean aha impano Mukagahima Génèreuse atabyanditse ngo anabisinyire; ikindi ko impano zombi Ngarambe Jean yari yahawe zari mu nyandiko, impano bavuga ko yahaye Mukagahima Génèreuse, ikaba itari gutangwa mu magambo gusa.

[28] Me Uwamahoro Marie Grâce avuga ko ibyo uruhande rwajuriye ruvuga ko ku nyandiko y'impano nta mukono w'uwatanze uriho, ataribyo kuko hariho igikumwe, naho ku by'uko Mukagahima Génèreuse yari afite umutungo uburanwa kuva mu mwaka wa 2004, avuga ko Urukiko rw'Ikirenga rusanze umutungo uburanwa ari uwa Ngarambe Jean, Mukagahima Génèreuse yazongera kuregera uburenganzira bwe.

[29] Me Uwamahoro Marie Grâce yakomeje avuga ko hari ibimenyetso bigaragaza ko impano zatanze ari ebyiri, iya mbere Ntacyobazi Anastasie ikaba ari ubutaka bufite 20mx14m, yahaye Mukagahima Génèreuse na Ngarambe Jean, nyuma ubwo butaka Umujyi wa Kigali uza kubuha uwitwa Kizito Jean. Avuga ko impano ya kabiri igaragazwa n'inyandiko yo ku wa 27/02/1995, Ntacyobazi Anastasie yayihaye Ngarambe Jean wenyine, ikaba

ari nawo mutungo uburanwa muri uru rubanza, ko niba uhagarariye abazungura ba Mukagahima Génèreuse atemera ko Ngarambe Jean yahawe uwo mutungo, bagaragaza aho Ngarambe Jean yakuye ubutaka bavuga yamuhaye.

[30] Ku bijyanye n’iperereza, Me Uwamahoro Marie Grâce avuga ko ubuhamya bwa Izere Valentine ntacyo bwatanga kuko adasobanura uburyo Ngarambe Jean yahaye Mukagahima Génèreuse; ko Twiringiyimana Célestin nawe atasobanuye ipfundo ry’ikibazo kuko atavuze ko Ngarambe Jean yahaye Mukagahima Génèreuse, ahubwo aribyo yumvise; ko ubuhamya bwa Bakina butashingirwaho kuko yavuze ko yasanze amasezerano yabaye, bakamuha inzoga agasinya, naho Nzabandora Jimmy na Kanani bo bakaba berekana inkomoko y’umutungo, bakagaragaza ko ari uwa Ngarambe Jean, bityo akaba akwiye ku wandikwaho.

[31] Me Bizimana Emmanuel avuga ko abajuriye bivuguruza, kuko bavuga ko Ngarambe Jean yatanze impano, kandi bagahakana aho yakuye umutungo, ikindi akaba ari uko amatariki Mukagahima Génèreuse avuga ko yahereweho ibyangombwa, ahura n’amatariki Ngarambe Jean yari afunzwe. Avuga ko ibyo Me Mugabonabandi Jean Maurice asaba ko Ngarambe Jean na Mukagahima Génèreuse bagabanamo kabiri kuko babanye bakaba barafatanyije kubaka inzu, asanga ari ikirego gishya, ingingo ya 4 n’iya 7 z’Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbenezamubano zikaba zitabyemera, kuko batigeze basaba kugabana bakaba babivugiye bwa mbere mu Rukiko rw’Ikirenga. Naho ibijyanye no kumenya niba Ngarambe Jean ariwe Ngarambe Jean-Pierre uvugwa mu nyandiko yo mu mwaka wa 1995, avuga ko ariwe ndetse ko

yatanze ikimenyetso cy'ikarita ya Batisimu yerekana ko yitwa Jean-Pierre.

[32] Me Bizimana Emmanuel avuga kandi ko kuba Radjab ataragaragaje ikimenyetso cy'uko yari umufundi, atari cyo cyari kigambiriwe, bikaba bitatuma ibyo yavuze bidahabwa agaciro, naho kuba Kanani yari umuyede akagenda na "Ingenieur" nta tegeko ryishwe. Asoza avuga ko kuba inyandiko y'impano igaragaraho Ngarambe Jean bihagije, kuba nta nyandiko ihari ivuguruzwa iya mbere, Urukiko rukwiye kubiharaho, rwemeza ko umutungo ari uwa Ngarambe Jean.

[33] Me Safari Kizito avuga ko ku bijyanye n'inkomoko y'umutungo Bakina Bernard ntacyo yafasha Urukiko, kuko yasanze amasezerano yarangiye bakamuha inzoga agasinya, Twiringiyimana Célestin akaba atavugisha ukuri kuko yaregwaga mu rubanza rw'inshinjabyaha hamwe na Mukagahima Génèreuse; Nzabandora Jimmy ibyo yasobanuye ko Ngarambe Jean ariwe wahawe wenyine bikaba aribyo, ubuhamya bwe bukaba butateshwa agaciro kubera ko avukana na Ngarambe Jean; naho kuri Kanani na Mukampabuka Hélène kuba umwe yabona ubunyobwa, undi akabona ikindi biterwa n'ibyo buri wese akunda, naho Radjab akaba yaravuze ko atazi inkomoko y'ubutaka, ko yatangiye kubaka mu mwaka wa 1999, kandi akaba avuga ko umuntu yabonaga akaba ari Ngarambe Jean wenyine, nabyo bikaba bikwiye guhabwa agaciro.

UKO URUKIKO RUBIBONA

[34] Ingingo ya 162 y'Itegeko N°15/2004 ryo ku wa 12/06/2004, ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko "Ubuhamya ari ibivugwa mu rukiko bivuzwe

n’umuntu wabibonye cyangwa wabyumvise ubwe ku byerekeye ikiburanwa”.

[35] Ingingo ya 27 y’Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy’Urwunge rw’amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y’umutungo w’abashyingiranywe, impano n’izungura yateganyaga ko “Impano zikorera inyandiko mpamo cyangwa inyandiko bwite cyangwa igashyikirizwa gusa nyirayo”. Naho ingingo ya 28 y’iryo Tegeko igateganya ko “impano itangira kugira agaciro ku munsu yemewe n’uyihawe. Kwemera impano bishobora gukorwa mu nyandiko cyangwa mu mvugo”

[36] Dosiye y’urubanza igaragaza ko igihe Mukagahima Génèreuse yarezwe mu Rukiko Rwisumbuye rwa Nyarugenge, mu rubanza N° RP0295/14/TGI/NYGE, icyaha cyo kwihesha ku bw’uburiganya ibyemezo bitangwa n’inzego zabigenewe no gukoresha abizi inyandiko itavugisha ukuri, Urukiko rwemeje ko ari umwere rushingiye ku mvugo z’abatangabuhamya barimo Twiringiyimana Célestin na Nibisekere Louis, bahamya ko ubwo bari Abayobozi mu nzego z’ibanze bakiriye Ngarambe Jean, abasaba ko Mukagahima Génèreuse ariwe wandikwaho umutungo, ngo kuko yavugaga ko agiye gutana n’umugore we wa mbere, akaba ashaka kuwandika kuri Mukagahima Génèreuse wari umugore we wa kabiri kugira ngo umwana bafitanye azabone ikimutunga, n’inyandiko yitwa isambu gakondo ivuga ko Ngarambe Jean na Mukagahima Génèreuse bahawe isambu irimo inzu gakondo na Ntacyobazi Anastasie, bityo ko kuba Ngarambe Jean ariwe wategetse inzego z’ibanze kwandikaho umutungo Mukagahima Génèreuse wenyine, nta kindi yari gukora usibye kubyemera.

[37] Ibyashingiweho muri urwo rubanza N° RP0295/14/TGI/NYGE rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge, bishimangirwa n'ibyo abatangabuhamya babwiye uru Rukiko ubwo rwakoraga iperereza, aho umutangabuhamya Bakina Bernard, yavuze ko umukecuru Ntacyobazi Anastasie yahaye ikibanza Ngarambe Jean n'umugore we Mukagahima Génèreuse kandi ko icyo gihe babanaga nk'umugabo n'umugore. Twiringiyimana Célestin, avuga ko kugira ngo ikibanza cyandikwe kuri Mukagahima Génèreuse, Ngarambe Jean yamuzanye, agasaba ko ikibanza cyandikwa ku mugore we ; Izere Valentine uvuga ko yari Umuyobozi w'Umudugudu kuva mu 2010, n'ubwo avuga ko atazi inkomoko y'umutungo, yavuze ko icyo azi ari uko Mukagahima Génèreuse yazanye icyemezo cy'umutungo kigaragaza ko ariwe wanditseho, akaba aricyo bashingiraho bamuha “acte de notoriété”.

[38] Urukiko rurasanga kuba Ngarambe Jean yarahaye Mukagahima Génèreuse impano akanasaba Inzego z'Ibanze kuyimwandikaho wenyine, uko kuyimwandikaho ubwabyo byari bihagije kandi bikaba bitanyuranyije n'ingingo ya 27 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura ryavuzwe haruguru ryariho icyo gihe, kuko iyo ngingo iteganya ko impano ishobora gushyikirizwa gusa nyirayo, byumvikana rero ko mu gihe Ngarambe Jean yari ashyikirije umugore we Mukagahima Génèreuse impano ye abinyujije ku nzego z'ibanze kugira ngo ayandikweho, bitari ngombwa ko iyo mpano ikorerwa inyandiko mpamo cyangwa inyandiko bwite, bitandukanye n'ibyo Urukiko Rukuru rwemeje, bivuze ko ibivugwa n'uhagarariye Ngarambe Jean ko Mukagahima Génèreuse yahengereye afunzwe akiyandikishaho ikibanza n'inzu bye, atari byo.

[39] Urukiko rurasanga hakurikijwe ingingo ya 10 y'Itegeko N°43/2013 ryo ku wa 16/06/2013 rigenga ubutaka mu Rwanda, ubutaka buburanwa Mukagahima Génèreuse yarabuhaweho impano, bityo akaba ari nta mpamvu ibyangombwa byo mu Buyobozi bw'Ibanze byamuhaga uburenganzira bwo kwandikwaho uwo mutungo byateshwa agaciro kuko yabibonye mu buryo bukurikije amategeko.

[40] Hashingiwe ku bisobanuro byose byatanzwe haruguru, Urukiko rurasanga umutungo uburanwa wari uwa Mukagahima Génèreuse, ukaba ugomba guhabwa abafite uburenganzira bwo kumuzungura kuko atakiriho.

[41] Urukiko rurasanga rero, iby'uko Ntacyobazi Anastasie yahaye Ngarambe Jean wenyine umutungo uburanwa ntacyo byahindura kuko byagaragaye ko uwo mutungo yaweguriye Mukagahima Génèreuse awumuhayeho impano.

3. Kumenya niba abazungura ba Mukagahima Génèreuse bahabwa indishyi basaba

[42] Mu myanzuro Me Mugabonabandi Jean Maurice, uhagarariye abazungura ba Mukagahima Génèreuse, yashyikirije Urukiko, yavuze ko Urukiko rwageneye Ngarambe Jean indishyi zingana na 1.225.000 Frw zidafite aho zishingiye kuko atari we wagombaga gutsinda, ahubwo Ngarambe Jean akaba ariwe wagombye guha Mukagahima Génèreuse indishyi kuko ariwe umushora mu manza, asaba Urukiko rw'Ikirenga gukosora amakosa yakozwe n'Urukiko Rukuru, rukavanaho indishyi zatanzwe, ahubwo abazungura ba Mukagahima Génèreuse bakagenerwa indishyi yari yasabye mu nkiko zabanje, igihembo cya Avoka mu nzego zose yanyuzemo n'amafaranga

y'ikurikiranarubanza, indishyi zose basaba zikaba zihwanye na 5.000.000 Frw.

[43] Mu myanzuro Me Kizito Safari, uhagarariye Ngarambe Jean, nawe mu mwanzuro yashyikirije Urukiko, yavuze ko indishyi Ngarambe Jean yagenewe n'Urukiko Rukuru yari azikwiye kuko yavukijwe uburenganzira ku mutungo, bigatuma yitabaza ubutabera ngo arenganurwe, atanga ubujurire bwuririye ku bundi avuga ko indishyi zo kuvutswa uburenganzira ku nzu zingana na 100.000 Frw ari nkeya ugereranije n'akababaro ka Ngarambe Jean, asaba Urukiko rw'Ikirenga kumuha indishyi zose yasabye zingana na 3.000.000 Frw, indishyi mbonezamusaruro zingana na 200.000 Frw ku kwezi, uhareye mu mwaka wa 2010, amafaranga yo gukurikirana urubanza angana na 500.000 Frw n'igihembo cya Avoka kingana na 1.500.000 Frw yo kuri uru rwego, akiyongera ku yagenwe mu rubanza rujuririrwa.

UKO URUKIKO RUBIBONA

[44] Ingingo ya 258 y'Igitabo cya gatatu cy'Urwunge rw'amategeko mbonezamubano, iteganya ko "Igikorwa cyose cy'umuntu cyangirije undi, gitegeka nyir'ugukora ikosa rigikomokaho kuriha ibyangiritse".

[45] Urukiko rurasanga kuba byagaragajwe ko umutungo uburanwa wari uwa Mukagahima Génèreuse, byumvikana ko Ngarambe Jean nta burenganzira yavukijwe ku mutungo, bityo n'indishyi yagenewe n'Urukiko Rukuru zikaba zigomba kuvaho, ahubwo abazungura ba Mukagahima Génèreuse bakaba aribo bagomba guhawa indishyi, bagahabwa 300.000 Frw y'ikurikiranarubanza na 500.000 Frw y'igihembo cya Avoka kuri

uru rwego kuko ariyo ari mu kigero gikwiye, naho indishyi z'akababaro bakaba batazihabwa kuko batazisobanuye.

III. ICYEMEZO CY'URUKIKO

[46] Rwemeje ko ubujurire bwatanzwe na Mukagahima Génèreuse bukaburanwa n'abana be Mugabo Aimé Fernand, Umulisa Murielle, Ngarambe Bruce Kevin na Ngarambe Chris, bufite ishingiro;

[47] Rwemeje ko urubanza RCA0174/15/HC/KIG rwaciwe n'Urukiko Rukuru, ku wa 23/10/2015 ruhindutse kuri byose;

[48] Rwemeje ko umutungo uburanwa wari uwa Mukagahima Génèreuse, ugomba guhabwa abana be Mugabo Aimé Fernand, Umulisa Murielle, Ngarambe Bruce Kevin na Ngarambe Chris, bafite uburenganzira bwo kumuzungura;

[49] Rutegetse Ngarambe Jean guha abazungura ba Mukagahima Génèreuse, indishyi zose hamwe zingana na 800.000 Frw nk'uko zasobanuwe haruguru;

[50] Rutegetse Ngarambe Jean kwishyura amagarama y'urubanza, angana na 100.000 Frw.

MUTONI v NIWENSHUTI N’UNDI

[Rwanda URUKIKO RW’IKIRENGA – RCAA 0014/15/CS
(Mutashya P.J., Nyirinkwaya na Karimunda, J.) 01 Ukuboza
2017]

Amategeko agenga umuryango – Ababana batarashakanye mu buryo bukurikije amategeko – Ikimenyetso – Ikimenyetso gishingirwaho hemezwa ko abantu babanaga nk’ umugabo n’umugore – Iyo imibanire bwite hagati y’abantu ntisaba ibimenyetso byihariye, uburyo bwose bushoboka bwagaragaza ko umugore n’umugabo babanye bwasishingirwaho mu gufata icyemezo – Icyemezo cy’ubuyobozi bw’aho batuye cyangwa inyemezabuguzi y’amasezerano y’ubukode agaragaza ko babaga mu nzu imwe n’ibimwe mu bimenyetso byashingirwaho mu kwemeza ko abantu babanaga nk’ umugabo n’umugore.

Amategeko agenga umuryango – Ababanaga batarashakanye mu buryo bukurikije amategeko – Umutungo – Kugabana umutungo wababanaga nk’umugabo n’umugore batarashyingiranywe mu buryo byemewe n’amategeko – Ntabwo ari ngombwa ko buri wese agomba kugaragaza ingano (quantité) y’ibyo yakoze kugirango umutungo ubeho cyangwa ngo yerekane ibyo yawushyizeho kugirango wiyongere agaciro, ahubwo uwo mutungo ugomba kuba warabonetse muri cya gihe kidashidikanywaho bombi babanaga kuko icya ngombwa ari uko muri iyo mibanire buri wese aba afite ibyakora mu guteza imbere urugo kabone niyo umwe muri bo atabasha kugaragaza mu buryo burondoye (détaille/details) ibyo yakoze kugirango uboneke cyangwa utubuke.

Incamate y'ikibazo: Mutoni K. Jackline yatambamiye urubanza RC0615/12/TGI/NYGE aho Niwenshuti yareze Mukambuguje, asaba ko bagabana umutungo bashakanye buri wese akegukana kimwe cya kabiri ($\frac{1}{2}$) cy'amafaranga avuyemo, Mutoni K. Jackline yarutambamiye avuga ko nawe yabaye umugore wa Niwenshuti mu buryo butemewe n'amategeko, babyarana abana babiri, bafatanyaga kubaka iyo nzu.

Niwenshuti na mukambuguje batanze inzitizi yo kutakira ikirego bavugaga ko Mutoni K. Jackline yabyaranye gusa na Niwenshuti kandi bakaba bahuje n'akazi k'ubucuruzi bakoreraga hamwe ariko ko batigeze babana nk'umugore n'umugabo, urwo Urukiko rwasanze iyo inzitizi nta shingiro ifite kuko agaragaza inyungu afite mu rubanza ishingiye ku kuba Urukiko rwarategutse ko inzu yubakanye na Niwenshuti igurishwa.

Mu mizi y'urubanza, Urukiko rwasanze, uretse kugaragaza gusa ko Niwenshuti Aloys yishyuraga imisoro no kuba hari amasezerano y'ubukode yagiranye na ba nyir'inzu yacururizagamo, nta kindi kimenyetso cyerekana ko yafatanyije nawe kubaka inzu iburanwa, maze rwemeza ko ikirego cye nta shingiro gifite, bityo ko urubanza yatambamiraga ruhamanye agaciro karwo, ntiyishimiye icyo cyemezo ajuririra mu Rukiko Rukuru, narwo rusanga nta kimenyetso agaragaza cy'uko yagize uruhare mw'iyubakwa ry'inzu iburanwa, uretse gukurikirana imirimo y'iyubakwa ryayo, maze rwemeza ko nta gihindutse ku mikirize y'urubanza rwajuririwe

Yongeye kandi ajuririra mu Rukiko rw'Ikirenga avugaga ko Urukiko Rukuru rwavuze ko Niwenshuti atabaye umugabo we ahubwo ko yamusuraga kenshi aje kwiruhukira, bituma rutabagabanya inzu bahahanye, nyamara uwari Umuyobozi w'Umudugudu wa Gatsata, babanje guturamo, Umuyobozi w'Umudugudu wa Gikondo, ndetse n'Umuyobozi

w'Umudugudu w'Umurava aho bagiye bimukira, bemeza ko yabanaga nawe nk'umugabo we, ari we wishyura ubukode. Asobanura avuga ko yamenyanye Niwenshuti yigira i Kabare muri Uganda, batangira kubana guhera ku wa 05/08/2005 abyarana abana babiri amuzanira n'icyemezo cy'ingaragu "attestation de célibat", bituma akomeza kumwizera, bajyana iwabo i Nyagatare, amukwa 1.000.000 Frw, nubwo nta mihango ikomeye yabaye kandi ko abasaza bakiriye iyo nkwan babihamya, asoza avuga ko ntacyo Mukambuguje yashyize ku nzu iburanwa kuko kugeza ubu atagaragaza icyo yakoraga cyari gutuma afatanyaga na Niwenshuti kubaka inzu iburanwa, ariyo mpamvu asaba kurenganurwa, agahabwa uruhare rwe ku nzu iburanwa.

Niwenshuti avuga ko yashakanye na Mukambuguje kandi ko intandaro yukugabana inzu ari uko Mukambuguje yanze kumusinyira kugirango afate amafaranga yitwaje ko yabyaye hanze, biramurakaza asaba ko iyo nzu bayigabana, asobanura ko yamenyanye na Mutoni K. Jackline guhera muri 2003, uyu azi ko afite undi mugore mu Gatsata kandi ko adahakana ko yitabiriye "collation des grades" ye muri Uganda nk'uko n'abandi bayitabiriye, ko muri ubwo bushuti babyaranye abana babiri kandi ko yamukodeshereje inzu agirango areke gukomeza kuba kwa musaza we. Asoza avuga ko kujya mu birori bisoza amashuri, kumutuma gushyira amafaranga kuri konti, kumukodoshereza inzu cyangwa ibivugwa n'abayobozi b'imidugudu ataribyo byashingirwaho hemezwa ko yari umugabo we.

Mukambuguje Alodie avuga ko intandaro y'amakimbirane ari inguzanyo ya kabiri Niwenshuti Aloys yashatse gufata akamwangira kuko yari amaze kumenya ko yabyaye hanze, ararakara, ata urugo, amara amezi atandatu ataragaruka, atanga

ikirego ari iyo yagiye asaba ko iyo nzu bayigabana, bamaze kugabana arigarura nawe aramwakira kuko ariwe wari nyir'amakosa kandi ko atumva uburyo Mutoni K. Jackline yamaze imyaka itandatu akodesha kandi yarubatse inzu. Asoza avuga ko uburyo umwe mu babanye batarashingiranywe agira uruhare ku mutungo w'umugabo cyangwa umugore babanaga ari ukugaragaza icyo yakoze kugirango uwo mutungo uboneke, bityo ko kuvuga gusa ko yabaye umugore utemewe n'amategeko wa Niwenshuti cyangwa ko babyaranye ataribyo byatuma agira uruhare ku nzu atubatse.

Incamake y'icyemezo: 1. Iyo imibanire bwite hagati y'abantu ntisaba ibimenyetso byihariye, uburyo bwose bushoboka bwagaragaza ko umugore n'umugabo babanye bashingirwaho mu gufata icyemezo.

2. Icyemezo cy'ubuyobozi bw'aho batuye cyangwa inyemezabuguzi y'amasezerano y'ubukode agaragaza ko babaga mu nzu imwe nibimwe mu bimenyetso byashingirwaho mu kwemeza ko abantu babanaga nk' umugabo n'umugore.

3. Iyo ababanaga nk'umugabo n'umugore batarashingiranywe mu buryo bwemewe n'amategeko bagiye kugabana umutungo ntabwo ari ngombwa ko buri wese agomba kugaragaza ingano (quantité) y'ibyo yakoze kugirango umutungo ubeho cyangwa ngo yerekane ibyo yawushyizeho kugirango wiyongere agaciro, ahubwo uwo mutungo ugomba kuba warabonetse muri cya gihe kidashidikanywaho bombi babanaga kuko icya ngombwa ari uko muri iyo mibanire buri wese aba afite ibyakora mu guteza imbere urugo.

4. Ingano y'ibyakozwe n'umugore cyangwa umugabo kugirango umutungo uburanwa uboneke cyangwa utubuke ubwayo atariyo ihesha umugore cyangwa umugabo uburenganzira bwo kugabana

umutungo uburanwa n'uwo avuga ko babanaga, ahubwo igomba kuza yiyongera ku bimenyetso by'uko uwo mutungo wabonetse cyangwa wongerewe agaciro bombi babana nk'umugore n'umugabo kabone niyo umwe muri bo atabasha kugaragaza mu buryo burondoye (détaille/details) ibyo yakoze kugirango uboneke cyangwa utubuke.

5. Kuva uwajuriye yari azi neza ko atasezeranye na Niwenshuti yari yiyemeje ko umubano wabo ushobora kurangira igihe icyo aricyo cyose, mu gihe ibyo yateganyaga bibaye akaba atahindukira ngo abifate nk'ikosa rikwiye kuryorezwa indishyi.

**Ubujurire bufite ishingiro;
Urubanza rwajuririwe ruhindutse mu ngingo zarwo zose;
Inzu iburanwa niya Niwenshuti Aloys, Mukambuguje
Alodie na Mutoni K. Jackline, buri wese akaba
ayifiteho uburenganzira bungana na 1/3;
Amagarama y'urubanza aherereye ku baregwa.**

Amategeko yashingiweho:

Itegeko N°59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, ingingo ya 39.

Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 3.

Imanza zifashishijwe:

Gatera Johnson na Kabarisa Teddy RS/Inconst/Pén.0003/10/CS rwaciwe ku wa 07/01/2011 n'Urukiko rw'Ikirenga.

Nyirakamana n'abandi na. Mukasharangabo n'abandi No RS/REV/INJUST CIV 0007/15/CS rwaciwe ku wa 04/12/2015 n'Urukiko rw'Ikirenga.

Ahishakiye Jean na Namagabira Venantie Reba urubanza no RCAA0048/14/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 11/03/2016.

Twahirwa Ahmed na Kaligirwa Rehema RCAA0036/15/CS rwaciwe ku wa 17/11/2017 n'Urukiko rw'Ikirenga

Lothar Pettkus V. Rosa Becker [1980] rwaciwe n'Urukiko rw'Ikirenga rwa Canada.

Baumgartener v Baumgartner [1987], rwaciwe n'Urukiko Rukuru rwa Australia.

Inyandiko z'abahanga:

Francois Terré na Philippe Simler, Droit Civil: Les régimes matrimoniaux, Paris: Dalloz, 2015, p.734.

Memento Pratique, Droit de la Famille 2014-2015, Lavallos : Francis Lefebvre, 2014, p. 307.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Nyarugenge, Niwenshuti Aloys arega Mukambuguje Alodie, asaba ko bagabana umutungo bashakanye buri wese akegukana kimwe cya kabiri ($\frac{1}{2}$) cy'amafaranga avuyemo.

[2] Mu rubanza RC0615/12/TGI/NYGE rwaciwe ku wa 03/05/2013, Urukiko rwasanze nubwo ababuranyi bombi bemeranya ko babanye mu buryo butemewe n'amategeko, ubu batakibana, ariyo mpamvu umutungo ugizwe n'inzu iri mu kibanza no 753 bagomba kuwugabana mu buryo bungana hashingiwe ku biteganywa n'ingingo ya 39, igika cya 2,

y'Itegeko N°59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina cyane cyane ko igabana ry'umutungo riteganywa n'iyi ngingo ridashingiye k'uburenganzira buturuka ku masezerano yo gushyingirwa ahubwo ari uburenganzira ku mutungo umwe mu babanaga aba afite, bushingiye ku kuba barawuhahanye cyangwa bawusangiye nk'uko byemejwe n'Urukiko rw'Ikirenga mu rubanza RS/Inconst/Pén.0003/10/CS hagati ya Gatera Johnson na Kabarisa Teddy¹, rwanzura ko inzu igurishwa, kimwe cya kabiri (½) cy'igiciro kigahabwa Niwenshuti Aloys, ikindi kigahabwa Mukambuguje Alodie, uyu akishyura Niwenshuti Aloys 410.000 Frw y'ikurikiranarubanza n'igihembo cy'avoka.

[3] Mutoni K. Jackline yatambamiye urwo rubanza avuga ko nawe yabaye umugore wa Niwenshuti Aloys mu buryo butemewe n'amategeko, babyarana abana babiri, bafatanyaga kubaka iyo nzu, nyuma aza kumva ko hari icyemezo cy'urukiko cyemeje ko igabanywa Niwenshuti Aloys na Mukambuguje Alodie, kandi uyu ntacyo yayishyizeho, ariyo mpamvu yumva ari we ukwiye kuyigabana na Niwenshuti Aloys kuko ariwe bafatanyije kuyubaka.

[4] Niwenshuti Aloys na Mukambuguje Alodie babanje gutanga inzitizi yo kutakira ikirego cya Mutoni K. Jackline bavugaga ko yabyaranye gusa na Niwenshuti Aloys, bahujwe n'akazi k'ubucuruzi bakoreraga hamwe ariko ko batigeze babana nk'umugore n'umugabo.

¹ Reba urubanza N°RS/Inconst/Pén.0003/10/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 07/01/2011 hagati ya Gatera Johnson na Kabarisa Teddy, igika cya 6.

[5] Mu rubanza RC0632/13/TGI/NYGE rwaciwe ku wa 31/03/2014, Urukiko rwasanze inzitizi y'uko Mutoni K. Jackline nta bubasha afite bwo gutambamira urubanza rw'uwo yita umugabo we kuko batigeze bashakana mu buryo bwemewe n'amategeko nta shingiro ifite kuko agaragaza inyungu afite mu rubanza ishingiye ku kuba Urukiko rwarategetse ko inzu yubakanye na Niwenshuti Aloys igurishwa.

[6] Mu mizi y'urubanza, Urukiko rwasanze, uretse kugaragaza gusa ko Niwenshuti Aloys yishyuraga imisoro no kuba hari amasezerano y'ubukode yagiranye na ba nyir'inzu yacuririzagamo, nta kindi kimenyetso cyerekana ko yafatanyije nawe kubaka inzu iburanwa, rwemeza ko ikirego cye nta shingiro gifite, bityo ko urubanza yatambamiraga ruhamanye agaciro karwo.

[7] Mutoni K. Jackline ntiyishimiye icyo cyemezo ajuririra mu Rukiko Rukuru avuga ko Urukiko rubanza rwemeje ko inzu ari iya Niwenshuti Aloys na Mukambuguje Alodie kandi ari we bayubakanye.

[8] Mu rubanza RCA0176/14/HC/KIG rwaciwe ku wa 27/02/2015, Urukiko rwasanze Mutoni K. Jackline nta kimenyetso agaragaza cy'uko yagize uruhare mw'iyubakwa ry'inzu iburanwa, uretse gukurikirana imirimo y'iyubakwa ryayo, maze rwemeza ko nta gihindutse ku mikirize y'urubanza rwajuririwe.

[9] Mutoni K. Jackline ntiyanyuzwe n'icyo cyemezo, ajuririra mu Rukiko rw'Ikirenga avuga ko:

- a. Yagaragarije Urukiko Rukuru inyandiko z'abatangababuhamya bemeza ko yari umugore wa

Niwenshuti Aloys mu gihe cy'imyaka umunani, babyarana abana babiri, ariko izo nyandiko ntizagaragara muri kopi y'urubanza ;

- b. Urukiko Rukuru rwagoretse ingingo ya 39, igika cya 2 y'Itegeko N°59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, ruyiha ubusobanuro butari bwo;
- c. Urukiko Rukuru rwavuze ko Niwenshuti Aloys yakuraga amafaranga kuri konti agirango ayamugurize, rubyemza ntacyo rubishingiyeho ahubwo rwirengagije ibimenyetso bigaragaza ko yayavanaga kuri konti agiye kuyubakisha ;
- d. Urukiko Rukuru rwemeje ko Niwenshuti Aloys yasezeranye na Mukambuguje Alodie mu rwego rwo kuvugurura umubano wabo, nyamara barabikoze imanza zaratangiye bagamije kujijisha ubutabera ;
- e. Urukiko Rukuru rwabogamiye kuri Niwenshuti Aloys kuko rwemeje ko yibwe « plan original » y'umutungo uburanwa, « carnet des chèques » yuzuzwaga ubwo yabaga agiye kubikuza, kashe yakoreshwaga mu kazi, byose bibistwe na Mutoni K. Jackline, rubyemeza nta kimenyetso rubishingiyeho kuko nta kirego cy'ubujura Niwenshuti Aloys yigeze atanga ;
- f. Yategetswe kwishyura 500.000 Frw y'ikurikiranarubanza n'igihembo cya Avoka byo gushora abaregwa mu manza nta mpamvu, Urukiko rwiye bagiza ko aribo bazimushoyemo ;

[10] Mutoni K. Jackline asaba kandi uru Rukiko kwemeza ko Niwenshuti Aloys yamutesheje agaciro, ntiyita ku burere

bw'abana bafitanye, anamubeshya ko nta wundi mugore afite, akaba abisabira indishyi za 4.000.000 Frw na 2.500.000 Frw y'igihembo cya avoka ku nzego zose.

[11] Iburanisha mu ruhame ryabaye ku wa 30/05/2017, Mutoni K. Jackline yunganiwe na Me Karangwayire Epiphane hamwe na Me Mukundamana Eric, Niwenshuti Aloys yunganiwe na Me Kimanuka John naho Mukambuguje Alodie aburanirwa na Me Karega Blaise Pascal, Urukiko rubanza gusuzuma inzitizi zazamuwe na Me Karega Blaise Pascal z'uko ubujurire budakwiye kwakirwa n'uru Rukiko kuko Mutoni K. Jackline yatsinzwe mu Nkiko zombi zibanza ku mpamvu zimwe, ariko ko niyo uru Rukiko rwasanga ataratsinzwe ku mpamvu zimwe, rwakwemeza ko kimwe cya gatatu (1/3) cy'inzu ifite agaciro ka 53.000.000 Frw yaregeye gituma ubujurire bwe butakirwa kuko kitageze nibura kuri 50.000.000 Frw, kandi ko niyo uru Rukiko rwakwemeza ko ubujurire buri mu bubasha bwarwo, rutabwakira kuko ari ubujurire bwa gatatu.

[12] Ku wa 30/06/2017, uru Rukiko rwasanze inzitizi zatanzwe nta shingiro zifite, rwemeza ko ubujurire buri mu bubasha bwarwo kandi ko bukwiye kwakirwa, rutegeka ko iburanisha rikomeza ku wa 26/09/2017. Uwo munsu ugeze, Urukiko rwasanze Niwenshuti Aloys yasabye ko iburanisha ryimurirwa undi munsu, atanga impamvu y'uko arwariye muri Uganda, naho Mukambuguje Alodie, Me Kimanuka John na Me Karega Blaise Pascal batitabye kandi nta mpamvu babitangiye.

[13] Urukiko rwasuzumye impamvu zatanzwe na Niwenshuti Aloys, uburana yunganiwe, rusanga nta shingiro zifite ahubwo ari uburyo bwo gutinza urubanza, rumuhanisha ihazabu mbonezamubano ya 100.000 Frw, naho Me Kimanuka John, umwunganira, na Me Karega Blaise Pascal, uhagarariye

Mukambuguje Alodie, buri wese ahanishwa ihazabu mbonezamubano ya 200.000 Frw, ariko mu nyungu z'ubutabera zishingiye ku kuba bikwiye ko urubanza ruburanishwa ababuranyi bose bahari, Urukiko rutegeka ko abaregwa mu bujurire bahamagarwa bihanangirijwe, iburanishwa ryimurirwa ku wa 24/10/2017.

[14] Uwo munsu iburanisha ryabereye mu ruhame, Mutoni K. Jackline yunganiwe nka mbere, Niwenshuti Aloys yunganiwe na Me Ruberwa Ngarukiye Silas, naho Mukambuguje Alodie yunganiwe na Me Kamushoshi Gandin.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

II. 1. Kumenya niba Mutoni K. Jackline yarabanye na Niwenshuti Aloys nk'umugore n'umugabo ku buryo bagabana inzu iburanwa.

[15] Mutoni K. Jackline avuga ko yajurijwe n'uko Urukiko Rukuru rwavuze ko Niwenshuti Aloys atabaye umugabo we ahubwo ko yamusuraga kenshi aje kwiruhukira, bituma rutabagabanya inzu bahahanye, nyamara Kalisa Théoneste wari Umuyobozi b'Umudugudu wa Gatsata, babanje guturamo, Habimana Ally, Umuyobozi w'Umudugudu wa Gikondo, ndetse na Ndagijimana Athanase, Umuyobozi w'Umudugudu w'Umurava, aho bagiye bimukira, bemeza ko yabanaga nawe nk'umugabo we, ari we wishyura ubukode. Asobanura ko yamenyanye na Niwenshuti Aloys yigira i Kabare muri Uganda, batangira kubana guhera ku wa 05/08/2005, ku wa 23/04/2006 babyarana umwana wa mbere, ku wa 20/11/2011 babyara uwa kabiri, muri 2012, Niwenshuti Aloys amuzanira “attestation de

célibat”, bituma akomeza kumwizera, bajyana iwabo i Nyagatare, amukwa 1.000.000 Frw, ko nubwo nta mihango ikomeye yabaye, abasaza bakiriye iyo nkwan babihamya.

[16] Asoza avuga ko ku wa 20/08/2012 Mukambuguje Alodie yabwiye Ubuyobozi bw'Akagali ka Niboye ko impamvu yimye Niwenshuti Aloys ibyangombwa by'inzu iburanwa ari uko yashatse undi mugore. Ku wa 13/11/2012, Niwenshuti Aloys yandikira abashinzwe ubutaka asaba kurenganurwa avuga ko Mukambuguje Alodie yamuciye inyuma yiyandikishaho inzu ye kandi batarasezeranye, bigeze mu rubanza RC0915/12/TGI/NYGE rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 03/05/2013, Mukambuguje Alodie avuga ko Niwenshuti Aloys yamutaye, amuhoye ko batasezeranye, bisobanuye ko Mukambuguje Alodie ahamya ko Niwenshuti Aloys yari yarashatse undi mugore, ndetse na Niwenshuti Aloys agahamya ko ntacyo Mukambuguje Alodie yashyize ku nzu iburanwa, ibi bikongera bigashimangirwa n'uko kugeza ubu atagaragaza icyo yakoraga cyari gutuma afatanyaga na Niwenshuti Aloys kubaka inzu iburanwa, ariyo mpamvu asaba kurenganurwa, agahabwa uruhare rwe ku nzu iburanwa.

[17] Me Mukundamana Eric, umwunganira, avuga ko Niwenshuti Aloys yavanye Mutoni K. Jackline mu ishuri, aramutunga, bamarana imyaka umunani (8) babana nk'umugore n'umugabo, basangira ubucuruzi muri “*quartier commercial*” nk'uko byemezwaga n'abatangabuhamya, kugeza ubu imyenda ya Niwenshuti Aloys, inyandiko z'ubucuruzi, *chequier* n'igishushanyo mbonera (*plan*) cy'inzu iburanwa bikaba bikibitswe na Mutoni K. Jackline, uyu kandi akaba yarahaye Niwenshuti Aloys sheki ya 500.000 Frw, ibyo bimenyetso byose bigaragaza ko babanaga nk'umugore n'umugabo bikaba

byarirengagijwe n'Urukiko rubanza, bituma rudaha Mutoni K. Jackline uruhare rwe ku nzu iburanwa.

[18] Me Karangwayire Epiphane, nawe wunganira Mutoni K. Jackline, avuga ko Niwenshuti Aloys yihutiye gusezerana na Mukambuguje Alodie kuko yari abonye Mutoni K. Jackline atangiye kuburana uruhare rwe ku nzu bubakanye, Mutoni K. Jackline ahita atambamira ubwo bushyingiranwe kugirango imanza zibanze zirangire, bivuze ko mbere yo gusezerana yabanaga n'abagore babiri, ariyo mpamvu Mutoni K. Jackline akwiye kubona uruhare rwe ku nzu iburanwa nk'uko biteganywa n'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryose rishingiye ku gitsina.

[19] Niwenshuti Aloys avuga ko yashakanye na Mukambuguje Alodie muri 1993, muri 1994 aratahuka, umuvandimwe we witwa Rutamu Diogène amuha ikibanza yubatsemo inzu iburanwa ku nguzanyo ya 8.000.000 Frw we na Mukambuguje Alodie bahawe na Banki y'Abaturage, amafaranga amubanye make Mukambuguje Alodie yanga kumusinyira kugirango afate andi yitwaje ko yabyaye hanze, biramurakaza asaba ko iyo nzu bayigabana. Asobanura ko yasezeranye na Mukambuguje Alodie yanga ko bakomeza kumwita inshoreke, ariko ko hagati aho yari yaramenyanye na Mutoni K. Jackline guhera muri 2003, uyu azi ko afite undi mugore mu Gatsata. Avuga ko adahakana ko yitabiriye “collation des grades” ye muri Uganda nk'uko n'abandi bayitabiriye, ko muri ubwo bushuti babyaranye abana babiri kandi ko yamukodeshereje inzu agirango areke gukomeza kuba kwa musaza we. Asoza avuga ko kujya mu birori bisoza amashuri, kumutuma gushyira amafaranga kuri konti, kumukodoshereza inzu cyangwa

ibivugwa n'abayobozi b'imidugudu ataribyo byashingirwaho hemezwa ko yari umugabo wa Mutoni K. Jackline, cyane cyane ko kubyemeza bitari mu nshingano z'abayobozi b'inzego z'ibanze, ariyo mpamvu asaba uru Rukiko kwemeza ko ubujirire nta shingiro bufite.

[20] Me Ruberwa Ngarukiye Silas, umwunganira, avuga ko ikigomba gusuzumwa muri uru rubanza atari ukumenya niba Mutoni K. Jackline yarabanye na Niwenshuti Aloys nk'umugore n'umugabo, kuko badahakana ko babyaranye cyangwa se ko bacururizaga mu nzu imwe buri wese afite ibyo acuruza, ahubwo ko ikibazo ari ukumenya niba hari icyo Mutoni K. Jackline yashyize ku nzu iburanwa. Asobanura ko dosiye igaragaza ko ikibanza cyatanze na Rutamu Diogène mu 2006, mu batangabuhamya hasinya Mukambuguje Alodie, ku wa 05/08/2007 Mukambuguje Alodie na Niwenshuti Aloys basaba inguzanyo hamwe muri Banki y'Abaturage, mu 2008, bombi biyumukiramo, byose biba Mutoni K. Jackline ahari, ntiyagira icyo akora, muri 2011 bayibaruzaho, na none ntiyabitambamira, akaba asanga Urukiko Rukuru rwarasesenguye ingingo ya 39, igika cya 2, y'Itegeko y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 ryavuzwe haruguru uko bikwiye kuko kugeza ubu Mutoni K. Jackline atagaragaza icyo yashyize ku nzu iburanwa ku buryo yayigiraho uruhare.

[21] Mukambuguje Alodie avuga ko intandaro y'amakimbirane ari inguzanyo ya kabiri Niwenshuti Aloys yashatse gufata akamwangira kuko yari amaze kumenya ko yabyaye hanze, umugabo ararakara, ata urugo, amara amezi atandatu atagararuka, atanga ikirego ari iyo yagiye asaba ko iyo nzu bayigabana, bamaze kugabana arigarura nawe aramwakira kuko ariwe wari nyir'amakosa. Avuga ko atumva uburyo Mutoni

K. Jackline yamaze imyaka itandatu akodesha kandi yarubatse inzu, akaba asaba uru Rukiko guhamishaho imikirize y'urubanza rwajuririwe, rukemeza ko ubujurire nta shingiro bufite.

[22] Me Kamashoshi Gandin, umwunganira, avuga ko uburyo umwe mu babanye batashyiranywe agira uruhare ku mutungo w'umugabo cyangwa umugore babanaga ari ukugaragaza icyo yakoze kugirango uwo mutungo uboneke, ko ibyo aribyo biteganywa n'ingingo ya 39 y'Itegeko N°59/2008 ryo ku wa 10/09/2008 ryavuzwe haruguru, akaba asanga ibyo Mutoni K. Jackline n'abamwunganira baburanisha ko uyu yabaye umugore utemewe n'amategeko wa Niwenshuti Aloys cyangwa ko babyaranye ataribyo byatuma agira uruhare ku nzu atubatse.

UKO URUKIKO RUBIBONA

[23] Ingingo ya 39 y'Itegeko N°59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina iteganya ko « ababanaga nk'umugore n'umugabo batashyiranywe mu buryo buteganywa n'amategeko, bashyirirwa hakurikijwe ihame ry'ubushyiriranwe bw'umugabo umwe n'umugore umwe. Mu gihe umwe mu barebwa n'ibivugwa mu gika kibanziriza iki, yabanaga n'abagore cyangwa abagabo benshi, abanza kugabana ku buryo bungana na buri wese mu bo babanaga, umutungo bari bafitanye cyangwa bahahanye mbere y'uko ashyingirwa ».

[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 ukuri kw'ibyo aburana ».

[25] Dosiye y'urubanza irimo icyemezo cy'Umuyobozi w'Umudugudu wa Nyakaliba, Kalisa Théoneste, wemeza ko Niwenshuti Aloys na Mutoni K. Jackline batuye muri uwo mudugudu nk'umugabo n'umugore kuva mu mwaka wa 2006 kugeza mu Ukuboza 2009; Nyamaswa Eugène, Umuyobozi w'Umudugudu wa Kabeza, avuga mu cyemezo cye cyo ku wa 17/09/2013, ko Niwenshuti Aloys n'umugore we Mutoni K. Jackline batuye mu nzu ya Gabiro Grégoire muri uwo mudugudu kuva ku wa 27/12/2010 kugeza ku wa 21/11/2012, hari kandi inyandiko y'abagize Komite y'Umudugudu w'Umurava bemeza ko Niwenshuti Aloys yashakanye na Mutoni K. Jackline kandi ko bafitanye abana babiri aribo Niwenshuti Patience na Niwenshuti Patrick, se akaba yarabataye, asanga undi mugore uri mu Mudugudu wa Mwijito muri Kicukiro. Dosiye irimo na none icyemezo cy'Ubuyobozi bwa Kigali Investment Company (KIC) cyemeza ko Mutoni K. Jackline yakoreye ubucuruzi mu iduka B2 35 ku masezerano y'ubukode yasinyweho na Niwenshuti Aloys, hakongera hakabamo amasezerano y'ubukode bw'inzu hagati ya Gabiro Grégoire na Niwenshuti Aloys yo ku wa 27/12/2010 ku mafaranga 100.000 Frw buri kwezi (cotes 26-30 na 115).

[26] Dosiye y'urubanza igaragaza ko ku wa 27/12/2011, Mutoni K. Jackline yashyize kuri konti 403-1085982-11 ya Niwenshuti Aloys iri muri Banki y'Abaturage, ishami rya “quartier commercial” 1.600.000 Frw, ku wa 30/12/2011 ashiraho 2.300.000 Frw, ku wa 18/04/2012 ashiraho 140.000 Frw, ku wa 15/06/2012 ashiraho 150.000 Frw, naho ku wa 19/06/2013, asinyira Niwenshuti Aloys sheki ya 500.000 Frw (cotes 22-25 na 75).

[27] Dosiye y'urubanza irimo kandi amasezerano y'impano y'ikibanza yakorewe imbere ya Noteri hagati ya Rutamu Diogène

na Niwenshuti Aloys yo ku wa 15/01/2006, kuri ayo masezerano hakaba harasinyeho Umukundwa Chantal na Mukambuguje Alodie nk'abatangabuhamya; harimo kandi amasezerano y'iguriza (contrat de prêt 357/2007) ya 8.000.000 Frw hagati y'Abanki y'Abaturage na Niwenshuti Aloys afatanyije na Mukambuguje Alodie, umwenda ukaba waragombaga kwishyurwa bitarenze ku wa 05/07/2011 (cote 103), hakongera hakabamo amasezerano y'ubukode burambye N°0753/KIC/NIB yo ku wa 01/09/2011 agaragaza ko ikibanza UPI: 1/03/09/02/753 ari icya Niwenshuti Aloys na Mukambuguje Alodie.

[28] Dosiye y'urubanza irimo kandi inyandiko yo ku wa 30/07/2012, Niwenshuti Aloys yandikiye Umunyamabanga Nshingwabikorwa w'Akagali ka Niboye avuga ko kubera ubwumvikane buke yagiranye na Mukambuguje Alodie, kandi uyu akaba ariwe ubitse ibyangombwa by'inzu ye, ayishinganishije kugirango atazayigurisha cyangwa akayitangaho ingwate atabizi, hari kandi inyandiko yo ku wa 13/11/2012, Niwenshuti Aloys yandikiye Perezida wa Komite ishinze iby'ubutaka mu Murenge wa Niboye amusaba kumukemurira ikibazo afitanye na Mukambuguje Alodie wibarujeho inzu yubatswe mu butaka yahawe n'umuvandimwe we, akaba avuga ko bayifatanyije kandi nta ruhare ayifiteho (cotes 19- 20).

[29] Dosiye y'urubanza irimo kandi inyandiko yitwa "Raporo y'ikemurwa ry'ikibazo hagati ya Niwenshuti n'umufasha we Alodie" yakozwe n'Umunyamabanga Nshingwabikorwa w'Akagari ka Niboye ku wa 20/08/2012, aho Mukambuguje Alodie yavuze ko impamvu yimye Niwenshuti Aloys ibyangombwa by'inzu ari uko batakibana neza bitewe n'uko yashatse undi mugore; naho raporo yakozwe na Havugimana

Cléophas, Umuyobozi ushinzwe ubukungu n'iterambere mu Mudugudu wa Nyamugari, ikemeza ko Niwenshuti Aloys yabanye n'umugore we Mutoni K. Jackline muri uwo mudugudu kuva muri 2006 kugeza muri 2010. Dosiye irimo kandi inyandiko-mvugo y'iburanisha mu Rukiko Rukuru yo ku wa 29/01/2015, Ndagijimana wabaye Umuyobozi w'Umudugudu w'Umurava mu Murenge wa Gisozi akaba yaravuze ko Mutoni K. Jackline “yabanaga n'umugabo we, niwe nyiri urugo, ... hagati ya 2011 na 2013..., uyu mugabo yaje kundegera ikibazo yagiranye n'uwari ubacumbikiye kandi urubanza rwabo narugiyemo, ... [ajya no kuhava] narabimenye... mbibwira ushinzwe umutekano ko Mutoni yaje kundebakumbwira ko umugabo yamutaye, inzara ikaba igiye kumwica n'abana kandi yazaga ku muganda agatanga amafaranga y'umutekano kandi mu manza z'abandi baturanyi hari igihe yadufashaga” (cotes 71, 102 na 129).

[30] Urukiko rurasanga ku bijyanye n'ikimenyetso cy'imibanire y'abagabo n'abagore batashakanye mu buryo bwemewe n'amategeko, Francois Terré na Philippe Simler bavuga ko iyo mibanire bwite hagati y'abantu idisaba ibimenyetso byihariye, ahubwo ko uburyo bwose bushoboka kugirango bugaragaze ko umugore n'umugabo babanye bwashingirwaho mu gufata icyemezo,² igitabo cya Mémento Pratique Francis Lefebvre, *Droit de la Famille* nacyo kivuga ko mu kugaragaza ko abantu babiri babanye nk'umugabo n'umugore, hashobora gushingirwa ku kimenyetso icyo aricyo cyose harimo icyemezo cy'ubuyobozi bw'aho batuye cyangwa

²*Le concubinage est une situation de fait, dont la preuve est par conséquent libre...*” Francois Terré et Philippe Simler, *Droit Civil: Les régimes matrimoniaux*, Paris: Dalloz, 2015, p.734.

inyemezabuguzi y'amasezerano y'ubukode agaragaza ko babaga mu nzu imwe.³

[31] Urukiko rurasanga Niwenshuti Aloys yemera ko yamenyanye na Mutoni K. Jackline guhera muri 2003, icyo gihe Mutoni K. Jackline akaba yari umunyeshuri i Kabare muri Uganda, umunsi yarangije amashuri ye, amuherekeza kwizihiza ibirori byo kurangiza amashuri (collation des grades), hanyuma batangira gucururiza hamwe, inzu bakoreragamo yishyurwa na Niwenshuti Aloys, icyo gihe Mutoni K. Jackline aba kwa musaza we, ariko bigera aho amukodeshereza inzu, banabyarana abana babiri, amasezerano y'ubukode bw'inzu ya Gabiro Grégoire mu Mudugudu wa Kabeza akaba agaragaza ko Niwenshuti Aloys ari we wishyuraga ubukode, Umukuru w'uwo Mudugudu witwa Nyamaswa Eugène, ndetse na Kalisa Théoneste, Umukuru w'Umudugudu wa Nyakaliba aho babanje gutura, bakaba bemeza ko Niwenshuti Aloys na Mutoni K. Jackline bari babanye nk'umugabo n'umugore, bityo hakaba nta gushidikanya ko guhera muri 2005 babanye mu buryo buhoraho (stable) kandi bukomeza (continue) kugeza igihe batandukaniye.

[32] Urukiko rurasanga ikindi kigaragaza ko Niwenshuti Aloys na Mutoni K. Jackline babanye nk'umugore n'umugabo ari uko Mukambuguje Alodie ubwe yivugira ko Niwenshuti Aloys yigeze kumuta, amusiga wenyine n'abana kuko yari amwangiye kumusinyira kugirango afate inguzanyo ya kabiri

³ “ *S'agissant d'une situation de fait, la preuve du concubinage peut être apportée par tous moyens: certificate de concubinage obtenu auprès de la mairie du domicile des concubins, ... quittances des loyers ou factures établies aux deux noms, relevés des comptes bancaires indiquant la même adresse, etc.*” *Memento Pratique, Droit de la Famille 2014-2015*, Lavallos: Francis Lefebvre, 2014, p. 307.

ubwo yari amaze kumenya ko abana n'undi mugore babyaranye, Niwenshuti Aloys nawe akaba adahakana ko yabaye Mutoni K. Jackline hafi, nubwo avuga ko byari mu nyungu z'abana be, ntiyari gukomeza kumukodeshereza iduka acururizamo, inzu atuyemo, ngo yitabire umuganda w'aho Mutoni K. Jackline yari atuye, yishyure amafaranga y'umutekano, aje mu bakemura ibibazo by'abaturanyi, abitse Mutoni K. Jackline ibyangombwa bye birimo sheki, igishushanyo cy'inzu yubakaga, uyu aje ashyira amafaranga kuri konti ye batabana, ahubwo ikigaragarira Urukiko ni uko yahishe Mutoni K. Jackline ko afite undi mugore, abatunga bombi kugeza ubwo Urukiko rumugabanyije inzu iburanwa na Mukambuguje Alodie.

[33] Ku bijyanye no kumenya niba Mutoni K. Jackline hari uburenganzira afite ku nzu yubatswe abana na Niwenshuti Aloys, Urukiko rurasanga ibyo Me Ruberwa Ngarukiye Silas na Me Kamashosi Gandin baburanisha ko umurongo watanzwe n'uru Rukiko mu rubanza ku kirego cyo kvanaho ingingo y'itegeko inyuranye n'Itegeko-Nshinga cyatanzwe na Gatera Johnson na Kabarisa Teddy⁴ ari uko ababanaga batarashyiranywe, buri wese agomba kugaragaza uruhare rwe kugirango umutungo aaburana ubeho cyangwa wongererwe agaciro nta shingiro byahabwa, kuko muri urwo rubanza Urukiko rwavuze ko *“mu gihe ababanaga nk'umugabo n'umugore batarashyiranywe bahagaritse kubana, kugirango bagabane umutungo n'uko*

⁴ Reba urubanza RS/Inconst/Pén.0003/10/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 07/01/2011, Gatera Johnson na Kabarisa Teddy baregeye basaba kvanaho ingingo ya 39 y' Itegeko N°59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, kuko inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04 Kamena 2003 nk'uko ryavugururwe kugeza ubu.

bagomba kuba bawufitanye cyangwa barawushakanye”,⁵ amagambo “bawufitanye” cyangwa “barawushakanye” akaba atavuga ko buri wese agomba kugaragaza ingano (quantité) y’ibyo yakoze kugirango umutungo ubeho cyangwa ngo yerekane ibyo yawushyizeho kugirango wiyongere agaciro, ahubwo uwo mutungo ugomba kuba warabonetse muri cya gihe kidashidikanywaho bombi babanaga kuko icya ngombwa ari uko muri iyo mibanire buri wese aba afite ibyakora mu guteza imbere urugo.

[34] Urukiko rurasanga, nk’uko bigaragara mu bika bya 9 kugeza kuri 13, Urukiko rw’Ikirenga rwashingiye uwo murongo ku rubanza rwa *Hayward v. Giordani* rwo muri New Zealand, urwa *Baumgartner v. Baumgartner*, urwa *Beaudouin Daigeault v. Ricahrd Paul Eugene* n’urwa *Pettkus v. Becker* zo muri Canada ndetse no kuri *Homesteads Acts* yo muri Manitoba (Canada), *Property (Relationships) Act 1976* yo muri New Zealand n’amategeko y’Intara za Australia, aya mategeko n’izi manza muri ibyo bihugu bikaba byemeza ko buri wese mu babanaga nk’umugore n’umugabo batarashingiranywe afite uburenganzira bungana n’ubwa mugenzi we ku mutungo bafitanye cyangwa bashakanye, by’umwihariko mu rubanza rwa *Pettkus v. Becker*, Rosa Becker akaba yarahawe n’Urukiko ½ cy’ubutaka n’imizinga y’inzuki kuko nawe hari ibyo yakoze mu guteza imbere urugo nko gushaka ibirutunga, gukora aho bororeraga inzuki ndetse no kwishyura ubokode bw’inzu yabanagamo na Lothar Pettkus, bityo mu gihe Niwenshuti Aloys adahakana ko mu mibanire ye na Mutoni K. Jackline, uyu yagiye amuha amafaranga kugirango bateze imbere urugo rwabo harimo no kubaka inzu iburanwa ndetse bakaba bari banahuriye ku bucuruzi

⁵ Reba igika cya 15 cy’urubanza.

bakoraga, nabyo bigaragaza ko koko babanaga nk'umugore n'umugabo, bikaba bikwiye ko bagabana umutungo bahahanye.

[35] Urukiko rurasanga kandi ingano y'ibyakozwe n'umugore cyangwa umugabo kugirango umutungo uburanwa uboneke cyangwa utubuke ubwayo atariyo ihesha umugore cyangwa umugabo uburenganzira bwo kugabana umutungo uburanwa n'uwo avuga ko babanaga, ahubwo igomba kuza yiyongera ku bimenyetso by'uko uwo mutungo wabonetse cyangwa wongerewe agaciro bombi babana nk'umugore n'umugabo kabone niyo umwe muri bo atabasha kugaragaza mu buryo burondoye (détaille/details) ibyo yakoze kugirango uboneke cyangwa utubuke. Uyu murongo kandi ukaba uhura n'uwemejwe n'uru Rukiko mu rubanza nyirakamana marciana na bagenzi be baburanaga na Mukasharangabo Eugénie na bagenzi be, aho rwemeje ko, nubwo Nyirakamana Marciana atari umugore w'isezerano, kuba yarabanye na Karimunda Gérard nk'umugore n'umugabo kuva ku wa 27/11/1970 kugeza apfuye mu mwaka wa 1994 bimuhesha uburenganzira bwo kwegukana $\frac{1}{2}$ cy'umutungo bari bafitanye cyangwa bahahanye,⁶ naho mu rubanza Ahishakiye Jean yaburanaga na Namagabira Venantie, uru Rukiko rusobanura ko kuba hari ibyo umugore yakoraga mu guteza imbere urugo, ni ukuvuga uruhare urwo arirwo rwose yaba yaragize, bihagije kugirango agabane n'umugabo umutungo bafitanye cyangwa bashakanye,⁷ nabyo bishimangira ko Mutoni

⁶ Reba urubanza RS/REV/INJUSTCIV0007/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 04/12/2015, igika cya 30.

⁷ Reba urubanza RCAA0048/14/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 11/03/2016, ibika bya 26 na 27. Reba kandi urubanza RCAA0036/15/CS hagati ya Twahirwa Ahmed na Kaligirwa Rehema rwaciwe n'Urukiko rw'Ikirenga ku wa 17/11/2017, igika cya 21.

K. Jackline afite uburenganzira ku mutungo yahahanye na Niwenshuti Aloys.

[36] Urukiko rurasanga kandi ubwo Niwenshuti Aloys yabanaga na Mutoni K. Jackline, yarakoranye na Rutamu Diogène amasezerano y'impano y'ikibanza ku wa 15/01/2006, Mukambuguje Alodie ayashyiraho umukono nk'umutangabuhamya, muri 2007, uyu afatanyije na Niwenshuti Aloys basaba umwenda wa 8.000.000 Frw yo kubaka iyo nzu, bombi bakaba bemeza ko bayimukiyemo muri 2008, ndetse bikaba binashimangirwa na Harerimana Gaspard, Umuyobozi w'Umudugudu wa Mwijuto uvuga ko *“Niwenshuti Aloys na Mukambuguje Alodie, inzu batuyemo hano [ni] iyabo, ... kuva yaturwamo uyu mugabo n'umugore n'abana babo batanu nibo tuzi baba muri iyo nzu.”* (Cote 2), bisobanuye ko hagati ya 2006 na 2012, Niwenshuti Aloys yari atunze abo bagore bombi, bityo bose bakaba bakwiye kugabana iyo nzu nk'uko biteganywa n'ingingo ya 39, igika cya 2, y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 ryavuzwe haruguru.

[37] Hashingiwe kubyasobanuwe haruguru, Urukiko rurasanga Mutoni K. Jackline afite uburenganzira kuri kimwe cya gatatu (1/3) cy'inzu iri mu kibanza UPI: 1/03/09/02/753 kiri mu Mudugudu wa Niboye, Akarere ka Kicukiro, Umujyi wa Kigali, ni ukuvuga 52.924.870 Frw/3 y'agaciro k'inzu yemejwe n'umuhanga washyizweho na Mukambuguje Alodie muri raporo yatanze ku wa 02/07/2012 (cotes 33-37), ariyo angana na 17.641.623Frw, agomba gutangwa na Niwenshuti Aloys afatanyije na Mukambuguje Alodie.

II.2. Kumenya niba indishyi zisabwa muri uru rubanza zifite ishingiro

[38] Mutoni K. Jackline asaba uru Rukiko kwemeza ko Niwenshuti Aloys yamutesheje agaciro, ntiyita ku burere bw'abana bafitanye, anamubeshya ko nta wundi mugore afite, akaba abisabira indishyi za 4.000.000 Frw hakiyongeraho igihembo cya Avoka ku nzego zose kingana na 2.500.000 Frw.

[39] Niwenshuti Aloys na Mukambuguje Alodie n'ababunganira bavuga ko izo ndishyi nta shingiro zifite kuko nta ruhare Mutoni K. Jackline yigeze agira ku nzu iburanwa. Basobanura ko Mutoni K. Jackline yashinganishije inzu ku buryo ibapfira ubusa, Niwenshuti Aloys akaba abisabira indishyi z'akababaro zingana na 3.000.000 Frw, na 500.000 Frw y'ikurikiranarubanza, naho Mukambuguje Alodie avuga ko yadindirijwe imirimo, akaba abisabira indishyi za 3.000.000 Frw, bombi bakaba basaba kandi igihembo cya Avoka kingana na 2.000.000 Frw.

[40] Mutoni K. Jackline n'abamwunganira bavuga ko nta ndishyi akwiye kuryozwa kuko Niwenshuti Aloys na Mukambuguje Alodie aribo bishoye mu manza, bakaba batakwitwaza ko iyo nzu yabahombeye kandi batuye muri Uganda, bakazanwa mu Rwanda no kuburana. Basobanura ko, uretse n'ibyo, indishyi yacibwa atabona aho azikura kuko amafaranga make akorera ariyo atunze abana bitewe n'uko Niwenshuti Aloys yanze gutanga indezo y'abana.

UKO URUKIKO RUBIBONA

[41] Urukiko rurasanga kuba Niwenshuti Aloys yariyemeje gutandukana na Mutoni K. Jackline kabone nubwo baba barabanye amubeshya ko nta wundi mugore afite, ubwabyo ntibyatangirwa indishyi kuko Mutoni K. Jackline kuva yari azi ko atasezeranye na Niwenshuti Aloys yari yiyemeje ko umubano wabo ushobora kurangira igihe icyo aricyo cyose, mu gihe ibyo yateganyaga bibaye akaba atahindukira ngo abifate nk'ikosa rikwiye kuryozwa indishyi.⁸

[42] Urukiko rurasanga kandi Mutoni K. Jackline atagaragaza uburyo Niwenshuti Aloys yamutesheje agaciro, ndetse n'ibyo avuga ko atita ku burere bw'abana bikaba bitasuzumirwa muri uru rubanza kuko ataribyo byaregewe.

[43] Urukiko rurasanga cyakora Niwenshuti Aloys yarirengagije ko yatanze abagore babiri mu buryo bunyuranije n'amategeko kandi ko, nk'uko biteganywa n'ingingo ya 39 y'Itegeko N°59/2008 ryo ku wa 10/09/2008 ryavuzwe haruguru, bombi bareshya imbere y'amategeko, bityo indishyi n'igihembo cya Avoka we na Mukambuguje Alodie basaba bikaba nta shingiro, naho amafaranga y'ikurikiranarubanza Niwenshuti Aloys asaba nayo akaba atayakwiriye kuko ari we watangije imanza kandi akaba atsinzwe.

⁸ *“Le concubinage est essentiellement précaire ; en ne se mariant pas, les concubins ont précisément voulu se réserver la liberté de rompre à leur gré cette liaison, chacun d’eux en s’y pretant, a accepté ce risqué, et ... celui qui le subit ne peut demander à l’autre d’en réparer les conséquences.”* Reba Francois Terré et Philippe Simler, *Droit Civil : Les régimes matrimoniaux*, Paris, Dalloz, p.741.

[44] Urukiko rurasanga Mutoni K. Jackline yarashowe mu manza na Niwenshuti Aloys na Mukambuguje Alodie, kuzizamo kugirango arengere uburenganzira bwe bikaba byari bifite ishingiro, bityo igihembo cya Avoka asaba akaba agikwiriye, cyakora kuba atagaragaza ko 2.500.000 Frw asaba ariyo yatanze ku nzego zose yaburaniyemo, akaba aganewe, mu bushishozi bw'Urukiko, 1.500.000 Frw ku nzego zose, agomba gutangwa na Niwenshuti aloys na Mukambuguje Alodie.

III. ICYEMEZO CY'URUKIKO

[45] Rwemeje ko ubujurire bwa Mutoni K. Jackline bufite ishingiro ;

[46] Rwemeje ko urubanza RCA0176/14/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 23/02/2015 ruhindutse mu ngingo zarwo zose ;

[47] Rwemeje ko inzu iri mu Kibanza UPI : 1/03/09/02/753 mu Mudugudu wa Mwijuto, Akagari ka Niboye, Umurenge wa Niboye, Akarere ka Kicuro, Umujyi wa Kigali ari iya Niwenshuti Aloys, Mukambuguje Alodie na Mutoni K. Jackline, buri wese akaba ayifiteho uburenganzira bungana na 1/3 ;

[48] Rutegetse Niwenshuti Aloys na Mukambuguje Alodie guha Mutoni K. Jackline 17.641.623 Frw ahwanye na 1/3 y'agaciro k'inzu iri mu kibanza UPI : 1/03/09/02/753 mu Mudugudu wa Mwijuto, Akagari ka Niboye, Umurenge wa Niboye, Akarere ka Kicuro, Umujyi wa Kigali ;

[49] Rutegetse Niwenshuti Aloys na Mukambuguje Alodie gufatanya kwishyura Mutoni K. Jackline 1.500.000 Frw y'igihembo cya Avoka ;

[50] Rutegetse Niwenshuti Aloys na Mukambuguje Alodie gufatanya kwishyura amagarama y'urubanza.



IMANZA Z'UBUCURUZI

EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd (ECU) v. ROYAL HASKONING DHV(Pty) Ltd

[Rwanda URUKIKO RW'IKIRENGA –
RCOMA00007/2017/SC (Rugege, P.J., Cyanzayire na
Mutashya, J.) 07 Ukuboza 2018]

Amategako agenga amasezerano – Amasezerano – Inenge y'imyandikire ntiyashingirwaho mu gutesha agaciro amasezerano impande zombi zumvikanyweho.

Ubukemurampaka – Ingingo iteganya ubukemurampaka mu masezerano – icyemezo cy'ubukemurampaka – Ingingo iteganya ubukemurampaka, nk'igice kimwe kigize amasezerano y'ibanze y'ubucuruzi, ifatwa nk'amasezerano ukwayo, hatitawe kubindi biteganywa muri ayo masezerano y'ibanze – Iyo icyumvikanyweho n'imapande zombi kidakurikijwe mu bijyanye n'imiburanishirize y'ubukemurampaka, iba ari imwe mu mpamvu zashingirwaho zatumye icyemezo cy'ubukemurampaka cyatashywe agaciro – Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, ingingo ya 9 n'iya 31.

Incamake y'ikibazo: Royal Haskoning DHV (Pty) Ltd yagiranye amasezerano (sub consultancy) na Experts Consultants United INC, UGANDA Ltd yo kwishyira hamwe bapatana igice cy'imirimu Royal Haskoning DHV(Pty)Ltd yagombaga gukorera Minisiteri y'Ibikorwa remezo mu Rwanda. Murayo masezerano bumvikana ko mu gihe havutse impaka hagati yabo baziambaza umukemurampaka umwe yabanje kumvikanwaho

n'impande zombi, akashyirwaho hakurikijwe itegeko ryo muri Africa y'Epfo, kandi ko imiburanishirize mu Bukemurampaka izumvikanwaho n'impande zombi, bumvikana kandi ko mu gihe hatabayeho kumvikana, hazakoreshwa amategeko mu miburanishirize yatangajwe n'Ishyirahanwe ry'Abakemurampaka azaba akurikizwa igihe umukemurampaka agiriyeho.

Nyuma yaho impaka zaravutse ku mpamvu yo kuba Experts Consultants United Inc, UGANDA Ltd itarishyuwe nk'uko amasezerano abiteganyaga, isaba Royal Haskoning DHV(Pty)Ltd kuyiha izina ry'umukemurampaka wafatanyaga nuwayo maze irabyanga, bityo itanga ikirego mu Rukiko rw'Ubucuruzi irusaba gushyiraho umukemurampaka wakemura icyo kibazo, maze uru rukiko rushyiraho umukemurampaka.

Royal Haskoning DHV (Pty) Ltd yatambamiye urwo rubanza, Urukiko rwemeza ko ikirego cyayo kitakiriwe kubera ko yagitanze ikererewe, maze ijurira mu Rukiko Rukuru rw'Ubucuruzi, narwo rwemeza ko ubujurire bwayo nta shingiro bufite, yongeye gutanga ikirego mu Rukiko Rukuru rw'Ubucuruzi isaba gusubirishamo urubanza ingingo nshya, maze uru Rukiko rwemeza ko ikirego cyayo nta shingiro gifite.

Mu bukemurampaka, inteko yemeje ko ikirego cya Experts Consultants United INC, Uganda, Ltd gifite ishingiro kuko Royal Haskoning DHV (Pty) Ltd yishe amasezerano, itegeka ko yishyura agaciro k'amasezerano yari asigaye gukorwa hamwe n'inyungu z'imyaka ine (4), indishyi z'akababaro, iz'ingendo n'icumbi hamwe n'igihembo cy'umukemurampaka.

Royal Haskoning DHV (Pty) Ltd yatanze ikirego mu Rukiko Rukuru rw'Ubucuruzi isaba ko icyemezo cy'ubukemurampaka gikurwaho kuko kitakurikije amategeko, Urukiko rwemeza ko

icyo cyemezo gikuweho kubera ko kitubahirije amasezerano ababuranyi bagiranye, rwabishingiye ku kuba Umukemurampaka yarashyizweho n'Urukiko rw'Ubucuruzi kandi agakoresha amategeko atari ay'ishyirahamwe ry'Abakemurampaka mu gihe impande zombi zitumvikanye ku miburanishirize, bityo ko icyemezo inteko yafashe gikwiye kuvaho, rutegeka Experts Consultants United INC, Uganda, Ltd guha Royal Haskoning DHV (Pty) Ltd indishyi zikubiyemo igihembo cya Avoka hamwe niz'ikurikiranarubanza.

Experts Consultants United INC, Uganda yajuriye mu Rukiko rw'Ikirenga ivuga ko umwanzuro w'Umukemurampaka utagombaga gukurwaho kubera ko wafashwe mu buryo bukurikije amategeko. Royal Haskoning DHV(Pty)Ltd yatanze inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga ariko Urukiko ruyisuzumye rusanga nta shingiro ifite.

Mbere y'iburanisha mu mizi, Royal Haskoning DHV(Pty)Ltd yatanze indi nzitizi ivuga ko n'ubwo nta ngingo yari ihari mu gihe ubujurire bwatangwaga yabuzaga kujuririra icyemezo gifashwe n'Urukiko Rukuru rw'Ubucuruzi ku mwanzuro w'Abakemurampaka, ariko kuba harasohotse itegeko ribuza kujurira icyo cyemezo kandi urubanza rukaba rugikomeza, icyemezo cyafashwe ku bubasha kigomba kuvaho kubera ko amategeko agenga imiburanishirize ahita ashyirwa mu bikorwa agisohoka. Naho Experts Consultants United ikavuga ko itegeko Royal Haskoning DHV Ltd ishingiraho, ryatangajwe urubanza rwarangije kujurirwa, ko rero nta mpamvu yari gutuma ubujurire butakirwa, kuko itegeko ryakoreshwaga icyo gihe ritabibuzaga. Urukiko rwemeza ko nubwo amategeko y'imiburanishirize (actes de procédure) yubahirizwa ako kanya, ibyakozwe mbere bukurikije amategeko bigumana agaciro kabyo.

Ku bijyanye no kumenya niba “Arbitration Act” yo muri 1965 ivugwa mu masezerano ariyo muri Afrika y’Epfo, Experts Consultants United Inc, UGANDA Ltd ivuga ko impande zombi zitabisobanuye neza, ko kandi kuba batari bumvikanye ku mukemurampaka, itegeko ryari gukoreshwa ni iryo mu Rwanda nk’uko impande zombi zabyumvikanyeho mu ngingo ya 2.4 y’amasezerano. Ikomeza isobanura ko n’ubwo impande zombi zitavuze neza Itegeko rizakoreshwa, isanga harabayeho kwibeshya ku mwaka, kuko aho kwandika 2008 kubera ko Itegeko ryerekeye ubukemurampaka n’ubwunzi mu bibazo by’ubucuruzi mu Rwanda ari iryo muri uwo mwaka, banditse 1965. Isobanura ko yasabye Royal Haskoning DHV (Pty)Ltd ngo bumvikane iranga, icyari gisigaye kwari ugukurikiza amategeko yo mu Rwanda, ko kuba barakoresheje amategeko ya KIAC, ntaho binyuranye n’ibyo impande zombi zumvikanye, kuko aricyo kigo cyemewe mu Rwanda gikora ibijyanye n’Ubukemurampaka.

Royal Haskoning DHV (Pty) Ltd yiregura ivuga ko ikigomba kurebwa muri uru rubanza, ari uburyo ingingo ya 2.4 irebana n’ibijyanye n’ururimi no kuburanisha urubanza mu mizi hamwe n’iya 9.1 ivuga ku bijyanye n’uburyo bwo gukemura impaka z’amasezerano impande zombi zagiranye zumvikana, ivuga ko ibyo Experts Consultants United Inc, UGANDA Ltd ivuga ko atari itegeko ryo muri Afurika y’Epfo ryagombaga gukoreshwa atari byo kuko hagombaga gukurikizwa “*Conduct of Association of Arbitrators*” nk’uko na KIAC ubwayo yabasubije ibabwira ko ibijyanye nayo bidateganyijwe ngo keretse bavuguruye amasezerano yabo bakayongeramo, bityo ibyakozwe rero bikaba binyuranyije n’ibyo impande zombi zumvikanyeho ariyo mpamvu Urukiko Rukuru rw’Ubucuruzi rwakuyeho icyemezo cy’Umukemurampaka kuko kitubahirije amategeko.

Incamake y'icyemezo: 1. Nubwo amategeko y'imiburanishirize (actes de procédure) yubahirizwa ako kanya, ibyakozwe mbere bikurikije amategeko bigumana agaciro kabyo.

2. Amasezerano y'Ubukemurampaka ni amasezerano yigenga nubwo aba agize zimwe mu ngingo zigize amasezerano muri rusange.

3. Inenge y'imyandikire ntiyashingirwaho mu gutesha agaciro amasezerano impande zombi zumvikanyweho. Bityo kuba mu masezerano bataranditse ko itegeko rigenga Ubukemurampaka ryo muri 1965 (*Arbitration Act of 1965*) n'Ishyirahamwe ry'Abakemurampaka (*Association of Arbitrators*) byombi bivugwa mu ngingo ya 9.1 y'amasezerano ari ibyo muri Afurika y'Epfo, bitavanaho ko icyo abagiranye amasezerano bari bagamije ari uko hazakoresheka amategeko n'imigendekere byo muri Afurika y'Epfo.

4. Iyo icyumvikanyweho n'impande zombi kidakurikijwe mu bijyanye n'imiburanishirize y'ubukemurampaka, iba ari imwe mu mpamvu zashingirwaho zatuma icyemezo cy'ubukemurampaka cyatashwe agaciro.

**Ubujurire nta shingiro bufite;
Icyemezo cy'ubukempurampaka cyari cyafashwe
kivanyweho;
Amagarama y'urubanza ahwanye nibyakozwe mu rubanza.**

Amategeko yashingiweho:

Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano mu Rwanda, ingingo ya 64 n'iya 66.

Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye
ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi,
ingingo ya 9 n'ya 31.

Nta manza zifashishijwe.

Inyandiko z'abahanga:

Larry A. Dimatteo "International Business Law and the Legal
Environment, A Transactional Approach."

Urubanza

I.IMITERERE Y'URUBANZA

[1] Ssi Engeneers and Environment Consultants (Pty) yaje guhinduka Royal Haskoning DHV (Pty) Ltd, ku wa 12/10/2010, yagiranye amasezerano (sub consultancy) na Experts Consultants United INC, Uganda Ltd yo kwishyira hamwe bagapatana igice cy'imirimo Royal Haskoning DHV(Pty)Ltd yagombaga gukorera Minisiteri y'Ibikorwa remezo mu Rwanda.

[2] Royal Haskoning DHV (Pty) Ltd ivuga ko muri ayo masezerano bumvikanye ko mu gihe havutse impaka zizashyikirizwa Umukemurampaka umwe uzashyirwaho hakurikijwe itegeko ry'Ubukemurampaka rya Afurika y'Epfo, kandi ko imiburanishirize mu Bukemurampaka izumvikanwaho n'impande zombi, ko mu gihe hatabayeho kumvikana, hazakoreshwa amategeko mu miburanishirize yatangajwe n'Ishtyirahanwe ry'Abakemurampaka (Association of Arbitrators) azaba akurikizwa igihe Umukemurampaka agiriyeho.

[3] Nyuma impaka zaravutse zijyanye no kuba Experts Consultants United INC, Uganda Ltd itarishyuwe nk'uko amasezerano yabiteganyaga, Experts Consultants United INC, Uganda Ltd isaba Royal Haskoning DHV (Pty)Ltd kuyiha izina ry'umukemurampaka wafatanyaga n'ubwo, irabyanga. Experts Consultants United INC, Uganda Ltd itanga ikirego mu Rukiko rw'Ubucuruzi isaba ko rushyiraho Umukemurampaka wakemura ikibazo ifitanye na Royal Haskoning DHV(Pty)Ltd, urubanza ruhabwa RCOM 0610/15/TC/NYGE, rucibwa ku wa 30/04/2015, Urukiko rwemeza ko hashyizweho Umukemurampaka witwa Me Rubasha Herbert.

[4] Royal Haskoning DHV (Pty) Ltd yatambamiye urwo rubanza, urubanza rwayo rwandikwa kuri RCOM0619/15/TC/NYGE, Urukiko rw'Ubucuruzi rwemeza ko ikirego cyayo kitakiriwe kubera ko yagitanze igihe cy'ukwezi cyararangiyeye kuva aho imenyeye imikurizwe y'urubanza yatambamiraga.

[5] Royal Haskoning DHV (Pty) Ltd yajuririye urwo rubanza mu Rukiko Rukuru rw'Ubucuruzi, rwandikwa kuri RCOMA00122/2016/CHC/HCC rucibwa ku wa 29/07/2016, Urukiko rwemeza ko ubujurire bwa Royal Haskoning DHV (Pty) Ltd nta shingiro bufite, ruyitegeka kwishyura ECU Ltd 2.500.000 Frw y'igihembo cy'Avoka n'ikurikiranarubanza.

[6] Royal Haskoning DHV(Pty) Ltd yongeye gutanga ikirego mu Rukiko Rukuru rw'Ubucuruzi isaba gusubirishamo urubanza RCOMA00122/2016/CHC/HCC ingingo nshya, urubanza rucibwa ku wa 03/11/2016, Urukiko rwemeza ko impamvu Royal Haskoning DHV (Pty) Ltd ishingiraho isubirishamo urubanza ingingo nshya nta n'imwe ihura n'iziteganyijwe n'amategeko, ko

rero ikirego cyayo kitakiriwe, ruyitegeka gutanga 600.000 Frw y'igihembo cya Avoka n'ikurikiranarubanza.

[7] Umukemurampaka washyizweho yaburanishije urubanza Royal Haskoning DHV (Pty) Ltd idahari, afata icyemezo ku wa 16/09/2016 yemeza ko ikirego cya Experts Consultants United INC, Uganda, Ltd gifite ishingiro kuko Royal Haskoning DHV (Pty) Ltd yishe amasezerano, rutegeka Royal Haskoning DHV (Pty) Ltd guha ECU Ltd USD 47.993 y'agaciro k'amasezerano yari asigaye gukorwa; inyungu z'imyaka ine(4) zingana na USD 34.556 ni ukuvuga $47.993 \times 18/100 = \text{USD } 8.6394 = \text{USD } 34.556$, indishyi z'akababaro z'ingendo n'icumbi, bingana na 18.400 USD no kwishyura igihembo cy'ubukemurampaka kingana na 10.000 USD.

[8] Royal Haskoning DHV (Pty) Ltd yaregeye Urukiko Rukuru rw'Ubucuruzi isaba ko icyemezo cy'ubukemurampaka gikurwaho ngo kubera ko kitakurikije amategeko. Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza ku wa 29/09/2017, rwemeza ko icyemezo nkemurampaka gikuweho kubera ko kitubahirije amasezerano ababuranyi bagiranye, rutegeka Experts Consultants United INC, Uganda, Ltd guha Royal Haskoning DHV (Pty) Ltd indishyi zingana na 650.000 Frw zikubiyemo igihembo cya Avoka n'ikurikiranarubanza.

[9] Urukiko mu gufata icyemezo, rwashingiye ku kuba ababuranyi barumvikanye mu masezerano bagiranye yiswe "*Association Agreement Document*" mu ngingo yayo ya 9, ko nihaba ubukemurampaka bizakorwa n'umukemurampaka umwe hakurikijwe Itegeko ryo muri Africa y'Epfo ryo muri 1965 nk'uko ryavuguruwe kugeza ubu, ko kandi imiburanishirize y'ubwo bukemurampaka izakurikiza ibyo impande zombi zizumvikanaho, hagakurikizwa imigendekere iteganyijwe mu

mategeko y'imyitwarire y'abakemurampaka mu bukemurampaka. Ko kandi mu gice cya kabiri cy'iyi ngingo, ababuranyi bumvikanye ko uwo mukemurampaka uzashyirwaho, azaba yabanje kumvikanwaho (kwemezwa) n'impande zombi.

[10] Rwasobanuye ko hashingiwe kuri iyi ngingo y'amasezerano impande zumbikanyeho, rwasanze haragombaga gushyirwaho umukemurampaka umwe kandi wumbikanyeho n'impande zombi, agakora ubwo bukemurampaka ashingiye ku mategeko y'ubukemurampaka yo muri Africa y'Epfo yo muri 1965 nk'uko yavuguruwe kugeza ubu, agakurikiza imiburanishirize yumbikanyeho bitashoboka agakurikiza amategeko y'imiburanishirize yatangajwe n'Ishyirahamwe ry'Abakemurampaka; ko ariko atari ko byagenze kuko uburyo umukemurampaka yashyizweho bitakurikije amategeko ya Afrika y'Epfo n'imiburanishirize yakurikije ikaba itarakurikije amategeko y'Ishyirahamwe ry'abakemurampaka yariho muri icyo gihe nk'uko impande zari zabyumvikanye mu masezerano.

[11] Rwasobanuye kandi ko, uretse no kuba uwo mukemurampaka yaragombaga gushyirwaho hakurikijwe itegeko ryo muri Africa y'epfo, yagombaga no gukemura impaka ashingiye kuri ayo mategeko haba mu miburanishirize no ku mpaka ubwazo, ko rero kuba Umukemurampaka yarashyizweho n'Urukiko rw'Ubucuruzi kandi agakoresha amategeko atari ay'ishyirahamwe ry'Abakemurampaka mu gihe impande zombi zitumvikanye ku miburanishirize, icyemezo yafashe gikwiye kuvaho kubera ko kitubahirije amasezerano ababuranyi bumvikanyeho.

[12] Experts Consultants United INC, Uganda yajuriye mu Rukiko rw'Ikirenga ku wa 28/10/2017 ivuga ko umwanzuro

w'Umukemurampaka wo ku wa 16/09/2016 utagombaga gukurwaho kubera ko wafashwe mu buryo bukurikije amategeko.

[13] Royal Haskoning DHV(Pty)Ltd yatanze inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga ivuga ko Experts Consultants United INC, Uganda yajuriye nk'aho ari mu manza zisanze kandi atariko bimeze hirengagijwe ko ibyemezo by'Ubukemurampaka bitajuririrwa, ko ari nako Urukiko rw'Ikirenga rwa Canada rwabyemeje.

[14] Urukiko mu cyemezo cyarwo cyo ku wa 08/06/2018, rwasanze iyo ntitizi nta shingiro ifite rwemeza ko Urubanza ruzaburanishwa mu mizi.

[15] Iburanisha ryongeye gusubukurwa ku wa 06/11/2018 ribera mu ruhamu, Experts Consultants United INC, Uganda Ltd iburanirwa na Me Munderere Léopold afatanyije na Me Mitsindo Tom, naho Royal Haskoning DHV (Pty) Ltd, iburanirwa na Me Bizimana Emmanuel.

[16] Mbere y'uko iburanisha ritangira mu mizi, Me Bizimana Emmanuel, ashingiye ku ngingo ya 74, igika cya 3, y'Itegeko N°22/2018 ryo ku wa 22/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi¹ no ku ngingo ya 82 y'Itegeko N°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'Inkiko², avuga ko ubwo

¹Icyakora iyo asanze hari ibyakozwe binyuranyije n'amategeko, hashobora gufatwa icyemezo cyo gutangira iburanisha bundi bushya cyangwa kugira ibihindurwa, hamaze kumvwa ababuranyi, hagasobanurwa impamvu

²Urukiko Rukuru rw'Ubucuruzi ruburanisha kandi imanza zigamije gusuzuma niba ibyemezo byafashwe n'abakemurampaka byubahirije amategeko.

Imanza ziciwe n'Urukiko Rukuru rw'Ubucuruzi ku byemezo byavuzwe mu gika cya 4 cy'iyi ngingo ntizijuririrwa

inteko iburanisha ihindutse, yakongera igasuzuma icyemezo cyafashwe ku bubasha ikagihindura kubera ko kinyuranyije n'amategeko hakurikijwe ingingo zimaze kuvugwa, bityo, inteko yasanga ubujurire butari mu bubasha bw'Urukiko rw'Ikirenga, ikemeza ko butari bukwiye kwakirwa, n'icyo cyemezo ku bubasha cyafashwe n'inteko yabanje kikavaho. Yongeraho ko, kuba icyemezo cyarafashwe, bitabuza ko indi nteko nshya yakongera kubisuzuma.

[17] Avuga ko kandi, n'ubwo nta ngingo yari ihari mu gihe ubujurire bwatangwaga yabuzaga kujuririra icyemezo gifashwe n'Urukiko Rukuru rw'Ubucuruzi ku mwanzuro w'Abakemurampaka, uwabaga atawishimiye yawuregeraga ariko atemerewe kujuririra icyemezo gifashwe, ko rero kuba harasohotse itegeko ribisobanura neza kandi urubanza rukaba rugikomeza, icyemezo cyafashwe ku bubasha kigomba kuvaho kubera ko amategeko agenga imiburanishirize ahita ashyirwa mu bikorwa agisohoka.

[18] Me Munderere Léopold uburanira Experts Consultants United INC, Uganda Ltd, avuga ko ibyo Me Bizimana Emmanuel avuga bitumvikana kuko icyemezo cyafashwe, nta buryo Urukiko rwakongera kwisubiraho, ko Urukiko rwareba niba igihe urubanza rwajuririrwaga, hari itegeko ryabuzaga bene izo manza kujuririrwa, ko itegeko Me Bizimana Emmanuel avuga, rireba izindi manza zishobora kujuririrwa muri uru Rukiko ariko bitareba imanza zari zarajuririwe mbere y'uko risohoka.

[19] Me Mitsindo Tom avuga ko itegeko Me Bizimana Emmanuel ashingiraho, ryatangajwe ku wa 02/06/2018 urubanza

rwararangije kujurirwa, ko rero nta mpamvu yari gutuma ubujurire butakirwa, kuko itegeko ryakoreshwaga icyo gihe ritabibuzaga.

[20] Urukiko rwariherereye rufata icyemezo kuri iyo nzitizi, rwemeza ko nubwo amategeko y'imiburanishirize (actes de procédure) yubahirizwa ako kanya, ibyakozwe mbere bikurikije amategeko bigumana agaciro kabyo, ko kandi hashingiwe ku manza zaciwe n'Urukiko rw'Ikirenga, icyemezo cyafashwe ku wa 08/06/2018 ku bubasha bw'Urukiko ku bujurire bw'icyemezo cyerekeranye n'ubukemurampaka, cyari gikurikije amategeko, kikaba kigomba kugumana agaciro kacyo; rutegeka ko iburanisha rikomeza hasuzumwa impamvu z'ubujurire za Experts Consultants United INC, Uganda Ltd zijyanye no kureba niba umwanzuro w'Umukemurampaka wafashwe ku wa 16/09/2016, warafashwe mu buryo no mu nzira bikurikije amategeko.

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURA RYACYO

Kumenya niba uburyo umukemurampaka yashyizweho n'uburyo yafashemo icyemezo haba mu mizi y'ikibazo n'imiburanishirize yarakurikije ibyo ababuranyi bumvikanyeho mu masezerano yabo (*Association Agreement Document*)

[21] Me Munderere Léopold uburanira Experts Consultants United INC, Uganda Ltd avuga ko ibyo Umucamanza yemeje mu gika cya 17 cy'urubanza RCOM0005/2017/CHC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ko Umukemurampaka yakemuye impaka adashingiye ku mategeko yumvikanyweho, atari byo, kuko mu masezerano impande zombi zagiranye, ntaho

biteganyijwe ko ari Itegeko ryo muri Afurika y'Epfo rizagenderwaho mu byerekeye imigendekere y'ubukemurampaka, iki kibazo kikaba cyarasuzumwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge rukemeza ko ntaho bigaragara ko ari Itegeko ryo muri South Africa rigomba gukurikizwa kandi uru rubanza rukaba rwarabaye itegeko, ari nayo mpamvu hashyizweho Umukemurampaka hashingiwe ku Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi mu Rwanda.

[22] Avuga ko mu guca urubanza, ingingo ya 2.4 n'ya 9.1 z'amasezerano impande zombi zagiranye, zareberwa hamwe, ko mu ngingo ya 2.4 igika cya 1 impande zombi zumvikanye ku rurimi, naho mu gika cya 2 cyayo, impande zombi zumvikanye ko amategeko azakurikizwa ari ayo mu Rwanda; mu ngingo ya 9.1 ho, bumvikanye ko mu bukemurampaka hazakurikizwa "*Arbitration Act*" yo muri 1965 ariko ntaho bigeze bavuga ko ari iyo muri Afrika y'Epfo. Avuga ko Urukiko nirusuzuma neza ingingo ya 9.1 y'amasezerano ateganya Ubukemurampaka, ruzasanga impande zombi zaragombaga kumvikana ku mukemurampaka akaba aribwo hakoresheya "*Arbitration Act*" yo muri 1965, ariko ko mu gihe batumvikanye, hazakoresheya amategeko y'u Rwanda.

[23] Yongeraho ko imanza zose zabaye ku ishyirwaho ry'umukemurampaka, Royal Haskoning DHV (Pty) Ltd yazitsinzwe, ko n'ubwo bitagaragara ko "*Arbitration Act*" yo muri 1965 yavugwaga ari iyo muri Afurika y'Epfo, yagombaga gukurikizwa ari uko impande zombi zabyumvikanyeho, ko rero Umukemurampaka yashingiye ku mategeko ya KIAC³ kubera ko impande zombi zitari zumvikanye kuri "*Arbitration Act*" yo muri

³ KIGALI INTERNATIONAL ARBITRATION CENTRE

1965, kuko bavuze ko ibizakurikizwa ari amategeko ya “*Association ya Arbitration*” mu gihe impande zombi zabyumvikanaho.

[24] Avuga ko aya masosiyete yombi, nta n'imwe ifite icyicaro mu Rwanda, ariyo mpamvu bumvikanye ko bazakurikiza amategeko yo mu Rwanda mu gihe batumvikanye ku bijyanye na “*Arbitration Act*” yo muri 1965.

[25] Ku bijyanye no kumenya niba “*Arbitration Act*” yo muri 1965 ivugwa mu masezerano ariyo muri Afrika y'Epfo, Me Munderere Léopold yasubije ko atabitindaho kuko ishobora kuba ariyo muri Afrika y'Epfo cyangwa muri Uganda kuko impande zombi zitabisobanuye neza, ko kandi kuba batari bumvikanye ku mukemurampaka, itegeko ryari gukoreshwa ni iryo mu Rwanda nk'uko impande zombi zabyumvikanyeho mu ngingo ya 2.4 y'amasezerano.

[26] Me Mitsindo Tom, avuga ko n'ubwo impande zombi zitavuze neza Itegeko rizakoreshwa, asanga harabayeho kwibeshya ku mwaka, kuko aho kwandika 2008 kubera ko Itegeko dufite ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi mu Rwanda ari iryo muri uwo mwaka, banditse 1965. Avuga ko Experts Consultants United INC, Uganda Ltd yasabye Royal Haskoning DHV (Pty)Ltd ngo bumvikane iranga, icyari gisigaye kwari ugukurikiza amategeko yo mu Rwanda, ko kuba barakoresheje amategeko ya KIAC, ntaho binyuranye n'ibyo impande zombi bumvikanye, kuko aricyo kigo cyemewe mu Rwanda gikora ibijyanye n'Ubukemurampaka.

[27] Me Bizimana uburanira Royal Haskoning DHV (Pty) Ltd avuga ko ikigomba kurebwa muri uru rubanza, ari uburyo ingingo ya 2.4 n'iya 9.1 z'amasezerano impande zombi zagiranye

zumvikana, ko ingingo ya 2.4 irebana n'ibijyanye n'ururimi no kuburanisha urubanza mu mizi, iya 9.1 ikavuga ku bijyanye n'uburyo bwo gukemura impaka; ko ibyo ababuranira Experts Consultants United INC, Uganda Ltd bavuga ko atari Itegeko ryo muri Afurika y'Epfo ryagombaga gukoreshwa atari byo, ko kuri icyo kibazo harebwa inyandiko bagiranye cyane cyane ibaruwa yo ku wa 12.06.2014 Experts Consultants United INC, Uganda Ltd yandikiye KIAC, nayo ikabasubiza ko ibijyanye na KIAC bidateganyijwe ngo keretse bavuguruye amasezerano yabo bakayongeramo, ibi bikaba byerekana ko nabo ubwabo bari bazi ko mu gukemura ikibazo hazakoreshwa amategeko yo muri Afurika y'Epfo.

[28] Yongeraho ko ibyo ababuranira Experts Consultants United INC, Uganda Ltd bavuga ko nibatumvikana hazakoreshwa amategeko ya KIAC (KIAC Rules), atari byo kuko hagombaga gukurikizwa “*Conduct of Association of Arbitrators*” nk’uko na KIAC ubwayo yabasubije, ibyakozwe rero bikaba binyuranyije n’ibyo impande zombi zumvikanyeho ariyo mpamvu Urukiko Rukuru rw’Ubucuruzi rwakuyeho icyemezo cy’Umukemurampaka kuko kitubahirije amategeko.

UKO URUKIKO RUBIBONA

[29] Ingingo ya 9 y'Itegeko N°005/2018 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi iteganya ko: «Amasezerano y'ubukemurampaka ni amasezerano impande zombi zigirana yo gushyikiriza ubukemurampaka ibibazo byose cyangwa bimwe mu bibazo zifitanye cyangwa bishobora kuvuka kubera imikoranire hagati yazo mu byerekeranye n'amategeko byaba ari ibishingiye ku masezerano zagiranye cyangwa ntayo bishingiyeho. Amasezerano

y'ubukemurampaka ashobora kuba akozwe n'ingingo ziteganywa ubukemurampaka ziri mu masezerano bagiranye cyangwa akaba ari andi masezerano ukwayo», naho igika cya 2 cy'iyi ngingo, kigateganywa ko ayo masezerano agomba kuba yanditse.

[30] Ingingo ya 31 y'iryo Tegeko rimaze kuvugwa haruguru, iteganywa ko uretse ibiteganywa n'iri tegeko, abiyambaje ubukemurampaka bafite uburenganzira bwo kumvikana ku buryo bw'ikemurampaka bwakoreshwa n'Inteko y'Abakemurampaka mu gihe isuzuma ikibazo bayigejejeho.

[31] Ingingo ya 64 y'Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano mu Rwanda riteganywa ko amasezerano akozwe neza abera itegeko abayagiranye ko kandi ayo masezerano agomba kubahirizwa nta buryarya⁴.

[32] Mu gika cya 1 cy'ingingo ya 2.4 y'amasezerano Experts Consultants United INC, Uganda Ltd na Royal Haskoning DHV (Pty) Ltd bagiranye, impande zombi zumvikanye ko ururimi amasezerano akozwemo ari icyongereza, igika cya 2 cy'iyi ngingo kigateganywa ko Amategeko azakurikizwa mu gushyira mu bikorwa amasezerano, ari Amategeko y'u Rwanda⁵.

[33] Mu ngingo ya 9.1 y'ayo masezerano, impande zombi zumvikanye ko Ubukemurampaka buzakorwa n'Umukemurampaka umwe nk'uko biteganywa n'Itegeko ry'Ubukemurampaka ryo muri 1965 ryakoreshwaga igihe bakoraga amasezerano, imigendekere y'iburanisha

⁴Amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayagiranye. Ashobora guseswa ari uko babyumvikanyeho cyangwa ku mpamvu zemewe n'amategeko. Agomba kubahirizwa nta buriganya

⁵The Language of the Agreement shall be the English language

ikumvikanwaho n’ababuranyi bitashoboka hagakurikizwa imigendekere y’Ubukemurampaka nkuko yatangajwe n’Ishyirahamwe ry’Abakemurampaka azaba arimo gukurikizwa igihe Umukemurampaka ashyiriweho⁶.

[34] Urukiko rurasanga mu gusesengura amasezerano impande zombi zagiranye hagomba kurebwa icyo abayagiranye bari bagamije n’icyo basezeranye nk’uko ingingo ya 66 y’Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano mu Rwanda⁷ ibiteganya.

[35] Urukiko rurasanga nk’uko ingingo ya 9 y’Itegeko N°005/2018 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n’ubwunzi mu bibazo by’ubucuruzi ibiteganya, amasezerano ateganya ubukemurampaka ashobora kuba mu masezerano ubwayo cyangwa akaba yakorerwa amasezerano yihariye, ibi bikaba byumvikanisha ko amasezerano ateganya ubukemurampaka aba yihariye ku buryo ashobora kugira agaciro n’igihe amasezerano azakoreshwamo yaba afite inenge yatuma ateshwa agaciro, ibivugwa muri iyi ngingo akaba ari nako umuhanga Larry A.Dimatteo abivuga mu gitabo cye cyitwa “*International Business Law and the Legal Environment, A*

⁶ *Arbitration shall be by a single arbitrator in accordance with the provisions of Arbitration Act of 1965 as amended and shall be conducted in accordance with such procedure as may be agreed between the parties or, failing such agreement, in accordance with the rules for the conduct of Arbitrations published by the Association of Arbitrators current at the date the arbitrator is appointed.*

⁷ Gusesengura amasezerano cyangwa imwe mu ngingo zayo ni ugusobanura icyo ayo masezerano agamije n’icyasezeranyijwe

Transactional Approach”, ku rupapuro rwa 122, ko amasezerano ateganya Ubukemurampaka aba yigenga kandi yihariye⁸.

[36] Urukiko rw'Ikirenga rushingiye kuri iyo ngingo imaze kuvugwa n'ibisobanuro bitangwa n'Umuhanga mu mategeko y'Ubukemurampaka, rwemeranya n'ibisobanuro byatanzwe n'Urukiko Rukuru rw'Ubucuruzi by'uko icyo ababuranyi bari bagamije mu masezerano y'ubukemurampaka, ari uko Ubukemurampaka buzakorwa n'umukemurampaka umwe nk'uko biteganyijwe mu itegeko rigenga ubukemurampaka ryo muri 1965⁹, ababuranyi bakumvikana uko ubukemurampaka buzagenda ku bijyanye n'imiburanishirize (Procedure), mu gihe batabasha kumvikana ku miburanishirize hagakoreshwa amategeko y'imyitwarire y'abakemurampaka yatangajwe n'Ishyirahamwe ry'Abakemurampaka azaba akoreshwa igihe Umukemurampaka ashyiriweho¹⁰, Umukemurampaka akagomba kwemerwa n'uwatsindiye isoko (Consultant) n'uwo yahaye akazi (Sub-Consultant).

[37] Urukiko rurasanga kandi, isesengura ry'ingingo ya 9.1 y'amasezerano impande zombi zagiranye, itagomba kureberwa

⁸The Severability principle recognizes the arbitration clause in a contract as a separate agreement independent of the contract. Therefore, a law is needed to determine the validity of the arbitration clause, Also, if viewed as a separate agreement, then It can be enforced even if the underlying of contract is determined to be invalid or unenforceable.

⁹Arbitration ACT 42 of 1965 as amended by Justice Laws Rationalisation Act 18 of 1996; General Law Amendment Act 49 of 1996 and Prevention and Combating of Corrupt Activities Act 12 of 2004, specifically in its provision 9 which provided that :« *Unless a contrary intention is expressed in the arbitration agreement, the reference shall be to a single arbitrator*».

¹⁰The Association of Arbitrators (Southern Africa) Rules for the Conduct of Arbitrations 2013 edition standard procedure rules.

hamwe n'ingingo ya 2.4 y'ayo masezerano nk'uko ababuranira Experts Consultants United INC, Uganda Ltd babiburanisha, kubera ko nk'uko byasobanuwe haruguru, amasezerano y'ubukemurampaka ari amasezerano yigenga nubwo aba agize zimwe mu ngingo zigize amasezerano muri rusange, bivuze ko mu gukemura ikibazo mu mizi, hazashingirwa ku ngingo ya 2.4 igika cya 2 y'ayo masezerano mpande zombi zagiranye ireba amategeko ababuranyi ubwabo bihitiyemo ku bijyanye no gukemura ibibazo mu gihe haba havutse ikibazo mu mizi (*Substantive Laws*), naho ibijyanye n'imigendekere (conduct) n'uburyo ubukemurampaka buzakorwamo (*Procedural rules*) bikaba ari byo bireberwa mu ngingo ya 9.1 y'amasezerano impande zombi zagiranye.

[38] Urukiko rurasanga, kuba ababuranyi bataranditse ko iri tegeko rigenga Ubukemurampaka ryo muri 1965 (*Arbitration Act of 1965*) n'Ishyirahamwe ry'Abakemurampaka (*Association of Arbitrators*) byombi bivugwa mu ngingo ya 9.1 y'amasezerano ari ibyo muri Afurika y'Epfo, bitavanaho ko icyo abagiranye amasezerano bari bagamije ari uko hazakoreshwa amategeko n'imigendekere byo muri Afurika y'Epfo kubera ko SSI Engineers and Environment Consultants (Pty) Ltd yahindutse Royal Haskoning DHV (Pty) Ltd yatanze akazi, ari isosiyete yo muri Afurika y'Epfo, kandi n'aya mategeko yavuzwe mu masezerano akaba ari ayo muri Afurika y'Epfo, Experts Consultants United INC, Uganda Ltd ikaba itarabashije kwerekana ko aya mategeko ari ayo mu Rwanda cyangwa ahandi, mu gihe bizwi ko mu Rwanda ibijyanye n'Ubukemurampaka bigengwa y'Itegeko N°005/2018 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, naho urwego rureberera Ubukemurampaka akaba ari KIAC (Kigali International Arbitration Centre).

[39] Rushingiye ku ngingo ya 64 y'Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano mu Rwanda ryavuzwe haruguru no ku bisobanuro byatanzwe muri uru rubanza, Urukiko rurasanga Umukemurampaka Me Rubasha Herbert icyemezo yafashe kitarubahirije amasezerano impande zombi zagiranye, bityo icyo cyemezo kikaba kigomba kuvaho nk'uko Urukiko Rukuru rw'Ubucuruzi rwabyemeje.

[40] Experts Consultants United INC, Uganda Ltd ivuga ko mu gihe byagaragaraga ko Royal Haskoning DHV (Pty) Ltd yari yararegeye ubusa ihunga kuryozwa amakosa yayikoreye, Urukiko rukaba rwarabirenzeho rukayitegeka gutanga amafanga y'indishyi, igihembo cya Avoka n'amafranga yo gukurikirana urubanza, ko ibi bigomba guhinduka ku rwego rw'Urukiko rw'Ikirenga, Royal Haskoning DHV (Pty) Ltd ikishyura Experts Consultants United INC, Uganda Ltd 3.000.000 Frw akubiyemo ayo guhemba ba Avoka, indishyi z'akababaro n'ayo gukurikirana urubanza.

[41] Royal Haskoning DHV (Pty) Ltd ivuga ko ibyo Urukiko Rukuru rw'Ubucuruzi rwakoze bikurikije amategeko kuko rwakuyeho icyemezo kandi mu by'ukuri kikaba cyari kibangamiye inyungu zayo kuko cyafashwe kidakurikije amasezerano impande zombi zagiranye, bityo ko amafanga Experts Consultants United INC, Uganda Ltd yaciwe akaba agomba kugumaho hiyongereyeho 3.000.000 Frw akubiyemo 2.000.000 Frw y'igihembo cya Avoka na 1.000.000 Frw y'ikurikiranarubanza.

UKO URUKIKO RUBIBONA

[42] Ingingo ya 258 yo mu gitabo cya gatatu cy'amategeko mbonezamubano, amasezerano n'imirimo nshinganwa iteganya ko igikorwa cyose cy'umuntu cyangirije undi gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse.

[43] Ku bijyanye n'uru rubanza, Urukiko rurasanga kuba Experts Consultants United INC, Uganda Ltd yarajuririye urubanza, byaratumye Royal Haskoning DHV (Pty) Ltd ishyiraho Abavoka bayiburaniye bikaba byarayiteje igihombo, icyo gihombo kibaba kigomba kwishyurwa na Experts Consultants United INC, Uganda Ltd itsinzwe urubanza, bityo Royal Haskoning DHV (Pty) Ltd ikaba igenewe 1.000.000 Frw agenwe mu bushishozi bw'Urukiko, akubiyemo ay'ikurikiranarubanza n'ay'igihembo cya Avoka.

[44] Ku bijyanye n'indishyi zasabwe na Experts Consultants United INC, Uganda Ltd Urukiko rurasanga nta shingiro zifite kubera ko ntacyo itsindiye muri uru rubanza.

III. ICYEMEZO CY'URUKIKO

[45] Rwemeje ko ubujurire bwa Experts Consultants United INC, Uganda Ltd, nta shingiro bufite ;

[46] Rwemeje ko icyemezo cy'Umukemurampaka Me Rubasha Herbert cyafashwe ku wa 16/09/2016 kivuyeho ;

[47] Rwemeje ko imikirize y'urubanza RCOM00005/2017/HCC/CHC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 29/09/2017 idahindutse ;

[48] Rutegetse Experts Consultants United, Inc Uganda, kwishyura Royal HASKONING DHV (Pty) Ltd 1.000.000 Frw y'indishyi z'ikurikiranarubanza n'igihembo cya Avoka ;

[49] Rutegetse ko amagarama y'urubanza yatanzwe na Experts Consultants United INC, Uganda Ltd, ahwanye n'ibyakozwe mu rubanza.

MININTCO Ltd v. DOBUSJES Ltd

[Rwanda URUKIKO RUKURU RW'UBUCURUZI –
RCOMA00402/2017/CHC/HCC (Mutajiri, P.J.) 29 Ukuboza
2017]

Amategako agamije kurengera iby'umutungo bwite mu by'ubwenge – Uburenganzira bwo kurengera ikirango – Sosiyete yanditseho ikirango ifite uburenganzira busesuye bwo kurega uwacyiganye cyangwa umucuruzi ufite ikirango gitera urujijo ku gicuruzwa cye

Amategako agamije kurengera iby'umutungo bwite mu by'ubwenge – Gusenya igicuruzwa cyigana ikindi gicuruzwa – Urukiko ntago rutegetswe byanze bikunze gutegeka ko igicurizwa gifite ikirango cy'ikiganano gisenywa, rushobora ahubwo gutegeka ko gisenywa cyangwa kikavanwa kw'isoko ryo mu gihugu mu bushishozi bwarwo – Itegeko N°31/2009 ryo ku wa 26/10/2009 rigamije kurengera iby'umutungo bwite mu by'ubwenge. ingingo ya 284.

Incamake y'ikibazo: Sosiyete MININTCO ® Ltd yandikishije ikirango cyayo cya KANTA mu Ikigo cy'igihugu cy'iterambere (RDB). Iyo sosiyete yaje kumenya ko DOBUSJES Ltd yinjije mu gihugu ibicuruzwa bifite ikirango KANTO BLACK HAIR DYE, cyigana ikirango cya KANTA, kikanatera urujijo. Bityo yareze DOBUSJES Ltd mu Rukiko rw'Ubucuruzi rwa Nyarugenge isaba ko ibyo bicuruzwa bifite ikirango cyigana ikirango cyayo cya KANTA byasenywa.

Urukiko rwaciye urubanza rwemeza ko ikirango KANTO kiri ku bicuruzwa byinjijwe mu Rwanda na DOBUSJES Ltd ari ikirango

cy'ikiganano cy'ikirango KANTA cyanditswe mu Rwanda kuri MININTCO Ltd, kandi ko icyo kirango giteza urujijo icyakoza rwemeza ko ibicuruzwa biriho bitagomba gusenywa, ahubwo rutegeka ko DOBUSJES Ltd itemerewe gushyira ku isoko ry'u Rwanda ibyo ibicuruzwa. MININTCO Ltd ntiyishimiye imikirize y'urubanza maze ijurira mu Rukiko Rukuru rw'Ubucuruzi ivuga ko urukiko rubanza rwanze gutegeka ko ibyo bicuruzwa bifite ikirango cya KANTO Black Hair Dye bisenywa, ntirwayigenera indishyi zikomoka ku gihombo yagize no kuba urukiko ntacyo rwavuze ku itangazwa ry'urubanza mu binyamakuru bisomwa na benshi, anasaba indishyi zo gusiragizwa mu manza ku maherere, iz'ikurikiranarubanza n'igihembo cya avoka.

Habanje hasuzumwa inzitizi yo kutakira ikirego kuberako urega nta bubasha afite bwo kurega ko umuntu runaka yiganye ikirango cye mu gihe atagaragaje ko asanzwe akora akazi k'inganda n'uregwa akaba adakwiye kuregwa kuko atari uruganda ahubwo ari umucuruzi urangura ikintu uko kiri akagisubiza ntacyo ahinduye.

Kuri iyo nzitizi, MININTCO Ltd ivuga ko isanga nta shingiro ifite kuko nka sosiyete y'ubucuruzi (personne morale) yandikishije ikirango cyayo mu Rwanda ifite uburenganzira bwo kurega uwariwe wese wigana icyo kirango, bityo DOBUSJES Ltd ikaba iregwa kuzana ibicuruzwa bifite ibirango by'ibiganano kandi bitera urujijo. Urukiko rwemeje ko iyo nzitizi nta shingiro ifite kuko MININTCO Ltd yari ifite uburenganzira busesuye bwo gukurikirana uwariwe wese wakwigana cyangwa agakoresha icyo kirango binyuranye n'amategeko.

Mu myiregurire ya DOBUSJES ivuga ko ibivugwa na MININTCO ko ibicuruzwa byagombaga gusenywa nta shingiro bifite kuko itegeko ridategeka umucamanza byanze bikunze gutegeka isenywa ry'ibyo bintu (peut ordonner non doit

ordonner), akaba rero yarashishoje asanga ibyo bintu bitagomba gusenywa, ikomeza ivuga ko nta kwigana ikirango cya MININTCO Ltd byabayeho kuko itavanye izo produits za KANTO mu ruganda ahubwo ko yazivanye mu iduka. Ku birebana n'indishyi zerekeranye n'igihombo zasabwe na MININTCO, ivuga ko itazihabwa kuko yagenewe amafaranga mu kirego cyihutirwa kandi ko bene izo ndishyi zisabirwa hamwe n'urubanza mu mizi, ivuga ko ziramutse zitanzwe yaba yishyuye inshuro ebyiri, DOBUSJES isoza nayo isaba indishyi z'ikurikiranarubanza n'igihombo cy'Avoka.

Incamake y'icyemezo: 1. Sosiye yanditseho ikirango ifite uburenganzira busesuye bwo kurega uwacyiganye cyangwa umucuruzi ufite ikirango gitera urujijo ku gicuruzwa cye. Bityo, MININTCO Ltd ifite uburenganzira busesuye bwo gukurikirana uwariwe wese wakwigana cyangwa agakoresha ikirango cyayo binyuranye n'amategeko.

2. Urukiko ntago rutegetswe byanze bikunze gutegeka ko igicurizwa gifite ikirango cy'ikiganano gisenywa, rushobora ahubwo gutegeka ko gisenywa cyangwa kikavanwa kw'isoko ryo mu gihugu mu bushishozi bwarwo.

3. Indishyi z'igihombo zisabwa n' uwajuriye ntizatanga kuko itabasha kugaragariza urukiko igihombo yaba yaratewe n'ibicuruzwa by'uregwa cyane ko ibyo bicuruzwa bitigeze bishyirwa ku isoko ngo bibe byarayibangamiye mu bucuruzi bwayo.

Ubujurire nta shingiro bufite.

Amategeko yashingiweho:

Itegeko N° 31/2009 ryo ku wa 26/10/2009 rigamije kurengera iby'umutungo bwite mu by'ubwenge, ingingo ya 284.

Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 2.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, MININTCO Ltd irega DOBUSJES Ltd isaba ko amakarito yayo ariho ikirango cya "KANTO Black Hair Dye" yasenywa.

[2] Inkomoko y'ikibazo ngo akaba ari ukuba ku wa 10/04/2012 Umwanditsi Mukuru (Registrar General) ashingiye ku itegeko N°11/2009 ryo ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by'ubwenge yatanze icyemezo cy'iyandikisha ry'ikirango cyemeza ko ikirango "KANTA BRAND" ari icya MININTCO Ltd.

[3] MININTCO Ltd ikaba yarareze ivuga ko DOBUSJES Ltd yinjije amakarito 99 mu gihugu afite ikirango cya "KANTO BLACK HAIR DYE", aya makarito ngo akaba yarafatiriwe muri gasutamo ngo kuko ibirango biyariho byigana ibya KANTA, ikaba yarareze isaba ko byamburwa nyirabyo bigasenywa kandi ikiguzi cyo kubisenya kikaba icya nyirabyo, haramuka hari

ibyatangiye gushyirwa mu bucuruzi bikavanwamo kuko gukoresha no kwinjiza mu Rwanda ibicuruzwa bya “KANTO BKACK HAIR DYE” byigana ibya KANTA ari igikorwa cy’ipiganwa mu bucuruzi kirimo uburiganya kandi kinyuranyije n’amategeko n’imigirire y’ubunyangamugayo kuko kigana icya kanta ndetse kikanateza urujijo.

[4] Isaba kandi ko nyiri ukubyingiza yamenyesha MININTCO ® Ltd amazina y’abandi bantu n’ibigo by’ubucuruzi n’inganda bifite uruhare mu ikorwa n’ikwirakwiza ry’ibicuruzwa bifite ikirango cya KANTO ndetse inasaba ko yategekwa kwishyura MININTCO ® Ltd indishyi zinyuranye.

[5] DOBUSJES Ltd ikaba yaraburanye ivuga ko ibi bicuruzwa yabiranguriye mu gihugu cy’Ubushinwa (Chine) ko mu kubizana itumvaga ko icyo gicuruzwa gifite ikibazo, ko nyuma yo kugera mu Rwanda yatangajwe nuko ibicuruzwa byayo byafatiriwe na gasutamo ngo kuko byakoreshejwe byiganwe nayo. Ikaba yarasabye kutakira ikirego cya MININTCO Ltd ngo kuko yaba urega n’uregwa nta bubasha bafite mu gihe ikiburanwa ari ukwigana ibihangano by’undi ngo na cyane ko DOBUSJES Ltd nta ruganda igira ngo ibe yarakoze KANTO yigana KANTA.

[6] Urukiko mu guca urubanza rukaba rwaremeje ko inzitizi yatanzwe na DOBUSJES Ltd yo kutakira ikirego nta shingiro ifite, rwemeza ko ikirego cya MININTCO Ltd gifite ishingiro kuri bimwe, rwemeza ko ikirango KANTO kiri k’ubicuruzwa byinjijwe mu Rwanda na DOBUSJES Ltd ari ikirango cy’urwiganwa rw’ikirango KANTA cyanditswe mu Rwanda kuri MININTCO Ltd, rwemeza ko icyo kirango giteza urujijo ndetse ko ariko ibicuruzwa kiriho bitagomba gusenywa. Rukaba rwarategetse ko DOBUSJES Ltd itemerewe kwinjiza mu

bucuruza ku isoko ry'u Rwanda ibicuruzwa biriho ikirango cya KANTO ndetse runayitegeka kwishyura MININTCO Ltd indishyi z'ikurikiranarubanza n'igihembo cya avoka n'amafaranga y'igarama.

[7] MININTCO Ltd ikaba itarishimiye imikirize y'urubanza maze Me Mhayimana Isaie ajurira avuga ko kuba urukiko mu kwanga gutegeka ko amakarito 99 y'amavuta « KANTO Black Hair Dye » asenywa ngo kuko DOBUSJES yayaranguye idafite umugambi mubi wo kubangamira MININTCO (R) Ltd, rwirengagije ibiteganywa n'ingingo za 258 na 284 z'itegeko rirengera umutungo mu by'ubwenge, kuba urukiko rutarahaye MININTCO Ltd indishyi zikomoka ku gihombo yagize kubera ibikorwa binyuranije n'ubunyangamugayo bya DOBUSJES, ko kuba urukiko ntacyo rwigeze ruvuga mu kibazo yari yasabye ko gisuzumwa kijyanye nuko urubanza ruzacibwa kuri iki kirego rutangazwa mu binyamakuru bisomwa na benshi. Asoza asaba indishyi zo gusiragizwa mu manza ku maherere, iz'ikurikiranarubanza n'igihembo cya avoka.

[8] Mu kugira icyo ivuga ku mpamvu z'ubujurire, Kigali Partners in Law ivuga ko nta shingiro zifite ngo nk'uko urukiko rwabyemeje koko DOBUSJES Ltd itumiza igicuruzwa cya KANTO nta mugambi mubisha wo kwangiriza MININTCO LTD yari ifite ku mpamvu z'uko icyo gicuruzwa atari cyo yaranguye gusa ahubwo yakiranguranye n'ibindi. Isoza isaba indishyi z'ikurikiranarubanza n'igihembo cya avoka.

[9] Muri uru rubanza hakaba hagomba gusuzumwa niba urukiko rwaragombaga gutegeka ko amakarito 99 y'amavuta « KANTO Black Hair Dye » asenywa, gusuzuma niba urukiko rwaragombaga gutegeka ko MININTCO Ltd ihabwa indishyi z'igihombo, gusuzuma niba urubanza rwaragombaga

gutangazwa mu binyamakuru bisomwa na benshi, gusuzuma niba indishyi zo gusiragizwa iz'ikurikiranarubanza n'igihembo cya avoka zisabwa na MININTCO Ltd zatangwa no gusuzuma niba zisabwa na DOBUSJES zatangwa.

II. ISESENGURA RY'IBIBAZO

A. Ku birebana no gusuzuma niba urega n'uregwa nta bubasha bafite bwo kurega

[10] Me Mutarindwa Félix na Me Ndagijimana Augustin basobanura ko habanza gusuzumwa inzitizi yatanze mu rukiko rw'ubucuruzi itarakiriwe, aho basanga yaba urega cyangwa uregwa nta bubasha bafite. Uregwa nta bubasha bwo kuregerwa kwigana produit runaka z'abandi mu gihe atari uruganda ahubwo ari umucuruzi urangura uko ikintu kiri akagisubiza ntacyo ahinduyeho. Urega nawe ntiyabasha kurega umuntu ko yigana produit runaka ze mu gihe atagaragaje ko asanzwe akora akazi k'inganda cyangwa ngo abe yafashwe agakora ariko bitari bisanzwe bizwi.

[11] Me Mhayimana Isaie asobanura ko iyi nzitizi nta shingiro ifite kubera ko ububasha bwa MININTCO Ltd ku kirego cyo kwigana igicuruzwa cyayo cya KANTA ibufite kubera ko ari sosiyeti y'ubucuruzi (personne morale), iregera kuvogerwa mu burenganzira bwayo nka sosiyeti yandikishije ikirango cyayo mu Rwanda, aho kigomba kurindwa nyamara DOBUSJES Ltd ikaba ngo yarabirenzeho ikakigana. DOBUSJES Ltd ikaba iregwa kwigana icyo kirango KANTA, aho yagiye kubikorera mu Bushinwa, ikazana ibicuruzwa yita KANTO byigana ndetse iby'ikirango KANTA ikanabifatanwa, nubw bikaba bifatiriye muri gasutamo. Bityo bikaba bitumvikana ukuntu DOBUSJES

Ltd yavugaga ko nta bubasha MININTCO Ltd ifite bwo kuregera ibyayo DOBUSJES ihungabanya mu buryo bunyuranije n'amategeko nkuko urukiko rw'ubucuruzi rwabyemeje.

UKO URUKIKO RUBIBONA

[12] Ingingo ya 2 y'itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu iteganya ko "ikirego nticyemerwa mu rukiko iyo urega adafite ububasha, inyungu n'ubushobozi bwo kurega. Ibivugwa mu gika cya mbere cy'iyingingo bireba n'amashyirahamwe, imiryango n'ibigo bidafite ubuzima gatozi kuko bidashobora kurega, bitabujijwe ariko ko bishobora kuregwa"

[13] Urukiko rusanga ibivugwa n'ababuranira DOBUSJES Ltd ko ikirego kitagombaga kwakirwa ngo kuko yaba urega cyangwa uregwa nta bubasha bafite bwo kurega ngo na cyane ko kuregerwa kwigana *produit* runaka z'abandi mu gihe atari uruganda ahubwo ari umucuruzi urangura, bitahabwa ishingiro kuko kuba MININTCO atari uruganda rukora KANTA bitayibuza nka sosiyete yanditsweho ikirango cya KANTA kugira inyungu, ububasha n'ubushobozi buteganywa n'ingingo ya 2 y'itegeko N° 21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, bityo ikaba ifite uburenganzira busesuye bwo gukurikirana uwariwe wese wakwigana cyangwa agakoresha icyo kirango binyuranye n'amategeko.

[14] Urukiko rusanga kuba DOBUSJES Ltd atari uruganda rukora KANTA bitayibuza kuregwa kuko icyo iregwa ari ukwigana no gucuruza ikirango gitera urujijjo cya KANTO Black Hair Dye, kugira DOBUSJES Ltd iregwe bikaba bitagombera ko

iba ariyo ikora icyo gicuruzwa gitera urujijo na cyane ko mubyo iregwa harimo gucuruza no gukwirakwiza icyo gicuruzwa.

B. Ku birebana no gusuzuma niba urukiko rwagombaga gutegeka ko amakarito 99 y'amavuta « KANTO Black Hair Dye » asenywa.

[15] Me Mpayimana Isaie asobanura ko umucamanza yanyuranyije n'amategeko mu kutemeza ko amakarito avugwa asenywa. Ikindi umucamanza akaba ngo yarizaniye notion ya bonne et mauvaise foi kandi itegeko rihari, ikindi Murekatete uhagarariye DOBUSJOS Ltd ataribwo bwa mbere yari akoze ibi bikorwa, kuko yari yaranabikoze n'ubundi.

[16] Akomeza asobanura ko MININTCO Ltd ntiyishimiye icyemezo kigaragara mu gace ka 47 k'urubanza rujurirwa n'ibisobanuro bigaragara mu gace ka 29 karwo ku byerekeye kwanga ko amakarito 99 y'amavuta ya « KANTO Black Hair Dye » yafatiriwe muri Gasutamo asenywa, kuva Urukiko narwo rwari rwemeje ko ibyo bicuruzwa ari ibyiganano kandi bitera urujijo, bikaba bisanzwe byaranafatiriwe muri Gasutamo mu rwego rwo kubibuza kwinjira ku isoko ry'u Rwanda ntibyumvikana ukuntu urukiko ruhita rwivuguruza, rukemera ko DOBUSJES yahabwa ibyo bicuruzwa, ndetse ikemererwa ngo kujya kubicuruza hanze y'u Rwanda. Ntibyumvikana ukuntu urukiko rwirengagije ibimenyetso by'umugambi mubi rwagaragarijwe ku byerekeye ukuntu DOBUSJES n'umuyobozi wayo Murekatete Fabiola basanzwe bishobora mu bikorwa byo kwinjiza mu Rwanda amavuta yigana aya KANTA, rukanirengagiza ibiteganyijwe mu mategeko aho ingingo ya 5.1 na 258 ndetse na 284 za *Loi sur propriété intellectuelle* zisobanura zikanagena ibihano ku bikorwa by'ipiganwa birimo uburiganya, maze rugahindukira rukemeza ko DOBUSJES nta

mugambi mubi yari ifite yinjiza mu Rwanda KANTO yigana kandi itera urujijo. Dore bimwe mu bimenyetso byirengagijwe byerekana umugambi mubi wa DOBUSJES. Mu myiregurire yayo iburana, DOSUBJES ntiyigeze ihakana iby'uwo mugambi mubi, ahubwo yavugaga ko idashaka ko MININTCO Ltd ikomeza kwiharira isoko ry'ayo mavuta (monopole), reba uko ibisobanura mu gace ka 20 k'urubanza. Hari amagambo bwite Murekatete Fabiola, uyobora DOBUSJES ubwe yanditse ku ibaruwa yo ku wa 11/07/2012 MININTCO Ltd yandikiye DOBUSJES Ltd iyihanangiriza ngo ihagarike gucuruza KANTA z'inyiganano. icyo gihe DOBUSJES Ltd yemeye ko yari izifite ngo ariko nkeya, ngo yahabwaga n'abantu itari izi aho bazikura. Muri Chine, nta mavuta ya KANTA ahakorerwa. KANTA ni amavuta akorerwa muri India ariko agacuruzwa muri Afrika gusa. Nta mpamvu rero abo muri China bakwiha gukora ibicupuri batabasha gucuruza iwabo. Ahubwo ukuri, ni ibanga rizwi na bose (secret de polichinelle) ko abacuruzi bo muri Afrika (barimo DOBUSJES Ltd) aribo bajya gukoresha muri Chine bene ayo mavuta y'ibicupuri(ibyiganano/counterfeit) kubera ko badashobora kwemererwa kurangura KANTA Original muri India. Iyo rero DOBUSJES Ltd igiye gukoresha ibicupuri bya KANTO muri Chine, yitwaje KANTA Original ngo barebereho, hanyuma abachinois bakabakorera ibyo byiganano bakabizana kubicuruza ari nabyo yafatanywe. Byakumvikana bite rero ko none nyuma y'imyaka itanu (2012-2017) DOBUSJES yihanangirijwe ko igomba kureka ibikorwa bibi byayo byo gutumiza hanze no gucuruza amavuta yigana KANTA HAIR DYE, urukiko rutinyuka rukemeza ko nta mugambi mubi DOBUSJES ifite wo kuba ariyo iri gukura ibyo bicuruzwa muri Chine, ikabyinjiza mu Rwanda! (Reba ibaruwa yo ku wa 11/7/2012 MININTCO Ltd yandikiye DOBUSJES Ltd isaba

guhagarika gucuruza KANTA y'inyiganano nayo ikemera ko izicuruza) cyandikishijwe mu Rwanda.

[17] icyemezo RW-M100000413 cyo ku wa 10/04/2012 cyo kwandikisha ikirango, ingingo ya 284 y'itegeko rigamije kurengera umutungo bwite mu by'ubwenge n'urukiko rwashingiyeho mu gace ka 28 k'urubanza, igaragaza ko "iyi ibicuruzwa byinjijwe mu gihugu ari ibyiganano, cyangwa bibangamiye ku buryo bugaragara uburenganzira ku mutungo bwite mu by'ubwenge, urukiko rubifitiye ububasha rushobora gutegeka ko bisenywa kandi ko bikurwa ku isoko ry'u Rwanda kugirango uburenganzira bwa nyir'umutungo bwite mu by'ubwenge butabangamirwa». Naho iya 280 yaryo ikagaragaza ibyemezo byihariye bikurikizwa ku mupaka hagamijwe gukumira iyinjizwa ry'ibicuruzwa bibangamiye uburenganzira ku mutungo bwite mu by'ubwenge butangwa mu Rwanda byafatwa n'inkiko zibifitiye ububasha. Izi ngingo zombi ziruzuzanya, ntabwo imwe ivanaho indi. Ahubwo Urukiko rubanza rwagombye kuba rwariboneye ko ibicuruzwa bya DOBUSJES Ltd byafatiriwe biramutse birekuriwe DOBUSJES Ltd mu gihugu cy'u Rwanda aho ikirango cya KANTA cyandikishijwe kigomba kurengerwa, ibyo MININTCO Ltd yaregeye byose byaba bibaye imfabusa, mu gihe n'ubundi DOBUSJES Ltd yaba yongeye guhabwa umwanya wo gukomeza mu bikorwa byayo bibi yagize akamenyero, ifatira ntacyo ryaba rimaze mu gihe urukiko rusanze ibikorwa by'iyigana no gutera urujijo byarakozwe, maze DOBUSJES Ltd aho kubihanirwa, ahubwo ikabwirwa gusa ngo ntizabishyire ku isoko ryo mu Rwanda kuko ishobora no kubicuruzwa rwihishwa kuko yabihawe contrôle, ko atabicuruzwa ntiyakunda. Bityo, MININTCO (R) ikurikije ibivugwa muri izi ngingo z'amategeko urukiko rubanza rwagaragaje kandi nayo yemera, isanga icyemezo cyagombaga

gufatwa kuri ariya makarito 99 ya Kanto yafatiriwe muri Gasutamo, ari ugusenywa, kandi amafanga agiye kuri icyo gikorwa agatangwa na DOBUSJES nkuko n'ubundi inkiko zagiye zibyemeza ku manza zisa n'uru zabaye itegeko.

[18] Me Mutarindwa Félix na Me Ndagijimana Augustin basobanura ko ibivugwa na Me Mhayimana Isaie nta shingiro bifite ngo kuko itegeko barivugira ibyo ritavuze kuko itegeko ridadegeka umucamanza byanze bikunze gutegeka isenywa ry'ibyo bintu (peut ordonner non doit ordonner), akaba rero yarashishoje asanga ibyo bintu bitagomba gusenywa. Ku kibazo cya *bonne ou mauvaise foi* umukiliya wabo yaranguye atagambiriye guhombya MININTCOLtd, ikindi umucamanza akaba yarakoze ibyo yemerewe n'amategeko. Na none basobanura ko mugutumiza biriya bicuruzwa umukiliya wabo yaranguye produits nyinshi iriya KANTO ikaba aribwo bwa mbere yari iyizanye. Gushingira ku ibaruwa yo mu mwaka wa 2012, ngo sibyo kuko icyo gihe DOMUSJOS itajyaga kurangura hanze ahubwo yaranguraga mu gihugu, iyo barwa ngo ikaba yarandikiwe abacurzi benshi, ko kandi icyo gihe umukiliya wabo mu gusubiza yaberetse ko ari KANTA ko kandi atariyo iburanwa uyu munsu. Bavuga ko ikimenyetso bazana cya KANTO ngo bakaba batayemera kuko idasa nizafatiriwe. Ko yakabaye agaragaza ikimenyetso cy'uko *carton* ari kwerekana ari iyo yakuye muzafatiriwe muri gasutamo.

[19] Bakomeza basobanura ko nkuko urukiko rwabyemeje koko DOBUSJES Ltd itumiza igicuruzwa cya KANTO nta mugambi mubisha wo kwangiriza MININTCO LTD yari ifite ku mpamvu z'uko icyo gicuruzwa atari cyo yaranguye gusa ahubwo yakiranguranye n'ibindi bicuruzwa bigera kuri 16 kandi izivana

mu iduka rimwe ryitwa YIWU CHENMIN IMPORT&EXORT CO Ltd risanzwe rirangurwaho n’abantu benshi.

[20] Ku bijyanye no kuvuga ko habayeho kwigana ikirango cya MININTCO LTD ibyo ngo sibyo kuko DOBUSJES Ltd ntiyavanye iyo produit mu ruganda ahubwo ni mu iduka. Iryo duka naryo rikaba ngo ryarazivanye muri WENLING JINGHUI COSMETIC CO, LTD nk’uko ibimenyetso biri ku mugereka byerekana aho byaranguwe.

[21] Ku bijyanye n’imanza zavuzwe na MININTCO urukiko rwagenderaho ngo basanga zidahuye n’uruburanwa ngo kuko iyo uzisomye usanga ibiburanwa atari bimwe ndetse n’abaregwa bemera ko ibyo bavanye hanze ari KANTA kandi bihuje amazina na KANTA ya MININTCO Ltd mu gihe bo ibicuruzwa byabo byatumijwe bidahuje amazina ndetse zikaba zitarakoreshejwe ahubwo zaranguwe mu iduka rizwi.

[22] Basozu bavugaga ko mu ibaruwa ivugwa na MININTCO yo muri 2012 havuzwe abantu batumiza ibicuruzwa bagateraho ikirango cya KANTA. Muri icyo gihe DOBUSJES nta bintu yatumizaga hanze yewe n’ibyo yavuze kuri iriya baruwa ngo ni ikarito zaje iwe zanditseho KANTA ntabwo ari produit ziburanwa ubu zitwa HAIR DYE.

UKO URUKIKO RUBIBONA

[23] Ingingo ya 284 y’Itegeko N°31/2009 ryo ku wa 26/10/2009 rigamiye kurengera iby’umutungo bwite mu by’ubwenge iteganya ko iyo ibicuruzwa byinjijye mu gihugu ari ibyiganano, cyangwa bibangamiye ku buryo bugaragara uburenganzira ku mutungo bwite mu by’ubwenge, urukiko

rubifitiye ububasha rushobora gutegeka ko bisenywa kandi ko bikurwa ku isoko ry'u Rwanda, kugira ngo uburenganzira bwa nyir'umutungo bwite butabangamirwa“

[24] Urukiko rusanga ikibazo nyamukuru kigomba gusuzumwa ari ukumenya niba amakarito 99 y'amavuta ya KANTO Black Hair Dye agomba gusenya kuko aricyo cyajuririwe kikanaburanishwa mu bujurire, ibyo kuba ari ibicuruzwa by'ibyiganano bikaba bitarajuririwe.

[25] Urukiko rusanga nk'uko byemejwe n'umucamanza wa mbere mu gika cya 27 cy'urubanza rujuririrwa ko igicuruzwa cya KANTO Black Hair Dye ari ikiganano kandi gitera urujijo ku gicuruzwa cya KANTA ndetse akanategeka ko kitagomba gucuruzwa mu Rwanda ariko agategeka ko na none kidasenywa, akaba nta makosa yakoze kuko ingingo ya 284 y'itegeko N° 31/2009 ryo ku wa 26/10/2009 ryavuzwe haruguru itavuga ko umucamanza ategetswe gutegeka ko bene ibyo bicuruzwa bisenywa, ahubwo iteganya ko ashobora gutegeka ko bisenywa;

[26] Urukiko rusanga ibisabwa n'ababuranira MININTCO Ltd ko amakarito 99 yavuzwe haruguru yasenywa bitahabwa ishingiro kuko nk'uko byasobanuwe n'umucamanza wa mbere, kuba nyiri kubigura atariwe wakoze ikirango KANTO Black Hair Dye, ahubwo yakiranguye nk'urangura ibindi bicuruzwa byose, kuba kandi mu kukinjiza mu Rwanda ntakigaragaza ko yari afite umugambi wo kubangamira MININTCO Ltd, uru rukiko narwo rusanga gutegeka DOBUSJES Ltd gusenya ibyo bicuruzwa nk'umucuruzi nayo byayitera igihombo kidasubirwaho, ahubwo nk'uko byemejwe n'umucamanza wa mbere, ikaba itemerewe kubicururiza k'ubutaka bw'u Rwanda, bivuga ko igomba gushaka ahandi itwara ibicuruzwa byayo bikavanwa k'ubutaka bw'u Rwanda.

C. Ku birebana no gusuzuma niba urubanza rwaragombaga gutangazwa mu binyamakuru bisomwa na benshi

[27] Me Mhayimana Isaie asobanura MININTCO Ltd mubyo yari yasabye mu rukiko rubanza, harimo ko rwategeka DOBUSJES Ltd ko urubanza ruzacibwa kuri iki kirego rutangazwa mu binyamakuru bisomwa na benshi mu Rwanda nka Imvaho Nshya, the new times, igihe.com kandi bikishyurwa na DOBUSJES mu gihe rwasanga ibikorwa by'ipiganwa mu bucuruzi birimo uburiganya bihama DOBUSJES Ltd, nyamara ntacyo urwo rukiko rwigeze rubivugaho. Akaba ariyo mpamvu asaba ko uru rukiko rubitegeka.

[28] Me Mutarindwa Félix asobanura ko rutangazwa mu binyamakuru bisomwa cyane ubifitemo inyungu ariwe wabikora kandi ko bitabujijwe n'amategeko.

[29] Me Ndagijimana asobanura ko nubundi iyo urubanza ruciwe ruba rwabaye publique, iyo publicité ngo akaba atakabaye abisaba urukiko ngo ikizava mu rubanza nikiramuka kimushimishije yazabyikorera.

UKO URUKIKO RUBIBONA

[30] Urukiko rusanga ibisabwa n'ababuranira MININTCO ® Ltd ko urubanza rwaragombaga gutangazwa mu binyamakuru bisomwa na benshi bitahabwa ishingiro kuko byonyine kuba DOBUSJES yategetswe kudacururiza ibyo bicuruzwa ku butaka bw'u Rwanda ndetse akaba nta n'ibindi bicuruzwa nk'ibyo MININTCO Ltd yaba igaragaza ko DOBUSJES yaba yarabishyize ku isoko ngo itangazwa ry'urubanza ribe ariryo kwereka abantu ko ibyo bicuruzwa bitemewe, akaba nta mpamvu

yari gutuma umucamanza yemeza itangazwa ry'urubanza mu binyamakuru, ariko MININTCO ® Ltd iramutse ibishaka ikaba yakwitangariza urwo rubanza mu binyamakuru na cyane ko ariyo bifitiye inyungu.

D. Ku birebana no gusuzuma niba urukiko rwaragombaga gutegeka ko MININTCO ® Ltd ihabwa indishyi z'igihombo

[31] Me Mhayimana Isaie asobanura ko MININTCO Ltd ntiyahawe indishyi ku rubanza ku kirego cyihutirwa (référé) RCOM 00654/2017/TC/Nyge nkaho hari ikosa yakoze ndetse yimwe n'indishyi z'igihombo yatewe n'ibikorwa bya DOBUSJES Ltd byabangamiye imikorere yayo bijyanye n'iyigana no gutera urujijo mu baguzi yakoze kandi yahamijwe. MININTCO ® Ltd imaze kubona ko urubanza RCOM0149/2017/TC/Nyge rwahawe itariki ya kure 06/04/2017 kandi ukurikije uko amategeko ateye kuri ibyo birego bisaba ubwihutire kuko ibicuruzwa byari byafatiriwe kuri gasutamo bitagombaga kurenza iminsi icumi yandikiye Perezida w'Urukiko rw'Ubucuruzi isaba itariki ya vuba yo kuburanisha urwo rubanza (reba amabaruwa yoherejwe kuri IECMS) ntiyasubijwe, ari nayo mpamvu yatanze ikirego cyihutirwa kigamije ifatira ry'amakarito 99 yari muri gasutamo, mu rubanza RCOM 0311/2017/TC/Nyge, urukiko rwemeza ifatira ryayo makarito mu gihe cy'iminsi 20 y'akazi, irangiye kuko urubanza rw'iremezo rwari rutaraburanishwa itanga ikindi kirego ishingiyeye na none ku ngingo ya 277 y'itegeko ryerekeye kurengera umutungo bwite mu by'ubwenge gihabwa RCOM 00654/2017/TC/Nyge.

[32] MININTCO ® Ltd isaba guhabwa indishyi z'ikurikiranarubanza n'igihembo cya avoka ndetse n'igarama yatanze kuri urwo rubanza zingana na 1,000,000 Frw no guhabwa

indishyi kubera ibikorwa bya DOBUSJES Ltd binyuranye n'ubunyangamugayo by'iyigana kandi bitera urujijo ikorera MININTCO ® Ltd zingana na 5,000,000 Frw zigatangwa kandi hashingiwe ku gihombo yatejwe na DOBUSJES Ltd iyirukansa mu nkiko ikayivutsa inyungu. Aha urukiko mu kuzigena rukanagendera ku makarito 99 yafatiriwe, noneho buri karito ibamo udukarito 24, natwo kamwe kabamo uducupa twa kanto 12, habariwe ko nibura buri gacupa kagura amafranga magana abiri (200 Frw) uwo mubare ni nawo uba mu twa KANTA byumvikane ko igihombo MININTCO ® Ltd ifite igiterwa n'ibyo byiganano byinjizwa na DOBUSJES Ltd kuko ahari kwinjira KANTA nyayo ubu noneho ni KANTO yinjizwa, inyungu zayo ikaba izivutswa yagombye kuzinjiza.

[33] Ababuranira uregwa basobanura ko izo ndishyi zitagomba gutangwa ngo kuko kuba baratanze ibirego byihutirwa bagenewe amafaranga, ko kandi bene izo ndishyi zisabirwa hamwe n'urubanza mu mizi, ibyo basaba rero bakaba bagamije kwishyurwa inshuro ebyiri ko kandi batazihabwa ngo kuko batsinzwe ikirego cyihutirwa.

[34] Bakomeza bavuga ko ahubwo DOBUSJES Ltd ikaba ariyo yari guhabwa indishyi kuri icyo kirego nubwo itazihawe yewe no mu mizi ntizihabwe. Ku bijyanye n'indishyi zikomoka ku kirango gitera urujijo nazo nta shingiro zahabwa kuko uwareze ntiyabashije kugaragaza ko igikorwa cyabaye cyari kigamije kwangiriza MININTCO Ltd.

[35] Ku birebana n'igihombo avuga ko zitagomba gutangwa ngo kuko itagaragaza igihombo yaba yaragize. Ko kandi niba ari indishyi nabwo zitatangwa (une personne morale) nta ndishyi igomba guhabwa.

[36] Me Ndagijimana Augustin asobanura ko ku ndishyi z'ibirego byihutirwa, ko nizo bahawe batagombaga kuzihabwa ngo kuko bene izo ndishyi zitangwa mu rubanza rw'iremezo. Avuga ko kuba ibirego byarabaye byinshi ari ku mpamvu za MININTCO ® Ltd ngo kuko ariyo yahoraga isaba kongera igihe cyo gufatira ibyo bicuruzwa.

[37] Akomeza avuga ko MININTCO ® Ltd imaze igihe kigera ku myaka 5 itazana KANTA ngo kubera imisoro yaciwe, ngo bikaba bitumvikana ukuntu umuntu yabuza abantu kuzana ibyo bicuruzwa kandi itazana ibyo bicuruzwa, harebwa itegeko rya *protection du consommateur*. Ikindi izi *produits* ngo zikaba zifite ubuziranenge nk'uko byagaragarijwe ibimenyetso.

[38] Ku kibazo cyo kumenya niba hari indishyi zatanzwe muri *référé* basubiza ko zatanzwe, ariko hagaragajwe urubanza RCOMA 00162/2017/CHC/HCC rwasibye ubujurire bwabo arinarwo rwatanzwemo indishyi zishingiwe ku mabwiriza ya Perezida w'Urukiko rw'Ikirenga.

UKO URUKIKO RUBIBONA

[39] Ingingo ya 320, igika cya 4 y'itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu iteganya ko "indishyi n'ibindi bijyanye n'amafaranga umuburanyi yakoresheje mu rubanza ku kirego cyihutirwa biregerwa hamwe n'ikirego cy'iremezo".

[40] Urukiko rusanga indishyi z'igihombo zisabwa na MININTCO ® Ltd zitagomba gutangwa kuko itabasha kugaragariza urukiko igihombo yaba yaratewe n'ibicuruzwa bya

DOBUSJES Ltd na cyane ko ibyo bicuruzwa bitigeze bishyirwa ku isoko ngo bibe byarabangamiye MININTCO ® Ltd mu bucuruzi bwayo.

[41] Urukiko rusanga indishyi z'ikurikiranarubanza n'igihembo cya avoka zisabwa ku birego byihutirwa RCOM 00311/2017/TC/NYGE na RCOM 00654/2017/TC/Nyge nta shingiro zifite kuko nko k'urubanza RCOM 00311/2017/TC/NYGE izo ndishyi zatanzwe mu rubanza rw'iremezo ruri kujururirwa uyu munsu nk'uko bigaragara mu gika cya 37 na 49 by'urwo rubanza.

[42] Ku kirego RCOM 00654/2017/TC/Nyge izo ndishyi zikaba zitarigeze zisabwa k'urwego rwa mbere ndetse zikaba zitagomba gutangwa kuko nta kimenyetso uzisaba agaragaza ko icyo kirego cyihutirwa cyanabayeho koko.

E. Ku birebana no gusuzuma niba indishyi z'ikurikiranarubanza n'igihembo cya avoka zisabwa na MININTCO ® Ltd zatangwa.

[43] Me Mhayimana Isaie asobanura ko MININTCO ® Ltd isaba indishyi zo gusiragizwa mu manza ku maherere, iz'ikurikiranarubanza n'igihembo cya avoka za 1.000.000 Frw kubera ko ibikorwa bya DOBUSJES Ltd binyuranije n'amategeko byatumye ijya mu manza, ishaka abavoka kandi ibyo byose bitakagombye.

[44] KIGALI PARTNERS IN LAW isobanura ko izo ndishyi isaba ntiyazihabwa ahubwo n'izo yahawe yazakwa kuko zidakurikije amategeko. Ikindi kandi MININTCO ® Ltd niyo yishora mu manza ku bushake.

UKO URUKIKO RUBIBANA

[45] Urukiko rusanga izi ndishyi zitagomba gutangwa kuko uzisaba urubanza rumutsinda.

F. Ku birebana no gusuzuma niba indishyi z'ikurikiranarubanza n'igihemb cya avoka zisabwa na na DOBUSJES zatangwa

[46] Ababuranira DOBUSJES Ltd basobanura ko kuva aho MININTCO ® Ltd itangiriye kurega DOBUSJES imaze kuyitumiza mu manza zirenga 5 kandi muri icyo gihe cyose yoherezaga avoka agakora ikagira n'ibindi itakaza, ngo akaba ariyo mpamvu isabye mu bushishozi bw'urukiko ko yakwishyurwa amafaranga 2,000,000.

[47] Me Mhayimana Isaie asobanura ko MININTCO ® LTD isanga izo ndishyi nta shingiro zifite kubera ko kuza mu manza byatewe n'ibikorwa bya DOBUSJES Ltd yishoyemo byo kwinjiza mu gihugu ibicuruzwa byigana igicuruzwa cya KANTA cyandikishijwe mu Rwanda. Ikaba rero idakwiye kwaka indishyi kuko kuza mu nkiko kwayo niyo yabigizemo uruhare kuko MININTCO ® Ltd yagombaga guharanira uburenganzira bwayo.

UKO URUKIKO RUBIBONA

[48] Ingingo ya 258 y'itegeko ryo ku wa 30 Nyakanga 1888 ryerekeye urwunge rw'amategeko y'imbonezamubano, igitabo cya gatatu ibyerekeye imirimo nshinganwa cyangwa amasezerano iteganya ko "igikorwa cyose cy'umuntu cyangirije undi gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse."

[49] Urukiko rusanga indishyi z'ikurikiranarubanza n'igihembo cya avoka zisabwa na DOBUSJES Ltd zifite ishingiro kandi zikaba zigomba hashingiwe ku ngingo ya 258 y'itegeko ryo ku wa 30 Nyakanga 1888 ryavuzwe haruguru, kuko kuba MININTCO ®Ltd nyuma yo gutsinda urubanza ku rwego rwa mbere yarajuriye bigatuma DOBUSJES Ltd igira ibyo itakaza mu kuza kuburana urubanza mu bujurire, kuba nk'uko byasobanuwe mu rubanza ibyo yajuririye nta shingiro bifite, igihombo yateje DOBUSJES Ltd ikaba igomba kukirengera, ariyo mpamvu igomba kuyishyura amafaranga 700,000 akubiyemo ay'igihembo cya Avoka n'igikurikiranarubanza agenwe mu bushishozi bw'urukiko kuko ayasabwaga ari umurengera.

III. ICYEMEZO CY'URUKIKO

[50] Rwemeye kwakira ubujurire bwa MININTCO Ltd kuko bwatanzwe bikurikije amategeko, ariko rubusuzumye rusanga nta shingiro bufite.

[51] Rwemeje ko nta gihindutse ku mikirize y'urubanza RCOM 00149/2017/TC/NYGE.

[52] Rutegetse MININTCO Ltd kwishyura DOBUSJES Ltd amafaranga 700,000 y'ikurikiranarubanza n'igihembo cya avoka mu bujurire.

[53] Rutegetse ko ibicuruzwa bya DOBUSJES Ltd bifite ikirango KANTO Black Hair Dye bitemewe gucururizwa k'ubutaka bw'u Rwanda, ko gasutamo ibiyiha igashaka ahandi ibijyana hatari mu Rwanda.

[54] Rutegetse ko amafaranga 75.000 MININTCOLtd yatanze ijurira aherera ku isanduku ya Leta.

URUBANZA RW'UBUTEGETSI

UMUJYI WA KIGALI v NDAKENGGERWA GASANA

[Rwanda URUKIKO RW'IKIRENGA –
RS/REV/INJUST/RAD00005/2018/SC – (Kayitesi Z, P.J.,
Mutashya na Cyanzaire J.) 15Werurwe 2019]

Amategeko agenga imanza z'ubutegetsi – Ibihano mu rwego rw'akazi – Uburyozwe bw'icyaha – Kuba Ubushinjacyaha bushyinguye dosiye bwari bukurikiranyeho umukozi mu rwego rw'inshinjabyaha ntibikuraho kuba yahanwa mu rwego rw'akazi.

Amategeko agenga imanza z'ubutegetsi – Ikosa rikomeye – Impamvu yongera uburemere bw'ikosa – Kuba umukozi wakoze ikosa ari umuyobozi ukuriye abandi, wagombye kubabera urugero mu kwirinda ibikorwa byose bishobora gusebya umukoresha we, ni impamvu yongera uburemere bw'ikosa.

Incamake y'ikibazo: Ndakengerwa wari Umuyobozi Mukuru ushinzwe Imibereho Myiza y'Abaturage mu Mujyi wa Kigali hamwe n'umushoferi we bakurikiranywe n'Ubushinjacyaha ku cyaha cyo gushimuta n'ukwambura bakoresheje kiboko uwitwa Twahirwa, ibyo bikaba byarakozwe bamukingirana mu modoka, bakamujyana kumufungira mu Kigo cya “Kigali Rehabilitation Transit Center” i Gikondo, kubera ibibazo bwite bari bafitanye ariko bageze muri icyo Kigo, abahakora banze kumufunga kubera ko bafungiramo abazanywe na Polisi. Nyuma Ubushinjacyaha bwaje gusanga atari ngombwa gukomeza gukurikirana iyi dosiye burayishyiringura.

Umujyi wa Kigali wamusabye kwisobanura ku makosa yakoze yitwaje akazi akora, ku makosa yo gusiba akazi nta ruhushya no

kuba atarubahirije amabwiriza y'imyubakire kandi ari Umukozi ushinze kurwanya imyubakire y'akajagari, ibisobanuro yatanze ntibyanguze Umujyi wa Kigali, nyuma yo kugisha inama Minisiteri ifite abakozi ba Leta mu nshingano zayo Umujyi wa Kigali wamwirukanye burundu ku kazi kubera amakosa akomeye.

Yaje gutakambira Komisiyo y'Abakozi ba Leta, ariko imisubiza ko atarenganye, nyuma yaho yatanze ikirego mu Rukiko Rwisumbuye, asaba ko icyo cyemezo cyavanwaho kuko yirukanywe mu buryo budakurikije amategeko, asaba n'indishyi zinyuranye. Urwo Urukiko rwemeje ko ikirego cye gifite ishingiro kuri bimwe, rutegeka Umujyi wa Kigali kumuha indishyi zo kwirukanwa binyuranyije n'amategeko n'amafaranga y'igihembo cy'Avoka

Ababuranyi bombi ntibanyuzwe maze bajuririra Urukiko Rukuru, Urukiko rwemeza ko ubujurire bwa Ndakengerwa bufite ishingiro kuri bimwe, ko ubujurire bw'Umujyi wa Kigali nta shingiro bufite, ko icyemezo cyo kwirukana Ndakengerwa kivanyweho, rutegeka Leta y'u Rwanda kumuha imishahara atishyuwe no kumusubiza mu kazi byaba bidashobotse ikamuha indishyi.

Umujyi wa Kigali wandikiye Urwego rw'Umuvunyi usaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane, nyuma yugusuzuma ikibazo cy'Umujyi wa Kigali, rwandikira Perezida w'Urukiko rw'Ikirenga rusaba ko urwo rubanza rusubirwamo ku mpamvu z'akarengane, nawe ashingiye kuri raporo y'Ubugenzuzi Bukuru bw'Inkiko, yemeza ko urubanza rusubirwamo. Urukiko rwabanje gusuzuma niba amakosa yashingiweho yirukanwa amuhama; mu gihe yaba amuhama, hagasuzumwa niba igihano yahawe aricyo cyari gikwiye no kuba cyaba cyaratanzwe mu nzira zikurikije amategeko.

Ku birebana nu kumenya niba ahamwa n'amakosa yashingiweho yirukanwa, Umujyi wa Kigali uvuga ko kuba atarahamwe n'icyaha yari akurikiranyweho, Ubushinjacyaha bugashyingura dosiye, bitavanaho kuba yarakoze ikosa mu rwego rw'akazi yagombaga gukurikiranwaho kandi ikosa yari akurikiranyweho ari ugutwara umuntu ku bw'urugomo hakaba hari n'ibimenyetso bidashidikanywaho.

Ku bijyanye n'ikosa ryo kubaka mu kajagari, Umujyi wa Kigali uvuga ko nk'Umuyobozi wari ushinze kurwanya akajagari, nawe yagateje nk'uko komisiyo yasuye aho yubakaga yabyemeje, nyuma yo gusanga yarubatswe indi nzu nyuma yo guhabwa ingurane.

Mu kwiregura kwe, Ndakengerwa avuga ko ibyo Umujyi wa Kigali uvuga ko ari amakosa ataribyo ndetse n'Akanama gashinzwe imyitwarire kabisesenguye kagasanga atari amakosa, kagategeka ko asubira mu kazi kandi ko icyo yari akurikiranyweho atari ukugerageza gufungira abantu mu Kigo mu nyungu ze bwite, ko ahubwo ari ikibazo cy'amasezerano y'abantu babiri, ko kandi abo bantu bishyuranye kuri Polisi dosiye igahita isozwa. Avuga ko n'iyi byaba ari icyaha atariwe wagombaga kubihanirwa, akaba ariyo mpamvu yarekuwe n'Ubushinjacyaha n'ibye byari byarafatiriwe akabihabwa. Naho ku bijyanye no kuba yarubatswe mu kajagari avuga ko nta nyubako yigeze yubaka mu buryo bw'akajagari nyuma y'uko amaze guhabwa ingurane kandi ko n'umukozi ushinze iterambere mu Mujyi wa Kigali yahasuye akemeza ko nta nzu yubatswe nyuma yo guhabwa ingurane.

Incamake y'icyemezo: 1. Kuba Ubushinjacyaha bushyinguye dosiye bwari bukurikiranyeho umukozi mu rwego rw'inshinjabyaha ntibikuraho kuba yahanwa mu rwego rw'akazi.

2. Umukozi ufata umuntu udafite icyaha aregwa n'inzego zibishinzwe, yitwaje akazi akora agashaka kumufungisha (detention) ni ikosa rikomeye mu rwego rw'akazi.
3. Kuba umukozi wakoze ikosa ari umuyobozi ukuriye abandi, wagombye kubabera urugero mu kwirinda ibikorwa byose bishobora gusebya umukoresha we, ni impamvu yongera uburemere bw'ikosa.

**Ndakengerwa Gasana Aimable yirukanywe mu buryo
bukurikije amategeko;
Imikirize y'urubanza RADA00023/2017/HC/KIG-
RADA00027/2017/HC/KIG rugakosorwa n'urubanza
RS/RECT/RAD 00003/2017/HC/KIG, ihindutse kuri
byose;
Amagarama aherereye ku Isanduku ya Leta.**

Amategeko yashingiweho:

- Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003
ryavuguruwe mu 2015, ingingo ya 13 n'ya 29
- Itegeko Ngenga N°11/2013/OL ryo ku wa 11/09/2013 rihindura
kandi ryuzuza itegeko ngenga N°61/2008 ryo ku wa
10/09/2008 rigenga imyitwarire y'abayobozi mu nzego
za Leta, ingingo ya 2 n'ya 3
- Itegeko N°30/2018 ryo ku wa 02/06/2018 rigena ububasha
bw'inkiko, ingingo ya 64
- Iteka rya Perezida N°65/01 ryo ku wa 4/3/2014 rigena uburyo
bwo gutanga ibihano ku bakozi ba Leta, ingingo ya 5, ya
7, n'ya 12
- Itegeko N°86/2013 ryo ku wa 11/09/2013 rishyiraho Sitati
Rusange y'Abakozi ba Leta, ingingo ya 3, 76, 78, 80, 81,
n'ya 98.

Nta manza zifashishijwe.

Ibitekerezo bya bahanga:

Georges Dupuis, Marie-Josée Guédon, Patrice Chretien, Droit
Administratif, 10 éme Edition, Sirey, 2007

Urubanza

I.IMITERERE Y'URUBANZA

[1] Ndakengerwa Gasana Aimable yari Umuyobozi Mukuru ushinzwe Imibereho Myiza y'Abaturage mu Mujyi wa Kigali. Yakurikiranywe n'Ubushinjacyaha hamwe na Nsengiyumva Gilbert wari umushoferi, ku cyaha cyo gushimuta Twahirwa Oswald no kumwambura ibye bakoresheje kiboko, kikaba cyarakozwe bamukingirana mu modoka, bakamujyana kumufungira mu Kigo cya "Kigali Rehabilitation Transit Center" i Gikondo, kubera ibibazo bwite bari bafitanye. Dosiye igaragaza ko bageze muri icyo Kigo, abakozi banze kumufunga kubera ko bafungiramo abazanywe na Polisi. Ubushinjacyaha bwaje gusanga atari ngombwa gukomeza gukurikirana iyo dosiye buyishyingura ku wa 17/12/2015.

[2] Ndakengerwa Gasana Aimable yasabwe n'Umujyi wa Kigali kwisobanura ku makosa yakoze yitwaje akazi akora, ku makosa yo gusiba akazi nta ruhushya kuva ku itariki ya 04 kugeza ku ya 11/09/2015, no kuba atarubahirije amabwiriza y'imyubakire ngo kuko yubatswe mu kibanza N° 385 kiri ahantu hatemewe kubakwa, akabikora kandi ari Umukozi w'Umujyi wa Kigali ushinzwe kurwanya imyubakire y'akajagari. Ibisobanuro Ndakengerwa Gasana Aimable yatanze ntibyanuyuze Umujyi wa

Kigali, umuhagarika ku kazi by'agateganyo nyuma yo kugisha inama Minisiteri ifite abakozi ba Leta mu nshingano (MIFOTRA), igatanga inama yo kumwirukana burundu kubera amakosa akomeye.

[3] Ku wa 29/01/2016, Umujyi wa Kigali wamwirukanye burundu ku kazi kubera amakosa akomeye, atakambira Komisiyo y'Abakozi ba Leta, iyi Komisiyo nayo imusubiza ko atarenganyijwe, ko yahawe igihano gikwiye. Ndakengerwa Gasana Aimable yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge, asaba ko icyo cyemezo cyavanwaho kuko yirukanywe mu buryo budakurikije amategeko, asaba n'indishyi zinyuranye. Ikirego cyanditswe kuri RAD00272/2016/TGI/NYGE, Urukiko rwemeza ko gifite ishingiro kuri bimwe, rutegeka Umujyi wa Kigali kumuha indishyi zo kwirukanwa binyuranyije n'amategeko zingana na 11.520.738Frw, n'amafaranga y'igihembo cy'Avoka angana na 1.000.000 Frw.

[4] Urukiko Rwisumbuye rwa Nyarugenge, mu kwemeza ko yirukanywe binyuranyije n'amategeko, rwashingiye ku kuba yaramaze icyumweru afungiyeye kuri Sitasiyo ya Police ya Muhima kuva ku wa 04/09/2015 kugeza ku wa 11/09/2015, kandi n'Ubuyobozi bw'Umujyi wa Kigali bukaba bwari bubizi; naho ku yandi makosa Umujyi wa Kigali wamwirukaniye ukaba utarabashije kuyatangira ibimenyetso.

[5] Ababuranyi bombi ntibanyuzwe bajuririra Urukiko Rukuru, urubanza rwandikwa kuri RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG, rucibwa ku wa 21/09/2017, Urukiko rwemeza ko ubujurire bwa Ndakengerwa Gasana Aimable bufite ishingiro kuri bimwe, ko ubujurire bw'Umujyi wa Kigali nta shingiro bufite, ko icyemezo cyo kwirukana

Ndakengerwa Gasana Aimable kivanyweho, rutegeka Leta y'u Rwanda kumuha imishahara atishyuwe ingana na 26.820.060 Frw no kumusubiza mu kazi byaba bidashobotse ikamuha indishyi zingana na 8.046.018Frw, n'indishyi z'ikurikiranarubanza zingana na 1.000.000 Frw. Urubanza rwasabiwe gukosorwa, ahanditse Leta y'u Rwanda handikwa Umujyi wa Kigali.

[6] Mu gufata icyemezo, Urukiko Rukuru rwashingiye ku kuba koko Ndakengerwa Gasana Aimable yarakoze amakosa nk'uko byari byagaragajwe n'Akanama gashinzwe gukurikirana amakosa y'abakozi mu Mujyi wa Kigali, ariko ko yari akwiye guhanishwa gutinzwa kuzamurwa mu ntera aho kwirukanwa nk'uko Umujyi wa Kigali wabikoze.

[7] Nyuma y'uko urubanza ruciwe, Umujyi wa Kigali wandikiye Urwego rw'Umuvunyi usaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane. Urwego rw'Umuvunyi rwasuzumye ikibazo cy'Umujyi wa Kigali, rwemeza ko urubanza RADA00023/2017/HC/KIG- RADA00027/2017/HC/KIG rwaciwe ku wa 21/09/2017 rurimo akarengane, rwandikira Perezida w'Urukiko rw'Ikirenga rusaba ko urwo rubanza rusubirwamo ku mpamvu z'akarengane.

[8] Urwego rw'Umuvunyi rwavuze ko urubanza RADA00023/2017/HC/KIG- RADA 00027/2017/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 21/09/2017 rurimo akarengane kubera impamvu zikurikira:

Urwego rw'Umuvunyi ruvuga ko Urukiko rwafashe icyemezo rushingiye ku biteganywa n'Iteka rya Perezida N°65/01 ryo ku wa 4/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi, naho

Umujyi wa Kigali ukaba warafashe icyemezo cyo kwirukana burundu Ndakengerwa Gasana Aimable ushingiyeye ku Itegeko Ngenga N°11/2013/OL ryo ku wa 11/09/2013 rihindura kandi ryuzuza Itegeko Ngenga N°61/2008 ryo ku wa 10/09/2008 rigena imyitwarire y'Abayobozi mu nzego za Leta.

Urwego rw'Umuvunyi rusanga kuba Akanama gashinzwe gukurikirana amakosa y'abakozi mu Mujyi wa Kigali kari kasabiye Ndakengerwa Gasana Aimable igihano cyo gukererezwa kuzamurwa mu ntera, ndetse icyo gihano n'Urukiko Rukuru rukaba aricyo rwasanze yari akwiriye guhanishwa, aruko ikosa yakoze rijyana n'ibihano byo mu rwego rwa kabiri, bisobanuye ko ikosa yakoze rikwiriye igihano kirenze kwihanangirizwa no kugawa.

Urwego rw'Umuvunyi rusobanura ko ingingo ya 20 y'Itegeko N°61/2008 ryo ku wa 10/09/2008 rigena imyitwarire y'abayobozi mu nzego za Leta itahinduwe cyangwa ngo ivanweho n'Itegeko Ngenga N°11/2013 ryo ku wa 11/09/2013, iyo ngingo ikaba iteganya ibihano ku muyobozi uhamwe n'amakosa birimo kwihanangirizwa mu nyandiko, kugawa mu nyandiko, kwirukanwa ku murimo no kwirukanwa ku murimo bigatangazwa mu binyamakuru, bigaragara ko muri iri Tegeko, igihano gikurikiraho mu gusumbya uburemere kwihanangirizwa no kugawa ari ukwirukanwa ku murimo; akaba ariyo mpamvu Ndakengerwa Gasana Aimable yari akwiye igihano cyo kwirukanwa ku murimo, ari nacyo yahawe n'Umujyi wa Kigali. Ndakengerwa Gasana Aimable yari Umuyobozi Mukuru ushinze Imibereho myiza y'Abaturage, akaba rero nawe agengwa n'Itegeko

Ngenga ryavuzwe haruguru, cyane cyane mu ngingo yaryo ya 2 (3°)¹

Urwego rw'Umuvunyi ruvuga ko mu guhana Ndakengerwa Gasana Aimable hagombaga gushingirwa ku Itegeko Ngenga rigena imyitwarire y'abayobozi mu nzego za Leta aho gushingira ku Iteka rya Perezida rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi, harebwe uburyo amategeko asumbana, byongeye kandi ingingo ya 5 igika cya mbere y'Iteka rya Perezida N°65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi iteganya ko umuyobozi ubifitiye ububasha ashobora, ashingiye ku mpamvu zongera uburemere bw'ikosa, guha umukozi wakosheje igihano gisumba igiteganyirijwe ikosa².

Urwego rw'Umuvunyi rwasanze niyo hashingirwa kuri iryo Teka rya Perezida, ntacyari gutuma Umujyi wa Kigali utirukana Ndakengerwa Gasana Aimable, mu gihe byabonekaga ko hari impamvu zongera uburemere bw'ikosa yari yakoze, kuko yakoze ikosa riremereye cyane.

¹Abayobozi Bakuru: abagize Guverinoma, abagize Inteko Ishinga Amategeko, Abacamanza mu Rukiko rw'Ikirenga n'abandi bashyirwaho n'Iteka rya Perezida n'abandi bayobozi bashyirwaho n'Iteka rya Minisitiri w'Intebe kugeza ku Muyobozi Mukuru n'abandi bakozi bari ku rwego rumwe n'Umuyobozi Mukuru

² Hashingiwe ku mpamvu zoroshya cyangwa zongera uburemere bw'ikosa ziteganyijwe mu ngingo ya 6 n'ya 7 z'iri teka, Umuyobozi ubifitiye ububasha ashobora gukuriraho umukozi wokosheje igihano, kumuha igihano gito cyangwa igisumba igiteganyirijwe ikosa”.

[9] Nyuma y'Uko Urwego rw'Umuvunyi rwandikiye Perezida w'Urukiko rw'Ikirenga, rusaba ko urubanza RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG rwasubirwamo ku mpamvu z'akarengane, yasesenguye ikibazo, anashingiye kuri raporo y'Ubugenzuzi Bukuru bw'Inkiko, yemeza ko urubanza rwandikwa mu bitabo byabugenewe kugira ngo ruzongere ruburanishwe. Urubanza rwanditswe kuri RS/INJUST/RAD00005/2018/CS.

[10] Iburanisha ryashyizwe ku wa 05/02/2019, ribera mu ruhame, Umujyi wa Kigali witabye uburanirwa n'Intumwa ya Leta Me Cyubahiro Fiat, Ndakengerwa Gasana Aimable yitabye yunganiwe na Me Musirimu Jean Claude. Muri uru rubanza ikibazo nyamukuru kigomba gusuzumwa akaba ari ukumenya niba Ndakengerwa Gasana Aimable yarirukanywe mu buryo bukurikije amategeko

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURA RYACYO

Kumenya niba Ndakengerwa Gasana aimable yarirukanywe mu buryo bukurikije amategeko.

[11] Kugirango Urukiko rushobore kwemezwa niba Ndakengerwa Gasana Aimable yarirukanywe mu buryo bukurikije cyangwa budakurikije amategeko, ni ngombwa guzuzuma niba amakosa yashingiweho yirukanwa amuhama; mu gihe yaba amuhama, hagasuzumwa niba igihano yahawe aricyo cyari gikwiye kandi niba cyaratanzwe mu nzira zikurikije amategeko.

Kumenya niba Ndakengerwa Gasana Aimable ahamwa n’amakosa Umujyi wa Kigali washingiyeho umwirukana burundu ku kazi

[12] Me Cyubahiro Fiat uburanira Umujyi wa Kigali avuga ko kuba Ndakengerwa Gasana Aimable atarahamwe n’icyaha yari akurikiranyweho, Ubushinjacyaha bugashyngura dosiye, bitavanaho kuba yarakoze ikosa mu rwego rw’akazi yagombaga gukurikiranwaho nk’uko biteganywa n’ingingo ya 78 y’Itegeko rigenga abakozi ba Leta.

[13] Avuga kandi ko mu Bushinjacyaha, Ndakengerwa Gasana Aimable atari akurikiranyweho ibijyanye n’amasezerano y’ubwishyu nk’uko abivuga, ahubwo ari ugutwara umuntu ku bw’urugomo, ibimenyetso byerekana ikosa yakoze bikaba bihari kandi bidashidikanywaho, ndetse n’Abapolisi baba ku Kigo yari agiye gufungiramo uwo muntu bakaba barabajijwe bakemeza ko yahageze akabasaba ko bamufunga bakabyanga, nawe ubwe akaba adahakana ko yahageze koko.

[14] Ku bijyanye n’ikosa ryo kubaka mu kajagari, Me Cyubahiro Fiat avuga ko Ndakengerwa Gasana Aimable nk’Umuyobozi wari ushinzwe kurwanya akajagari, nawe yagateje nk’uko komisiyo yasuye aho yubakaga yabyemeje, nyuma yo gusanga yarubatse indi nzu nyuma yo guhabwa ingurane.

[15] Ndakengerwa Gasana Aimable avuga ko nta karengane kagaragara mu rubanza rwaciwe n’Urukiko Rukuru, ko iby’uburanira Umujyi wa Kigali avuga ko ari amakosa ataribyo kuko Akanama gashinzwe imyitwarire kabisesenguye kagasanga atari amakosa, kagategeka ko asubira mu kazi. Ku kibazo cyo kuba yaragiye gufungira abantu I Gikondo mu Kigo cya “Kigali

Rehabilitation Transit Center”, avuga ko ntabyo yigeze akora, ko ahubwo yagiye kuri icyo Kigo ajyanywe no gusaba raporo umudamu wahakoraga witwa Kayitesi, kubera ko yari imaze iminsi itaza kandi ubundi yarayihabwaga.

[16] Ndakengerwa Gasana Aimable avuga ko abantu bari mu modoka ye, bivugwa ko yari agiye kubafunga, ari abo yari atwaye bisanzwe abahaye “Lift”. Asobanura ko yabanje guhura n’uwitwa Twahirwa Oswald akamutwara, yagera imbere agashyiramo uwitwa Nsengiyumva Gilbert, nyuma akaza kumenya ko bari bafitanye ikibazo cy’ideni, ko rero atari abashimuse nk’uko uburanira Umujyi wa Kigali abivugaga. Yabajijwe niba hari icyo apfa n’abakozi bakora mu Kigo cya “Kigali Rehabilitation Transit Center”, avuga ko ntacyo bapfa uretse ko ibyo bavuze ataribyo.

[17] Me Musirimu Jean Claude uburanira Ndakengerwa Gasana Aimable we avuga ko kugeza ubu uwo yunganira yirukanwe mu buryo bunyuranyije n’amategeko, kuko ikosa cyangwa amakosa Umujyi wa Kigali washingiyeho umwirukana atigeze ayakora nk’uko byemejwe na Komisiyo yo kurwanya akarengane y’Umujyi wa Kigali ku wa 11/12/2015, ndeste n’Inama Njyanama idasanzwe y’Umujyi wa Kigali yateranye tariki ya 13/12/2015 ikaba aribyo yemeje.

[18] Avuga ko ikosa Umujyi wa Kigali uvuga ko Ndakengerwa Gasana Aimable yakoze ryo kugerageza gukoresha abakozi akuriye b’ikigo cya “Kigali Rehabilitation Transit Center” mu nyungu ze bwite, ritigeze ribaho kuko nta bimenyetso birimuhamba byigeze bigaragarizwa Urukiko, bityo ko ibyo Urukiko rwavuze mu gika cya 35 bidakwiye gufatwa nk’akarengane ahubwo ari imvugo y’Umucamanza. Avuga ko icyo Ndakengerwa Gasana Aimable yari akurikiranyweho atari

ukugerageza gufungira abantu mu Kigo mu nyungu ze bwite, ko ahubwo ari ikibazo cy'amasezerano y'abantu babiri, ko kandi abo bantu bishyuranye kuri Polisi dosiye igahita isozwa. Avuga ko n'iyi byaba ari icyaha atariwe wagombaga kubihanirwa, akaba ariyo mpamvu yarekuwe n'Ubushinjacyaha n'ibye byari byarafatiriwe akabihabwa.

[19] Me Musirimu Jean Claude yongeraho ko Ikigo gishyirwamo inzererezi (Kigali Rehabilitation Transit center) atari urwego rukorerwamo n'abasivile ku buryo gishobora kubarizwa mu nshingano za Ndakengerwa gasana Aimable, nk'uko uburanira Umujyi wa Kigali abivuga. Ku bijyanye n'abatangabuhamya babajijwe bakemeza ko uwo yunganira yashatse gufunga abantu, Me Musirimu Jean Claude avuga ko imvugo zabo zidakwiye gushingirwaho, kubera ko nta nyandiko-mvugo z'ibazwa ryabo zihari.

[20] Ndakengerwa Gasana Aimable avuga ko ku bijyanye no kuba yarubatse mu kajagari, nta nyubako yigeze yongeraho nyuma y'uko amaze guhabwa ingurane kubera impamvu y'umuhanda wari umaze kumusenyerera. Avuga ko amazu ahari, ari ayari ahasanzwe yashyizemo ibikoresho byavuye aho yimuwe. Me Musirimu Jean Claude umwunganira avuga ko umukozi ushinze iterambere mu Muji wa Kigali yasuye aho Ndakengerwa Gasana Aimable yubakaga, akemeza ko nta nzu yubatse nyuma yo guhabwa ingurane.

UKO URUKIKO RUBIBONA

[21] Ingingo ya 80 y'Itegeko N°86/2013 ryo ku wa 11/09/2013 rishyiraho Sitati Rusange y'Abakozi ba Leta iteganya ko nta gihano na kimwe gishobora gushyirwa mu bikorwa ikosa

ritarahama nyirubwite. Urukiko rurasanga rero hagomba kubanza gusuzumwa niba amakosa Umujyi wa Kigali washingiyeho wirukana burundu ku kazi Ndakengerwa Gasana Aimable, amuhama.

[22] Mu ibaruwa yo ku wa 29/01/2016, Umuyobozi w'Umujyi wa Kigali yanditse yirukana burundu ku kazi Ndakengerwa Gasana Aimable, hagaragaramo ko yirukaniwe amakosa atatu akurikira:

Kumara icyumweru kirenga atari ku kazi kandi atabanje kumenyesha abamukuriye, n'aho agarukiye ntamenyeshe mu nyandiko icyatumye atubahiriza inshingano ze;

Kugerageza gukoresha abakozi b'Ikigo cy'Umujyi wa Kigali (Kigali Rehabilitation Transit Center) mu nyungu ze bwite;

Kutubahiriza amategako n'amabwiriza ajyanye n'imiturire n'imyubakire mu Mujyi wa Kigali kandi yari mu bayobozi bakuru ku rwego rw'Umujyi wa Kigali rushinzwe kurwanya imyubakire mu buryo bw'akajagari.

Ku bijyanye n'ikosa ryo kumara icyumweru atari mu kazi kandi atamenyesheje abamukuriye

[23] Mu rubanza RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG, rwaciwe n'Urukiko Rukuru, igika cya 11, hagaragaramo ko Ndakengerwa Gasana Aimable yafunzwe na Polisi tariki ya 04/09/2015, akarekurwa by'agateganyo ku wa 11/09/2015. Muri raporo yakozwe n'Akanama gashinzwe gukurikirana amakosa y'abakozi mu kazi mu Mujyi wa Kigali ku wa 27/11/2015, bavuga ko Ndakengerwa Gasana Aimable yabagaragarije ubutumwa bugufi yandikiye Umuyobozi w'umujyi wa Kigali nawe akamusubiza,

amumenyesha ko nyuma yo gufungwa na Polisi “ku wa gatanu ushize”, yafunguwe by’agateganyo akazajya yitaba buri wa gatanu.

[24] Urukiko rurasanga ikigaragara mu bimaze kuvugwa, ari uko iminsi irindwi Ndakengerwa Gasana Aimable yabuze ku kazi (kuva ku wa 04/09/2015 kugera ku wa 11/09/2015), ari nabwo yari yafunzwe n’Urwego rwa Polisi, kandi akaba yarahise abimenyesha ubuyobozi bumukuriye akimara kurekurwa. Urukiko rurasanga rero, iryo kosa ritamuhama, kuko atari kubasha kujya ku kazi kandi afunzwe n’urwego rubifitiye ububasha.

Ku bijyanye n’ikosa ryo kugerageza gukoresha abakozi b’Ikigo cy’Umujyi wa Kigali kitwa “Kigali Rehabilitation Transit Center”(RTC) mu nyungu ze bwite

[25] Mu ibaruwa yirukana Ndakengerwa Gasana Aimable hagaragaramo ko yatwaye umuturage mu modoka akamugeza muri iki Kigo, agasaba abakozi bacyo ko bamufungira uwo muntu amwita igisambo. Abo bakozi bavuganye cyangwa babonanye na Ndakengerwa Gasana Aimable, bumviswe n’abagize Akanama gashinzwe gukurikirana amakosa y’abakozi mu kazi mu Mujyi wa Kigali, batanga ubuhamya bugaragara muri raporo yakozwe ku wa 27/11/2015, isinywaho n’abagize Akanama bose.

[26] Abakozi b’Ikigo RTC babajijwe bagera kuri bane, barimo na Komanda ukiyobora, bose bahuriye ku kuba Ndakengerwa Gasana Aimable yarabasabye kumufungira umuntu bari kumwe mu modoka ye, avuga ko ari igisambo, ariko bakamwangira. Ibyo uburanira Ndakengerwa Gasana Aimable avuga ko nta cyemeza ko imvugo zigaragara muri iyo raporo ari izabo, ngo kuko nta

nyandikomvugo y'ibazwa bashyizeho umukono, Urukiko rurasanga nta shingiro byahabwa kuko nta mpamvu yagaragaje yatuma abantu 6 basinye raporo y' Akanama gashinzwe gukurikirana amakosa y'abakozi mu kazi mu Mujyi wa Kigali babeshya.

[27] Mu bimenyetso Ndakengerwa Gasana Aimable atanga agaragaza ko atakoze iryo kosa, harimo inyandiko y'inyemezabwishyu hagati ya Nsengiyumva Gilbert na Twahirwa Oswald (uyu akaba ariwe Ndakengerwa Gasana Aimable aregwa ko yagerageje gufungira muri RTC). Iyo nyandiko igaragaza ko Nsengiyumva Gilbert yishyuye Twahirwa Oswald amafaranga 400.000 y'indishyi, Urukiko rukaba rusanga ntacyo yafasha muri uru rubanza kuko, uretse no kuba idasobanura impamvu y'izo ndishyi, ntikuraho ikosa Ndakengerwa Gasana Aimable yirukaniwe.

[28] Ibyo Ndakengerwa Gasana Aimable avuga ko Ubushinjacyaha bwamukurikiranye kubera iyo nyandiko y'inyemezabwishyu, nyuma bugasanga ari ibibazo mbonezamubano bukamurekura, ngo kikaba ari ikindi kimenyetso ko nta kosa yakoze, Urukiko rurasanga nta shingiro byahabwa kuko icyaha ubushinjacyaha bwamukurikiranyeho ari icyo gutwara umuntu ku bw'urugomo, atari ubwishyu. Urukiko rurasanga kandi kuba iyo dosiye yarashyinguwe n'Ubushinjacyaha ntacyo byamumarira, kuko kuba umuntu adakurikiranywe mu rwego rw'inshinjabyaha, bidakuraho kuba yakurikiranwa mu rwego rw'akazi, hashingiwe ku biteganywa n'ingingo ya 78³ y'Itegeko N°86/2013 ryo ku wa 11/09/2013

³ *“The disciplinary sanction of a public servant shall be independent from criminal liability and punishment as provided by the criminal code to the extent that the same fault may cause both disciplinary procedure and criminal*

rishyiraho Sitati Rusange y'Abakozi ba Leta. Ibiteganywa n'iyi ngingo ninabyo bisobanurwa n'abahanga mu mategeko Georges Dupuis, Marie-Josée Guédon na Patrice Chretien⁴, bemeza ko ikosa umukozi akoze mu kazi rishobora gukurikiranwa mu rwego rw'akazi no mu rwego rw'inshinjabyaha.

[29] Ibindi bimenyetso Ndakengerwa Gasana Aimable atanga agaragaza ko atakoze ikosa ryo kugerageza gukoresha abakozi akuriye mu nyungu ze bwite, ni raporo ya Komisiyo yo kurwanya akarengane y'Umujyi wa Kigali yo ku wa 11/12/2015, hamwe n'imyanzuro y'inama idasanzwe y'Inama Njyanama y'Umujyi wa Kigali yateranye ku wa 13/12/2015. Raporo ya Komisiyo yo kurwanya akarengane ivuga ko inzego zakurikiranye Ndakengerwa Gasana Aimable ari nazo zatumye abura ku kazi zasanze nta kimuhama, Urukiko rukaba rusanga kuba inzego zamukurikiranyeho icyaha zarashyinguye dosiye bidakuraho

procedure/ La sanction disciplinaire est indépendante de la responsabilité pénale et de la répression prévue par la législation pénale à tel point qu'un même fait peut déclencher des poursuites disciplinaires et pénales ».

⁴ ***Une faute professionnelle d'un fonctionnaire peut entraîner, à la fois, une répression disciplinaire et une répression pénale. Dans les deux cas, il s'agit d'édicter une sanction en réponse à une faute. Il existe toutefois une réelle indépendance des deux procédures. L'autonomie de la répression disciplinaire tient à son lien avec l'exercice d'une fonction: la faute est fonctionnelle et la peine l'est aussi, alors que la répression pénale concerne tous les individus pour des faits qui ne sont pas liés à une fonction, et que la sanction pénale ne vise pas le coupable dans sa fonction mais dans sa liberté ou sa propriété. Pratiquement, la décision de l'autorité disciplinaire ne lie jamais le juge pénal: de nombreux agissements sont des fautes disciplinaires sans être, pour autant, des délits.***

De même, l'autorité disciplinaire n'est pas liée par la décision du juge pénal, sauf lorsque ce dernier s'est prononcé sur l'existence ou l'inexistence de certains faits: ses constatations matérielles s'imposent à l'autorité administrative » ; Georges DUPUIS, Marie-Josée GUÉDON, Patrice CHRETIEN, Droit Administratif, 10^{ème} Edition, Sirey, 2007, p. 381.

gukurikiranwaho amakosa mu rwego rw'akazi nk'uko byasobanuwe, iyi raporo ikaba rero ntacyo yafasha mu kugaragaza niba harakozwe cyangwa hatarakozwe ikosa mu rwego rw'akazi. Urukiko rurasanga Imyanzuro y'inama idasanzwe y'Inama Njyanama nayo ntacyo yafasha kuko ikivugwamo ari uko Inama Njyanama na Komite Nyobozi byabanza kuganira ku kibazo cya Ndakengerwa Gasana Aimable mu gushakisha igisubizo kimwe, hakaba nta cyemezo cyafashwe.

[30] Urukiko rurasanga kandi ibyo Ndakengerwa Gasana Aimable avuga ko atashoboraga gutanga amabwiriza mu Kigo cya RTC ngo kuko kitari mu nshingano ze, bitahabwa ishingiro, kuko hakurikijwe inyandiko igaragaza imiterere y'inzego z'imirimu mu Mujyi wa Kigali (Organizational Chart), iki Kigo kiri mu nzego z'imirimu yari akuriye nka "Director General of Social Development". Ndakengerwa Gasana Aimable kandi ntahakana kuba yaragiye ku Kigo cya RTC umunsi bivugwa ko yakoreyeho ikosa, ari kumwe na Twahirwa Oswald na nsengiyumva Gilbert mu modoka ye. Ibyo yabwiye Urukiko ko yari ajyanyweyo no gufata raporo y'akazi ihabwa abayobozi buri munsi, ku Muyobozi wungirije w'Ikigo, Urukiko rurasanga bitumvikana mu gihe we avuga ko ntaho ahurira n'icyo Kigo; ikindi kandi akaba yarashoboraga gusaba iyo raporo atagombye kwigirayo nk'Umuyobozi.

[31] Urukiko rurasanga nanone, ibyo uwunganira Ndakengerwa Gasana Aimable avuga ko kuba Umujyi wa Kigali waremeye kurangiza urubanza bishimangira ko nta makosa yakoze, nta shingiro byahabwa kuko gusubirishamo urubanza ku mpamvu z'akarengane bidahagarika irangiza ryarwo hashingiwe ku biteganywa n'ingingo ya 64, igika cya mbere, y'Itegeko N°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko.

[32] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga Ndakengerwa Gasana Aimable ahamwa n'ikosa ryo kugerageza gukoresha abakozi b'Ikigo cy'Umujyi wa Kigali kitwa "Kigali Rehabilitation Transit Center" (RTC) mu nyungu ze bwite.

Ku bijyanye n'ikosa ryo kutubahiriza amategeko n'amabwiriza ajyanye n'imiturire n' imyubakire mu Mujyi wa Kigali

[33] Mu nyandiko zigize dosiye harimo raporo yakozwe ku wa 24/11/2015, n'itsinda ryashyizweho n'Umujyi wa Kigali kugirango rikore ubugenzuzi ku nyubako iri mu kibanza No 385 ya Ndakengerwa Gasana Aimable. Muri iyo raporo, hagaragaramo ifoto y'inzu ntoya ifite imiryango ibiri ngo yubakishije ibikoresho bishaje, abagize itsinda bakaba barasabye Ndakengerwa Gasana Aimable kwerekana icyemezo cyo kubaka iyo inzu ivugwa ko ari iyo kubikamo ibikoresho, yaba atabifite agahita ayikuraho. Urukiko rurasanga abagize itsinda bataramaze niba iyo nzu yarubatswe nyuma y'uko Ndakengerwa Gasana Aimable yimurwa kubera inyungu rusange, cyangwa niba yari ihasanzwe igashyirwamo ibikoresho byavuye ku nzu zakorewe "expropriation" nk'uko uyu abiburanisha.

[34] Muri raporo yo ku wa 27/11/2015, y'Akanama gashinzwe gukurikirana amakosa y'abakozi mu kazi mu Mujyi wa Kigali, hagaragaramo ko uwitwa Muhinda Arhtur, umukozi ushinze ibijyanye n'imyubakire mu Karere ka Gasabo, yabwiye Akanama ko nta nzu Ndakengerwa Gasana Aimable yubatswe, ko ihari yari ihasanzwe mbere y'uko hakorwa "expropriation", ikaba ibitse ibikoresho by'inzu zahasenywe. Urukiko, rushingiye ku bikubiye muri raporo zimaze kuvugwa, rurasanga ikosa ryo kutubahiriza

amategeko n'amabwiriza ajyanye n'imiturire n'imyubakire mu Mujyi wa Kigali ridahama Ndakengerwa Gasana Aimable.

[35] Urukiko, rushingiye ku isesengura ryakozwe ku makosa yose uko ari atatu yarezwe Ndakengerwa Gasana Aimable, rurasanga ikosa rimuhama ari rimwe ryo kugerageza gukoresha abakozi b'Ikigo cy'Umujyi wa Kigali kitwa "Kigali Rehabilitation Transit Center" (RTC) mu nyungu ze bwite.

Kumenya niba igihano cyo kwirukanwa burundu ku kazi cyahawe Ndakengerwa Gasana Aimable cyari gikwiye kandi cyaratanzwe mu nzira zikurikije amategeko

[36] Me Cyubahiro Fiat uburanira Umujyi wa Kigali avuga ko mu guhana Ndakengerwa Gasana Aimable hashingiwe ku Iteka rya Perezida rigena ibihano ku bakozi ba Leta, no ku Itegeko Ngenga rigenga imyitwarire y'Abayobozi, kuko yari Umuyobozi Mukuru mu Mujyi wa Kigali. Avuga ko mu bika bya 35, 36 na 37 by'urubanza rusubirishwamo ku mpamvu z'akarengane, Urukiko Rukuru rwasanze Ndakengerwa Gasana Aimable yarahamwaga n'amakosa yo kugerageza gukoresha abakozi yari akuriye mu nyungu ze bwite, ariko rwanzura ruvuga ko yagombaga guhabwa igihano cyavuzwe n'Akanama gashinzwe gukurikirana amakosa mu kazi, aricyo cyo gukererezwa kuzamurwa mu ntera rushingiye ku ngingo ya 12 agace ka 5 y'Iteka rya Perezida N°65/01 ryo ku wa 4/3/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta, rwirengagije ko n'ubwo Akanama gashinzwe gukurikirana amakosa kari kabibonye gutyo, nta cyabuzaga Umuyobozi ufite ububasha bwo gutanga ibihano kubibona ukundi hashingiwe ku buremere bw'amakosa yari yakozwe.

[37] Me Cyubahiro Fiat avuga kandi ko ingingo ya 5 y'Iteka rya Perezida N°65/01 ryo ku wa 4/3/2014 ryavuzwe haruguru, iteganya ko bitewe n'uburemere bw'ikosa, umuyobozi ashobora gutanga igihano gisumba igiteganyijwe; naho ingingo ya 7 ikaba iteganya impamvu zongera uburemere bw'amakosa. Asobanura ko kubireba Ndakengerwa Gasana Aimable, uburemere bushingiye ku ruhurirane rw'amakosa yakoze, no kuba yarashatse gufunga umuntu mu buryo bunyuranyije n'amategeko, kandi yari Umuyobozi Mukuru ufite mu nshingano kureberera Ikigo yashatse gukoresha mu nyungu ze bwite. Me Cyubahiro Fiat avuga ko izi mpamvu zose zahaye ikosa uburemere bwatumye Ndakengerwa gasana Aimable ahabwa igihano cyo kwirukanwa burundu.

[38] Me Cyubahiro Fiat yongeraho ko Umuyobozi w'Umujyi wa Kigali yatanze igihano amaze kubona inama yatanzwe n'Akanama gashinzwe gukurikirana amakosa ku bihano byari bikwiye gutangwa, akaba yaranagishije inama Minisiteri ishinze abakozi ba Leta (MIFOTRA), nayo ikaba yaramushubije ko hakurikijwe uburemere bw'amakosa yakozwe, uwo mukozi akwiye kwirukanwa burundu. Avuga ko na Ndakengerwa Gasana Aimable yandikiye Komisiyo ishinze Abakozi ba Leta, imusubiza ko igihano yahawe gikurikije amategeko.

[39] Me Musirimu Jean Claude wunganira Ndakengerwa Gasana Aimable avuga ko Urukiko Rukuru rwagaragaje ko uwo yunganira atagombaga kwirukanwa, ahubwo ko yagombaga guhanishwa igihano giteganywa n'Iteka rya Perezida N°65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu ngingo yaryo ya 12, igika cya 2, n'ubwo we atemera iryo kosa

[40] Avuga kandi ko Umujyi wa Kigali ukoresha amategeko nabi, kuko uhura ku Iteka rya Perezida ryavuzwe haruguru mu gushaka impamvu zongera uburemere bw'icyaha, ariko mu guhana ugashingira ku Itegeko-Ngenga rigenga imyitwarire y'Abayobozi mu nzego za Leta. Yongeraho ko n'ubwo uwo yunganira atemera ko hari ikosa ryakozwe, igihano cyifujwe n'Akanama gashinzwe gukurikirana amakosa mu kazi cyo gukererezwa kuzamurwa aricyo cyagombaga gutangwa, nk'uko Urukiko Rukuru rwabyemeje.

UKO URUKIKO RUBIBONA

[41] Ingingo ya 98 y'Itegeko N°86/2013 ryo ku wa 11/09/2013 rishyiraho Sitati Rusange y'Abakozi ba Leta iteganya ko kwirukanwa burundu ku kazi ari icyemezo gifatwa mu nyandiko n'umuyobozi ubifitiye ububasha cyo kuvana burundu umukozi wa Leta mu bakozi ba Leta, bitewe n'ikosa rikomeye yakozwe. Iteganya kandi ko ikosa rikomeye rihanwa n'umuyobozi ubifitiye ububasha amaze kugisha inama Minisitiri.

[42] Ingingo ya 3 y'Itegeko rimaze kuvugwa isobanura ko ikosa rikomeye ari ikosa rikorwa hashingiwe ku buremere bw'icyakozwe, ikitakozwe cyangwa imyitwarire, uburyo byabayemo, ingaruka byateje mu butegetsi bwa Leta, kuri serivisi itangwa no ku bo serivisi igenerwa.

[43] Ikosa rikomeye rihanishwa ibihano byo mu rwego rwa kabiri, hashingiwe ku biteganywa n'ingingo ya 76 y'Itegeko N°86/2013 ryo ku wa 11/09/2013 ryavuzwe haruguru. Ingingo ya 81 y'iryo tegeko, isobanura ko umuyobozi ufite ububasha bwo gutanga ibihano byo mu rwego rwa kabiri, ari uwashyize umukozi mu mwanya, amaze kugisha inama Minisitiri. Minisitiri

uvugwa, ni Minisitiri ufite abakozi ba Leta mu nshingano ze, hakurikijwe ibiteganywa n’ingingo ya 3 y’Itegeko N°86/2013 ryavuzwe haruguru.

[44] Hashingiwe kuri ibi bisobanuro bitangwa n’Itegeko N°86/2013 ryo ku wa 11/09/2013 rishyiraho Sitati rusange y’abakozi ba Leta, kugirango umukozi wa Leta yirukanwe burundu ku kazi, agomba kuba ahamwa n’ikosa rikomeye. Mu kwemeza ko ikosa ryakozwe rikomeye, hakaba harebwa uburemere bw’icyakozwe, uburyo cyakozwemo, n’ingaruka zacyo. Kwirukanwa Burundu kandi ni kimwe mu bihano byo mu rwego rwa kabiri, bitangwa n’uwashyize umukozi mu mwanya kandi akabikora mu nyandiko, nyuma yo kugisha inama Minisitiri ufite abakozi ba Leta mu nshingano ze.

[45] Nk’uko byasobanuwe haruguru, Ndakengerwa Gasana Aimable ahamwa n’ikosa ryo kugerageza gukoresha abakozi b’Ikigo cy’Umujyi wa Kigali kitwa “Kigali Rehabilitation Transit Center” (RTC) mu nyungu ze bwite, abasaba kumufungira umuntu amwita igisambo. Itegeko Nshinga Igihugu kigenderaho, mu ngingo yaryo ya 13, riteganywa ko umuntu ari umunyagitinyiro kandi ari indahungabanywa. Ingingo ya 29 y’iri Tegeko nayo igashimangira ihame ry’uko umuntu afungwa ari uko yakoze icyaha giteganywa kandi gihanwa n’amategeko. Kuba Ndakengerwa Gasana Aimable yaragerageje gufungisha umuntu udafite icyaha aregwa n’inzego zibishinzwe, ahantu hatagenewe gufungira abantu, Urukiko rurasanga ari uguhohotera no guhungabanya umuntu hatitawe ku mahame amurengera, ashimangirwa n’Itegeko Nshinga rya Repubulika y’u Rwanda, bikaba ari ikosa rikomeye. Urukiko rurasanga kandi, kuba yarakoze iryo kosa ari umuyobozi ukuriye abandi, ugombye kubaha urugero akirinda ibikorwa byose bishobora

gusebya Leta nk'umukoresha we, ari impamvu yongera uburemere bw'ikosa.

[46] Hakurikijwe ibiteganywa n'ingingo ya 76 y'Itegeko N°86/2013 ryo ku wa 11/09/2013 ryavuzwe haruguru, ikosa rikomeye rihanishwa ibihano byo mu rwego rwa kabiri. Ibihano byo mu rwego rwa kabiri ku bakozi bagengwa n'iri Tegeko, bigizwe no gukererezwa kuzamurwa mu ntera, guhagarikwa ku kazi mu gihe kitarenze amezi atatu adahemberwa, no kwirukanwa burundu. Urukiko rurasanga Ndakengerwa Gasana Aimable yari mu bakozi bagengwa n'iri Tegeko nk'umukozi wa leta, bakanagengwa ariko by'umwihariko n'Itegeko Ngenga N°11/2013/OL ryo ku wa 11/09/2013 rihindura kandi ryuzuza itegeko ngenga N°61/2008 ryo ku wa 10/09/2008 rigenga imyitwarire y'abayobozi mu nzego za Leta, kubera umwanya yari ariho w'Umuyobozi Mukuru ushinze imibereho myiza. Ingingo ya 2 n'ya 3 z'iri Tegeko Ngenga ziteganyaga ko abayobozi bagengwa naryo barimo Abayobozi Bakuru (Director General) n'abandi bari kuri urwo rwego.

[47] Urukiko rurasanga, ibyo uwunganira Ndakengerwa Gasana Aimable avugaga ko icyo ikosa rimuhama yagombaga guhanishwa gukererezwa kuzamurwa mu ntera, nta shingiro byahabwaga kuko icyo gihano kitari mu biteganywa n'Itegeko Ngenga N°11/2013/OL ryo ku wa 11/09/2013 rigenga imyitwarire y'abayobozi mu nzego za Leta, kandi iri Tegeko Ngenga rikaba ariryo ryagombaga gukoreshwa hashingiwe ku ihame ry'amategeko rivugaga ko itegeko ryihariye riza mbere y'itegeko riri rusange (specialia generalibus derogant). Ibyo avugaga nanone ko hagombaga gukurikizwa inama yatanze n'Akanama gashinzwe gukurikirana amakosa y'abakozi b'Umujyi wa Kigali, katanze inama ko Ndakengerwa Gasana

Aimable akwiye guhabwa igihano cyo gukerereweza kuzamurwa mu ntera, Urukiko rurasanga nta shingiro bifite kuko icyemezo ntakuka kiba kigomba gufatwa n'Umuyobozi ufite ububasha bwo gutanga igihano.

[48] Hashingiwe ku biteganywa n'ingingo ya 20 y'Itegeko Ngenga rimaze kuvugwa, ibihano byo mu rwego rwa kabiri bihabwa abayobozi bahamwe n'ikosa rikomeye ni ukwirukanwa ku murimo, cyangwa kwirukanwa ku murimo impamvu igatangazwa mu binyamakuru iyo bifitiye rubanda akamaro. Urukiko rukaba rurasanga rero, Ndakengerwa Gasana Aimable yarahawe igihano kijyanye n'ikosa rikomeye rimuhama.

[49] Urukiko rurasanga kandi igihano cyo kwirukanwa burundu cyahawe Ndakengerwa Gasana Aimable cyaratanzwe mu nzira zikurikije amategeko, kuko cyatanzwe mu nyandiko n'Umuyobozi wamushyize mu mwanya ariwe Umuyobozi w'Umujyi wa Kigali hakurikijwe ibaruwa yo ku wa 30/10/2014, akaba ari nawe wamwirukanye burundu hakurikijwe ibaruwa yo ku wa 29/01/2016, kandi akaba yarabikoze amaze kugisha inama Minisitiri ufite abakozi ba Leta mu nshingano nk'uko bigaragazwa n'amabaruwa yo ku wa 11/12/2015⁵ no ku wa 27/01/2016⁶.

[50] Hashingiwe ku bisobanuro byose byatanzwe, Urukiko rurasanga Ndakengerwa Gasana Aimable yarakoze ikosa rikomeye ryo kugerageza gukoresha abakozi b'Ikigo cy'Umujyi wa Kigali kitwa "Kigali Rehabilitation Transit Center" (RTC) mu

⁵ Ibaruwa y'umuyobozi w'Umujyi wa Kigali igisha inama Minisitiri w'Abakozi ba Leta n'Umurimo ku mushinga w'ibihano.

⁶ Ibaruwa ya Minisitiri w'Abakozi ba Leta n'Umurimo itanga inama ku gihano cyo kwirukana burundu ku kazi Ndakengerwa Gasana Aimable.

nyungu ze bwite, igihano yahawe cyo kwirukanwa burundu ku kazi kikaba aricyo cyari gikwiye kandi kikaba cyaratanzwe mu nzira zikurikije amategeko, akaba rero yarirukanywe mu buryo bukurikije amategeko. Kubera iyo mpamvu, Urukiko rurasanga atari ngombwa kwirirwa rusuzuma ibirebana n'indishyi yari yasabye.

III. ICYEMEZO CY'URUKIKO

[51] Rwemeje ko ikirego cyatanzwe n'Umujyi wa Kigali gisaba gusubirishamo ku mpamvu z'akarengane urubanza RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 21/09/2017, rugakosorwa n'urubanza RS/RECT/RAD00003/2017/HC/KIG ku wa 07/11/2017, gifite ishingiro;

[52] Rwemeje ko Ndakengerwa Gasana Aimable yirukanywe mu buryo bukurikije amategeko;

[53] Rwemeje ko icyemezo cyo kwirukana Ndakengerwa Gasana Aimable kigumyeho;

[54] Rwemeje ko imikirize y'urubanza RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 21/09/2017, rugakosorwa n'urubanza RS/RECT/RAD 00003/2017/HC/KIG ku wa 07/11/2017, ihindutse kuri byose;

[55] Rutegetse ko amagarama y'ibyakoze mu rubanza aherera ku Isanduku ya Leta.

URUBANZA NSHINJABYAHA

UBUSHINJACYAHA v. Col. BYABAGAMBA N'ABANDI

[Rwanda URUKIKO RW'UBUJURIRE – RPA00001/2019/CA
(Mukanyundo, P.J.,Kanyange na Rugabirwa,J.) 12 Nyakanga
2019]

Amategeko mpanabyaha – Igihano cy'igifungo – Iyicarubozo – Kuba ufunze afungiwe ahantu ha wenyine, ubwabyo ntibyakwitwa iyicarubozo mu gihe uburyo afunzwemo bwubahirije uburenganzira bw'ikiremamuntu.

Ubwishingizi bw'indwara – Ubwishingizi bw'indwara bukoreshwa ku muntu ufunze – Ku byerekeye ubwishingizi bukoreshwa mu kwivuzwa icyangombwa si ubwoko bw'ubwishingizi bukoreshwa ahubwo icyangombwa ni ukumenya niba ufunze avurwa uko bikwiye, kuba hadakoreshe ubwishingizi ufunzwe yifuza gukoresha, ubwabyo ntibyafatwa nk' impamvu yo gufungurwa by'agateganyo.

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko Rukuru rwa Gisirikare, abaregwa aribo Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara na Rtd. Sgt Kabayiza François bakurikiranywe n'Ubushinjacyaha bwa Gisirikare ibyaha binyuranye.

Urwo rukiko rwabahamije ibyaha baregwa uretse Rtd. Sgt Kabayiza utarahamijwe icyaha cyo gutunga imbunda mu buryo bunyuranije n'amategeko maze urwo Rukiko ruhanisha Col. Byabagamba igihano cy'igifungo cy'imyaka 21, ruhanisha Rtd Brig.Gen. Rusagara igihano cy'igifungo cy'imyaka 20 naho Rtd. Sgt Kabayiza ahanishwa igihano cy'igifungo cy'imyaka 5.

Abaregwa ntibishimiye imikirize y'urubanza maze bajuririra Urukiko rw'Ikirenga, nyuma y'ivugururwa ry'amategako urubanza rwabo rwaje kwimurirwa mu Rukiko rw'Ubujurire maze muri uru rukiko Ubushinjacyaha bwa Gisirikare butanga inzitizi yo kutakira ubujurire bw'abaregwa buvuga ko butakozwe nk'uko amategako abiteganyaga. Abaregwa nabo batanze inzitizi basaba ko bafungurwa by'agateganyo bakaburana bari hanzu, bagaragaza ko bafite ikibazo cy'uburwayi, bavugaga kandi ko batishimiye uburyo bavuzwa kubera ko ngo batabonana n'abaganga igihe babishakiye kandi ko Gereza itabemerera gukoresha ubwishingizi bw'indwara bari basanganywe bwa MMI. Bakomeza bavuga ko nta banga ribaho hagati yabo na muganga mu gihe basuzumwa kuko baba bahagarikiwe n'umusirikare wa *military police*.

Ubushinjacyaha bwa Gisirikare bwo buvuga ko kuba abaregwa barwaye, igisubizo kuri ubwo burwayi bwabo kitaba kubafungura, kuko iyi mpamvu idateganywa n'amategako kugira ngo ishingirweho hemezwa ko umuntu arekurwa by'agateganyo. Ku byerekeranye no kwivuka, buvuga ko abaregwa bivuka uko bikwiye, ko hari n'umuganga wa *Military Police* ubakurikirana umunsi ku wundi, naho kuvuka ko muganga abasuzuma hari umusirikare ucunga umutekano, igihari nuko baherekezwa kwa muganga, kandi bakavurwa uko bikwiye.

Indi mpamvu abaregwa batanga basaba gufungurwa by'agateganyo, buvuga ko bafunzwe mu buryo bunyuranyije n'amategako buvuga ko bafungirwe ahantu hatategatswe n'Urukiko kuko ubu bafungirwe muri Military Police i Kanombe aho kuba muri Gereza ya Gisirikare ya Mulindi, bongeraho ko bafungirwe mu kato, ko baba ahantu hafunganywe cyane kandi hashyizwe za cameras, bakaba nta muntu n'umwe bashobora kubonana nawe uretse umusirikare ubazanira ibiryo, ikindi kibazo buvuga bafite nuko nta burenganzira bafite bwo gusurwa

n'imiryango yabo bityo rero bakaba babona nta mpamvu nimwe ituma batabemerera gusurwa nk'uko bimeze ku bandi bagororwa.

Ubushinjacya bwa Gisirikare bwo buvuga ko akato abaregwa bavuga ko bafungiyemo nta kuri kurimo kuko nk'uko Urukiko rwabyiboneye mu gihe cy'iperereza, baryama ahantu hisanzuye, ko aho bafungiyeye hatabangamiye ikiremhamuntu kuko bafite ibyangombwa byose ndetse bemererwa ko imiryango yabo iboherereza amafaranga bakagura icyo bashatse, ko ariko batagomba kwirengagiza ko iyo ufunzwe hari ibyo udashobora kubona nk'uko ubyifuza, busaba Urukiko ko rwazita kucyarujyanye igihe rwari rugiyeye gukora iperereza kuko ibindi abagororwa bavugaga ntaho bihuriye n'urubanza.

Ubushinjacyaha bwa Gisirikare bukomeza buvuga ko kuba hari cameras zashyizwe aho bafungiyeye nta kibazo kibirimo, kuko ziriya cameras zashyizweho mu rwego rwo gucungira abafungwa umutekano kandi ko ibihugu byose bifite amikoro bibikora, naho kuba badafungiyeye muri Gereza ya Gisirikare ya Mulindi, Ubushinjacyaha buvuga ko bafungiyeye muri extension ya Gereza ya Gisirikare ya Mulindi (i Kanombe) bikaba byaratewe n'urwego barimo (rank bafite) ari nayo mpamvu aho Col. Byabagamba na Rtd Brig.Gen. Rusagara bafungiyeye hatandukanye naho Rtd Sgt Kabayiza afungiyeye kuko we afungiyeye mu nzu ya rusange.

Incamate y'icyemezo: 1. Kuba ufunze afungiyeye ahantu ha wenyine, ubwabyo ntibyakwitwa icyarubozo mu gihe uburyo afunzweho bwubahirije uburenganzira bw'ikiremhamuntu.

2. Kuba abaregwa batabonera muganga igihe bamushakiyeye si ikibazo gihoraho cyangwa cy'umwihariko kuri bo kubera ko bafunzwe, ahubwo bagisangiyeye n'abandi badafunzwe kuko ahanini biterwa n'ubucye bw'abaganga b'inzobere igihugu gifite,

bityo iyo mpamvu ikaba itatuma abaregwa bafungurwa by'abyagatenyo.

3. Ku byerekeye ubwishingizi bukoreshwa mu kwivuzwa icyangombwa si ubwoko bw'ubwishingizi bukoreshwa ahubwo icyangombwa ni ukumenya niba ufunze avurwa uko bikwiye, kuba hadakoreshwa ubwishingizi ufunzwe yifuza gukoresha, ubwabyo ntibyafatwa nk' impamvu yo gufungurwa by'agateganyo.

4. Uburenganzira kw'ibanga ryo kwivuzwa ku muntu ufunzwe bugomba guhuzwa n'inshingano y'Ubuyobozi bwa Gereza yo kurinda buri gihe cyose abo bashinzwe, ariko bigakorwa mu buryo nta kibangamiye ikindi.

5. Abafungwa bagomba kwemererwa, ariko babigenzurwamo, gushyikirana n'imiryango yabo n'iy'inshuti zabo zashobora kwizerwa, buri gihe runaka byaba mu nyandiko cyangwa se byaba gusurwa, bityo abaregwa bakaba bagomba gusubizwa uburenganzira bwo gusurwa n'imiryango yabo.

**Inzitizi zisaba gufungurwa by'agateganyo nta shingiro
zifite;
Urubanza ruzakomeza mu mizi.**

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu mwaka wa 2003 ryavugururwe mu mwaka wa 2015, ingingo ya 14 (1), (2), iya 21 n'iya 22.

Itegeko ngenga N°01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'Amategeko, ingingo ya 176.

Itangazo Mpuzamahanga ku burenganzira bwa muntu ryo ku wa 10/12/1948, Ingingo ya 25, igika cya mbere.

Amasezerano Mpuzamahanga mu by'imbonezamubano na politiki yo ku wa 19/12/1966 yashyizweho umukono n'u Rwanda ku wa 12/02/1975, ingingo ya 7, n'iya 10, igika cya mbere.

Amasezerano Mpuzamahanga ajyanye n'uburenganzira mu by'ubukungu, imibereho y'abantu n'umuco yo ku wa 19/12/1966 u Rwanda rwemeje ku wa 12/02/1975, ingingo ya 12

Amasezerano Nyafurika y'uburenganzira bwa muntu n'abaturage yo ku wa 27/06/1981, u Rwanda rwashyizeho umukono ku wa 11/11/1981, rukayemeza ku wa 17/05/1983, ingingo ya 16, igika cya mbere.

Amabwiriza Mpuzamahanga agenga uburyo abagororwa bafatwamo yitiriwe Mandela (Nelson Mandela rules), Ingingo ya 10, iya 37 n'iya 44

Imanza zifashishijwe:

Bagosora v. the Prosecutor, ICTR, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File Corrigendum, 2 September 2009.

Prosecutor v. Rašić, ICTY, Case No. IT-98-32/1-R77.2-A, Judgement, 16 November 2012.

Karemera et al. v. the Prosecutor, ICTR, Case No. ICTR-98-44-A, Decision on Mathiew Ngirumpatse's Motion for Provisional Release, 11 December 2012.

Rhode v. Denmark, European Court of Human rights, application N°10263/83

Ramirez Sanchez v. France, European Court of Human rights, application N°59450/00.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rukuru rwa Gisirikare, Ubushinjacyaha bwa Gisirikare burega Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara na Rtd. Sgt Kabayiza François ibyaha byavuzwe haruguru, urwo Rukiko ruca urubanza N° RP0006/014/HCM ku wa 31/03/2016, rwemeza ko icyaha cyo guteza imvururu cyangwa imidugararo, icyaha cyo gukora igikorwa kigamije gusebya Igihugu cyangwa Leta uri umuyobozi, icyaha cyo guhisha nkana ibintu byagombye gufasha kugenza icyaha cy'ubugome cyangwa gikomeye, gutahura ibimenyetso cyangwa guhana abakoze icyaha n'icyaha cyo gusuzugura ibendera ry'Igihugu, bihama Col. Tom Byabagamba akaba agomba kubihanirwa, ko icyaha cyo guteza imvururu cyangwa imidugararo muri rubanda, icyaha cyo gukora igikorwa kigamije gusebya Leta ari umuyobozi n'icyaha cyo gutunga imbunda mu buryo bunyuranyije n'amatgeko bihama Rtd Brig Gen Frank Kanyambo Rusagara akaba agomba kubihanirwa, rwemeza kandi ko icyaha cyo gutunga imbunda mu buryo bunyuranyije n'amategeko kidahama Rtd Sgt Kabayiza François akaba atagomba kugihanirwa, rwemeza ko ahamwa n'icyaha cyo guhisha nkana ibintu byagombye gufasha kugenza icyaha cy'ubugome cyangwa gikomeye, gutahura ibimenyetso cyangwa guhana abakoze icyaha, akaba agomba kugihanirwa.

[2] Ururukiko rwahanishije Col. Tom Byabagamba igifungo cy'imyaka 21, rumuhanisha kandi igihano cy'ingereka cyo kunyagwa amapeti ya Gisirikare, ruhanisha Rtd Brig Gen Frank Kanyambo Rusagara igifungo cy'imyaka 20, naho Rtd Sgt Kabayiza François rumuhanisha igifungo cy'imyaka 5 n'ihazabu ya 500.000 Frw.

[3] Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara na Rtd Sgt Kabayiza François, bajuririye Urukiko Rw'Ikirenga. Nyuma y'ivugururwa ry'amategako, urubanza rwimuriwe mu Rukiko rw'Ubujurire hashingiwe ku ngingo ya 105 y'Itegeko N°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'Inkiko, ikirego gihabwa N° RPA00001/2019/CA.

[4] Mu Rukiko rw'Ubujurire, Ubushinjacyaha bwa Gisirikare bwatanze inzitizi yo kutakira ubujurire bw'abaregwa kuko butakozwe nk'uko amategako abiteganyaga. Col. Byabagamba Tom, Rtd Brig. Gen Frank Kanyambo Rusagara na Rtd Sgt Kabayiza François nabo batanze inzitizi basaba ko bafungurwa by'agateganyo bakaburana bari hanze, bavuga ko ifungurwa ry'agateganyo basaba barishingira ku ngingo ya 105, igika cya mbere n'icya kabiri, y'Itegeko N°30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha.

[5] Urubanza rwaburanishijwe mu ruhamwe ku wa 22/05/2019, Col. Byabagamba Tom yunganiwe na Me Musore Gakunzi Valery, Rtd Brig. Gen. Kanyambo Rusagara Frank yunganiwe na Me Buhuru Pierre Célestin, naho Rtd Sgt Kabayiza François yunganiwe na Munyandatwa S. Nkuba Milton, Ubushinjacyaha bwa Gisirikare buhagarariwe na Cpt Nzakamwita Faustin, habanza gusuzumwa inzitizi zatanze, ababuranyi bamenyeshwa ko icyemezo ku nzitizi kizasomwa ku wa 31/05/2019.

[6] Ku wa 31/05/2019, Urukiko rw'Ubujurire rwaciye urubanza rubanziriza urundi ku nzitizi yo kutakira ikirego cy'ubujurire yatanze n'Ubushinjacyaha maze rwemeza ko iyo nzitizi nta shingiro ifite. Ku birebana n'inzitizi yatanze n'abajuriye, Urukiko rwemeje ko mbere yo kuyifataho icyemezo,

ruzabanza gukora iperereza rukagera aho bafungiyeye, ko iburanisha rizasubukurwa ku wa 13/06/2019.

[7] Iperereza ryashyizwe ku wa 05/06/2019, saa tatu n'igice za mu gitondo, uwo munsu ugeze, rikakorwa hari abaregwa, ababunganira mu mategeko hamwe n'Ubushinjacyaha.

[8] Ku itariki ya 13/06/2019, urubanza rwarasubukwye, abaregwa bajuriye ndetse n'Ubushinjacyaha, bunganiwe banahagarariwe nka mbere, buri ruhande ruhabwa umwanya kugira ngo rugire icyo ruvuye ku byavuye mu iperereza.

[9] Ku wa 28/06/2019, Urukiko rwafashe icyemezo gitegeka Ubuyobozi bwa Gereza ya Military Police, Rtd Sgt Kabayiza François afungiyemo cyo kumujyana kwa muganga usanzwe amuvura, kugira ngo amusuzume, akore raporo azageza ku rukiko yerekana uko ubuzima bwe buhagaze muri iki gihe kandi anerekane niba uburwayi bwe busaba ko avurirwa mu bitaro cyangwa ko yajya yivuye ataha kuri Gereza nk'uko bisanzwe.

[10] Iburanisha ryasubukwye ku wa 08/07/2019, abaregwa bitabye kandi bunganiwe nk'uko bisanzwe, Ubushinjacyaha buhagarariwe ndetse na Dr Nahayo wakoze raporo ashingiye kuri dosiye yo kwa muganga (electronic medical file) ya Rtd Sgt Kabayiza François, yitabye Urukiko kugira ngo agire ibisobanuro atanga kuri icyo raporo yakozwe.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

II.1. Kumenya niba Col Tom Byabagamba, Rtd Brig. Gen Frank Kanyambo Rusagara na Rtd Sgt Kabayiza François

bafungurwa by'agateganyo kubera ko batavuzwa mu buryo bukwiye

[11] Col.Tom Byabagamba avuga ko imwe mu mpamvu zituma asaba gufungurwa by'agateganyo, ari uko afite ikibazo cy'uburwayi bw'umugongo bumukomereye, ko umuti we ari siporo yo kugenda ndetse no koga, ko rero ibyo bitashoboka agumye aho afunguye kuko ari hato cyane kandi ko aho kogera ho atahabona. Rtd Brig. Gen Frank Kanyambo Rusagara we avuga ko arwaye indwara y'izabukuru yitwa prostate imukomereye, ko ariko afunguwe yashobora kwivuza neza ikaba yakworoha.

[12] Me Munyandatwa S.Nkuba Milton wunganira Rtd. Sgt. Kabayiza François avuga ko kuva agitangira kuburanishwa, atigeze ahwema kugaragariza Inkiko ikibazo cy'ubuzima bw'umukiliya bubangamiye n'uburwayi avuga ko bwatewe n'iyicarubozo yakorewe akimara gufatwa aho avuga ko ryamuteye uburwayi bw'imitsi ndetse n'ubujyanye n'umuvuduko w'amaraso uri hejuru cyane (180) (hypertension), ibyo bikaba byaraje byiyongera ku bundi burwayi bw'umwijima wa Hepathite B yari asanganywe. Avuga ko yivuriza muri CARAES i Ndera no muri RMH, akaba anywa ibinini 25 ku munsu. Asaba ko yafungurwa kuko n'igihano yakatiwe kigiye kurangira, ariko ko kuba aho afunguye nta bwinyagamburiro buhari bitewe n'uko aba mu buryamo bwa rusange, bikaba bimubangamiye nk'umurwayi urembye, ndetse n'Ubuyobozi bwa Gereza bukaba bwaranze ko ajya kurwarira mu bitaro nk'uko Muganga yabimwandikiye.

[13] Urukiko rwategetse ko Rtd Sgt Kabayiza François yazashyikirizwa Umuganga kugira ngo azamusuzume maze akore raporo yerekana uko ubuzima bwe bumeze muri iki gihe.

Ubushinjacyaha bwavuze ko Rtd Sgt Kabayiza François yanze ko bamujyana kuri RMH, nyirubwite we akavuga ko atanze, ko ahubwo yashakaga ko bamujyana ku Bitaro bya CARAES i Ndera kuko aribo basanzwe bamuvura. Dr Ndahayo Ernest wasuzumye dosiye ye ibitse mu buryo bw'ikoranabuhanga, yasobanuriye mu Rukiko ibikubiye muri raporo yakoze, avuga ko ubwe atasuzumye Kabayiza ariko yagendeye kuri raporo z'abandi baganga bamuvuye mbere. Yavuze ko Kabayiza afite uburwayi butuma igice gihera cy'amaguru n'icy'amaboko bigira intege nkeya, ko afite uburwayi bwa Hepatite B ndetse n'umuvuduko w'amaraso uri hejuru (hypertension), yagaragaje kandi ko izo ndwara arwaye ari izisanzwe ndetse ko bitamubuza kugira icyo akora keretse ari igisaba ingufu, ko ibimenyetso agaragaza bitatuma ajya mu bitaro keretse bibaye ngombwa ko aterwa imiti yo mu mutsi kandi nabwo yakoroherwa agataha.

[14] Abaregwa bose bavuga ko batishimiye uburyo bavuzwa kubera ko batabonana n'Abaganga igihe babishakiye kuko gereza hari ubwo ivuga ngo nta modoka ihari, ubundi ntibabajyane mu buryo bwihuse kandi Muganga hari ibyo aba yategetse bikenewe gusuzumwa, ko ikindi kibazo bafite mu kwivuzwa ni uko akenshi bahabwa abaganga batari inzobere zifite ubumenyi bujyanye n'indwara barwaye (specialists).

[15] Kuri icyo kibazo cyo kwivuzwa, Rtd Brig. Gen Frank Kanyambo Rusagara na Me Buhuru Pierre Célestin umwunganira, Rtd Sgt Kabayiza François na Me Munyandatwa S.Nkuba Milton, umwunganira, bavuga ko bafunguwe by'agateganyo, babasha kwivuzwa mu bwisanzure kuko uko bikorwa ubu, bivuzwa bahagarikiwe n'umusirikare wa Military Police, ku buryo batabona uko bavugana na Muganga ku burwayi bwabo, ko ibanga rigomba kuba hagati ya Muganga n'umurwayi

ntaryo bagirirwa bikaba bibangamiye ubuzima bwabo. Bakaba basaba ko mu gihe Urukiko rwasanga bagomba gukomeza gufungwa, rwategeka ko bafungwa mu buryo butabangamiye ubuzima bwabo kandi bakavuzwa uko bikwiye.

[16] Rtd Brig Gen Frank Kanyambo Rusagara avuga na none ko afite ubwishingizi bwa MMI ariko ko yimwe uburenganzira bwo kubukoresha, ko ahubwo bamujyanye mu bwishingizi bwa Mutuelle de santé kandi hari imiti atabona bitewe n'ubwo bwishingizi ndetse no kuba yasuzumwa n'abaganga b'inzobere. Iki kibazo agihuriyeho na Col Tom Byabagamba uvuga ko cyagakwiye gusuzumwa mu buryo bugari kuko atumva impamvu umuntu ufunzwe yari umusirikare, yahagarikirwa ubwishingizi bwe muri MMI igihe cyose atarahamwa n'icyaha burundu, kuko igihe akiburana, aba agifatwa nk'umwere ku byaha uregwa(presumption of innocence) nk'uko biteganywa n'Itegeko Nshinga rya Repubulika y'u Rwanda.

[17] Me Munyandatwa S.Nkuba Milton avuga ko ingingo ya 14 n'ya 15 z'Itegeko Nshinga rya Repubulika y'u Rwanda ziteganya ko umuntu afite uburenganzira bwo kuvurwa, kandi ko umuntu ari umunyagitinyiro, ko ariko Rtd Sgt Kabayiza François we yahohotewe akimara gufatwa ari nabyo byamuviriyemo uburwayi afite, akaba asaba Urukiko ko rwamurekura by'agateganyo kugirango ashobore gushaka Umuganga umuvura kandi yihitiyemo.

[18] Uhagarariye Ubushinjacyaha avuga ko kuba abaregwa barwaye(Rtd Brig Gen Frank Kanyambo Rusagara uvuga ko arwaye prostate), asanga igisubizo kuri ubwo burwayi bwabo kitaba kubafungura, kuko iyi mpamvu idateganywa n'amategeko kugira ngo ishingirweho hemezwa ko umuntu arekurwa by'agateganyo. Avuga ko ifungurwa ryabo ry'agateganyo basaba

uru Rukiko bashingira ku ngingo ya 105 y'Itegeko N°30/2013 ryo ku wa 24/5/2013 ryavuzwe haruguru, ataribyo, ko ahubwo bagombye kurisaba bashingira ku ngingo ya 184 y'iryo tegeko, iteganya ko umucamanza wo mu Rukiko rwajuririwe ashobora gusabwa gufungura umuntu by'agateganyo.

[19] Ku byerekeranye no kwivuzwa, avuga ko abaregwa bivuzwa uko bikwiye, ko hari n'umuganga wa Military Police ubakurikirana umunsi ku wundi, naho kuvuga ko muganga abasuzuma hari umusirikare ucunga umutekano, Urukiko ntabyo rwabonye gusa igihari nuko baherekezwa kwa muganga, kandi bakavurwa uko bikwiye.

UKO URUKIKO RUBIBONA

[20] Urukiko rurasanga, kugira ngo umuntu ufunzwe akurikiranyweho icyaha afungurwe by'agateganyo, agomba kwerekana impamvu zidasanzwe zituma arekurwa, Urukiko rusuzuma ishingiro ryazo harebwe umwihariko w'ikibazo cy'uregwa.

[21] Ingingo ya 21 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu mwaka wa 2003 ryavugururwe mu mwaka wa 2015, iteganya ko "Abanyarwanda bese bafite uburenganzira bwo kugira ubuzima bwiza", naho ingingo ya 22 yaryo ikavuga ko "Umuntu wese afite uburenganzira bwo kuba ahantu hatunganye kandi hadafite ingaruka mbi ku buzima."

[22] Ingingo ya 16, igika cya mbere, y'Amasezerano Nyafurika y'uburenganzira bwa muntu n'abaturage yo ku wa 27/06/1981, u Rwanda rwashyizeho umukono ku wa 11/11/1981,

rukayemeza ku wa 17/05/1983¹, iteganya ko buri muntu afite uburenganzira ku buzima bwiza bw'umubiri no mu mutwe ashobora kwigezaho. Igika cya kabiri giteganya ko Ibihugu byasinye aya masezerano byiyemeje gufata ingamba za ngombwa kugirango zirengere ubuzima bw'abaturage no kubafasha kwivuza igihe barwaye.

[23] Ingingo ya 10, igika cya mbere, y'Amasezerano Mpuzamahanga mu by'imbonezamubano na politiki yo ku wa 19/12/1966 yashyizweho umukono n'u Rwanda ku wa 12/02/1975² ateganya ko buri muntu wese ufunzwe agomba gufatwa neza kandi hubahirijwe agaciro gakwiye ikiremwa muntu. Naho ingingo ya 12 y'Amasezerano Mpuzamahanga ajyanye n'uburenganzira mu by'ubukungu, imibereho y'abantu n'umuco yo ku wa 19/12/1966 u Rwanda rwemeje ku wa 12/02/1975³ ivuga ko Ibihugu byayashyizeho umukono byemeye ko buri muntu afite uburenganzira bwo kugira ubuzima bwiza bw'umubiri no mu mutwe ashobora kwigezaho. Igika cya 2, agace ka d) k'iyi ngingo kongeraho ko mu ngamba ibihugu bigomba gufata kugirango ubwo burenganzira bwubahirizwe harimo no gushyiraho uburyo bwihariye butuma buri wese abasha kuvurwa kandi akabona ubwishingizi cyangwa ubufasha bwo kuvurwa mu gihe arwaye.

[24] Ingingo ya 25, igika cya mbere, y'Itangazo Mpuzamahanga ku burenganzira bwa muntu ryo ku wa 10/12/1948, iteganya ko buri muntu wese afite uburenganzira ku mibereho myiza kugirango yite ku buzima bwe

¹ Reba Itegeko N° 10/1983 ryo ku wa 17/05/1983.

² Reba Itegeko-Teka N° 85/75 ryo ku wa 12/02/1975.

³ Reba Itegeko-Teka N° 85/75 ryo ku wa 12/02/1975.

n'ubw'umuryango we, abona ibiryo, imyambaro, icumbi, ubuvuzi n'ibindi bikenewe.

[25] Ku bijyanye n'uburenganzira bw'abagororwa ku buvuzi, Inama Rusange y'Umuryango w'Abibumbye yabifasheho umwanzuro A/RES/70/175 ku wa 17/12/2015 mu rwego rwo kuvugurura Amabwiriza Rusange ajyanye n'uburyo bwo kwita ku bagororwa azwi cyane nka Nelson Mandela Rules, yemeza ko mu byo abagororwa bemerewe harimo ibi bikurikira:

a) ko kuvurwa kw'abagororwa ari inshingano ya Leta, bagahabwa serivisi nk'iz'abandi baturage kandi mu buryo bwikurikiranya (ibwiriza rya 24);

b) ko buri gereza igomba kuba ifite serivisi z'ubuvuzi zitandukanye, zifite abakozi babifitiye ubumenyi, zikurikirana ubuzima bw'abagororwa hitawe cyane cyane ku bakeneye ubuvuzi bwihariye (ibwiriza rya 25);

c) ko serivisi zo kwa muganga zishobora kubika dosiye z'abagororwa barwaye, abagororwa bagahabwa dosiye zabo igihe bazikeneye cyangwa zikaba zasuzumwa n'undi muntu, umugororwa yifuza (ibwiriza rya 26)

d) ko mu gihe bikenewe, umugororwa ashobora kugezwa kwa muganga vuba kandi agahabwa ubuvuzi butanzwe n'inzobere hagendewe ku mwihariko wa buri ndwara (ibwiriza rya 27).

[26] Ku bijyanye n'ifungurwa ry'agateganyo kubera impamvu zidasanzwe z'uburwayi, mu gihe urubanza rw'ubujurire rukiburanishwa, Urukiko Mpuzamahanga Mpanabyaha rwashyiriweho u Rwanda, n'Urukiko Mpuzamahanga Mpanabyaha rwashyiriweho icyahoze cyitwa Yugoslaviya, zahuriye ku kwemeza ko nta hame runaka ririhwo inkiko zikwiye

kugenderaho, ko ahubwo uko byagenda kose, bene izo mpamvu zisuzumwa hitawe ku mwihariko wa buri rubanza.⁴ Izo nkiko zasobanuye kandi ko impamvu zidasanzwe zituma uregwa afungurwa by'agateganyo zigomba kuba zishingiye ku bisobanuro bifatika (an acute justification) bijyanye no kugira ubumuntu.⁵

[27] Urukiko rurasanga, uburenganzira ku buzima buteganywa n'ingingo ya 21 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu mwaka wa 2003 ryavugururwe mu mwaka wa 2015, bushyirwa mu bikorwa hakurikijwe ingamba Leta yafashe kugirango abaturage bashobore kuvurwa kandi babone ubufasha bwatuma bavurwa igihe barwaye, iyi nshingano akaba ariyo u Rwanda rwiyejeje mu ngingo 16, igika cya mbere, y'Amasezerano Nyafurika y'uburenganzira bwa muntu n'abaturage yo ku wa 27/06/1981 no mu ngingo ya 12 y'Amasezerano Mpuzamahanga ajyanye n'uburenganzira mu by'ubukungu, imibireho y'abantu n'umuco yo ku wa 19/12/1966, gushyira mu bikorwa izi nshingano akaba ari uguhesha agaciro ikiremwa muntu kabone nubwo yaba ari umuntu ufunzwe,

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

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

nk'uko biteganywa n'ingingo ya 10, igika cya mbere y'Amasezerano Mpuzamahanga mu by'imbenezamubano na politiki yo ku wa 19/12/1966 yibukijwe haruguru.

[28] Urukiko rurasanga, buri muntu afite uburenganzira ku mibereho myiza kugirango yite ku buzima bwe, ingingo ya 25, igika cya mbere, y'Itangazo Mpuzamahanga ku burenganzira bwa muntu ryo ku wa 10/12/1948, ikaba ivuga ko kubera iyo mpamvu umuntu wese ahabwa amahirwe ku ifunguro, ubuvuzi, imyambaro n'ibindi.

[29] Ku bijyanye n'ikibazo cyo kwivuka muri rusange, biragoye kumenya niba abagororwa bavurwa uko bikwiye, ariko na none byose biterwa n'intera ubuvuzi buba bugezeho mu gihugu. Kugira ngo umugororwa yivuze biramugora koko kuko nta baganga bahagije Gereza ziba zifite kandi kwivuka bikaba bihenze, ariko ku birebana n'uru rubanza, nubwo abaregwa bavugaga ko batishimiye uburyo ubuyobozi bwa gereza bubavuzi, ntibahakana ko bavurwa, kuko nk'inbandiko yo kwa muganga Rtd Brig Gen Frank Kanyambo Rusagara yeretse uru Rukiko igaragaza ko yasuzumwe kandi yakurikiranywe n'Umuganga w'inzobere ubifitiye ubumenyi. Nanone kandi, inbandiko zo kwa Muganga, Sgt Kabayiza François yivurizaho, zeretswe uru Rukiko, zigaragara ko nawe avurirwa mu bitaro bishoboye nka RMH, CARAES i Ndera ndetse ko hari n'ibizamini yandikiwe kujya gukorera kuri Mediheal. Ikibazo bahura nacyo cyo kutabonera Muganga igihe bamushakije, Urukiko rwasanze atari ikibazo gihoraho cyangwa se cy'umwihariko kuri bo kubera ko bafunzwe, ko ahubwo bagisangiye n'abandi baturage badafunzwe kuko ahanini biterwa n'ubucye bw'abaganga b'inzobere Igihugu gifite, ibi rero bikaba bitaba impamvu yatuma bafungurwa by'agateganyo mu gihe Ubuyobozi bwa Gereza

bukurikiranira hafi ubuzima bwabo hakaba hari n'Umuganga ubasura hafi buri munsu areba ibibazo bafite, byaba ngombwa akabasabira rendez-vous ku muganga w'inzobere bifuzwa kwivurizaho.

[30] Ku kibazo cya Rtd Brig Gen Frank Kanyambo Rusagara uvuye ko ibanga ryo kwivuka riba hagati y'umurwayi na Muganga ritubahirizwa iyo arimo asuzumwa, Urukiko rurasanga n'ubwo umuntu afite uburenganzira bwo gusuzumwa na muganga nta wundi uhari, byumvikana na none ko umuntu ufungurwa atafatwa nk'umuturage usanzwe, kumuherekeza aho asuzumirwa bikaba byakumvikana ko bikorwa mu rwego rwo kumucungira umutekano, uwa rubanda n'uwo Igihugu, ubwo burenganzira kw'ibanga ryo kwivuka bukaba bugomba guhuzwa n'inshingano y'Ubuyobozi bwa Gereza yo kurinda buri gihe cyose abo bashinzwe, ariko bigakorwa mu buryo nta kibangamiye ikindi.

[31] Ku kibazo cya Col Tom Byabagamba na Rtd Brig Gen Frank Kanyambo Rusagara cy'uko Ubuyobozi bwa Gereza butabemerera kwivuka bakoresheje ubwishingizi bari basanganywe bwa MMI, Urukiko rurasanga icyangombwa atari ubwoko bw'ubwishingizi bakoresha bavurwa ahubwo ari ukumenya niba bavurwa uko bikwiye, imbere y'uru Rukiko bakaba baremeye ko bavurirwa mu Bitaro bya Gisirikare bya Kanombe, bimwe mu bitaro bikomeye mu gihugu, bifite inzobere zifite inararibonye mu kuvura indwara zitandukanye, kuba bavurwa hakoreshejwe Mutuelles de Santé akaba ataribwo byaba impamvu idasanzwe yatuma bafungurwa by'agateganyo kuko iyo bibaye ngombwa, ubuyobozi bwa Gereza bubavuka aho basuzumwa n'abaganga babifitiye ubushobozi.

[32] Ku kibazo cya Rtd Sgt Kabayiza François uvuga ko afite uburwayi butatuma akomeza gufungwa, Urukiko rurasanga mu cyemezo cyarwo cyo ku wa 28/06/2019, rwarifuje kumenya uko ubuzima bwe bwifashe muri iki gihe, niba ari ngombwa ko avurwa ari mu bitaro, ariko nk'uko byagaragariye urukiko igihe cy'iburanisha ryo ku wa 08/07/2019, ntiyatumye icyo cyemezo gishyirwa mu bikorwa, kuko uwagombaga kumujoyana kwa muganga kugira ngo asuzumwe, yabwiye urukiko ko yanze ko ajyanwa gusuzumirwa mu bitaro bya Kanombe, ko ashaka gusuzumirwa mu bitaro by'i Ndera, kandi na Rtd Sgt Kabayiza François ubwe akaba yemera ko yagaragaje icyo cyifuzo, mu gihe nyamara iyo ajyanwa gusuzumirwa mu bitaro bya Kanombe, aribyo byashoboraga kumwohereza ahandi igihe byari gusanga ari ngombwa.

[33] Byongeye kandi, nk'uko byavuzwe no ku bandi, Rtd Sgt Kabayiza François akurikiranwa n'abaganga, ndetse ubwo Urukiko rwakoraga iperereza aho afungiyey, rwiboneye dosiye ye yo kwa muganga, igaragaza ko anashakirwa rendez-vous ku baganga b'inzobere, ndetse no mu iburanisha ry'ubushize, akaba yararetse Urukiko ko afite *rendez-vous* yo gukoresha ibizamini kuri MEDIHEAL.

[34] Urukiko rurasanga imvugo z'abaregwa ko batishimiye uburyo bavurwa, nta bimenyetso bifatika byerekana ko uko bikorwa bibangamiye ubuzima bwabo, kuko Leta ibavuze nk'uko ibikora ku bandi baturage bose, ndetse bo bakaba bafite akarusho kuko hari Umuganga wa Gereza ukurikiranira hafi ubuzima bwabo, igihe umuturage usanzwe utari mu gihano atari igihe cyose abona amahirwe n'amikoro yo gusuzumwa n'inzobere uko abishatse. Byongeye kandi, igihe Urukiko rwajyaga mu iperereza, abaregwa barubwiye ko Gereza yemerera imiryango

yabo kubashakira imiti ihenze igihe ikiguzi cyayo kirenze amikoro ya Leta, kuba rero ibiteganywa n'Itegeko Nshinga, amategeko n'Amasezerano Mpuzamahanga ndetse n'amabwiriza y'Umuryango w'Abibumbye byavuzwe haruguru, ku birebana n'uburyo imfungwa n'abagororwa bavuzwa, byubahirizwa uko bikwiye, iyi mpamvu yo gusaba gufungurwa kubera kutavurwa mu buryo bukwiye nta shingiro ifite.

II.2. Kumenya niba Col Tom Byabagamba, Rtd Brig. Gen Frank Kanyambo Rusagara na Rtd Sgt Kabayiza François bafungurwa by'agateganyo kubera ko bafunzwe mu buryo bunyuranyije n'amategeko

[35] Me Buhuru Pierre Célestin wunganira Rtd Brig Gen Frank Kanyambo Rusagara, Me Musore Gakunzi Valery wunganira Col Tom Byabagamba na Me Munyandatwa S.Nkuba Milton, umwunganira, avuga ko Rtd. Sgt Kabayiza François bavuga ko abo bunganira bafungiwe ahantu hatategetswe n'Urukiko kuko ubu bafungiye muri Military Police i Kanombe aho kuba muri Gereza ya Gisirikare ya Mulindi, ko ibyo Ubushinjacyaha buvuga ko Military Police i Kanombe ari extension ya Gereza ya Gisirikare ya Mulindi atari byo kuko nta teka ryigeze riyishyiraho, kandi ko niyo yaba ari extension, Military Police itagomba gukuraho icyemezo cy'Urukiko Rukuru rwa Gisirikare rwategetse aho bafungirwa . Bavuga ko aho abagororwa bafungirwa n'uburyo bafungwamo, bigengwa n'amategeko aho kuba imicungire ya Gereza (management) nkuko Uhagarariye Ubushinjacyaha bwa Gisirikare abivuga, kuko byaba ari ukwirengagiza ibiteganywa n'Itegeko Nshinga by'uko ibyemezo by'inkiko bigomba gukurikizwa na buri wese.

[36] Me Buhuru Pierre Célestin na Me Musore Gakunzi Valery bavuga kandi ko abo bunganira bafungiye mu kato, ko

baba ahantu hafunganye cyane kandi bakaba nta muntu n'umwe bashobora kubonana nawe uretse umusirikare ubazanira ibiryo, ko aho bafungiye ubuyobozi bwa Military Police bwabanje kuhakora basiba imyanya yose yatuma bumva amajwi y'abandi bantu cyangwa bakabonana, yemwe n'abandi bahafungiye, ibyo bikaba bimaze igihe kija kungana n'imyaka itanu (5), ko rero basanga abaregwa barimo gukorerwa iyicarubozo ryo mu mutwe no mu bitekerezo (torture psychologique) kandi bibuzwa n'ingingo ya 6 y'amahame agenga abafungwa.

[37] Col.Tom Byabagamba asobanura ko impamvu avuga ko afungiye mu kato, ari ko aba wenyine akaba nta muntu ahura nawe (human contact), ko adashobora no kubonana na Rtd Brig Gen Frank Kanyambo Rusagara bavuga ko ari icyitso cye. Avuga ko yibaza impamvu afunzwe muri ubwo buryo nyamara ibyaha aregwa bidahanishwa gufungirwa mu kato, ibi we akaba abifata nk'iyicarubozo bakorerwa kuko amabwiriza mpuzamahanga azwi ku izina rya Mandela Rules abibuza, cyane cyane ingingo yayo ya 43 iteganya ko akato kadafite aho kagarukiye mu gihe kabujijwe, kuko n'igihe byaba ngombwa ko bagashyiramo umufungwa, bidakwiye ko birenga iminsi 15, naho ingingo ya 41(2) y'amabwiriza amaze kugvugwa ikavuga ko umuntu ufungiwe mu kato agomba kumenyeshwa impamvu afashwe gutyo, ko rero we kugeza ubu atigeze amenyeshwa impamvu yashyizwe muri ako kato.

[38] Akomeza asobanura ko n'ubushakashatsi bw'abahanga bwagaragaje ko iyo umuntu amaze amasaha 22 ku munsu adahuye n'undi muntu ngo baganire amubwire icyo ashatse ndetse anamubaze icyo ashatse atariwe ubyishakiye, bikamara iminsi 15 ikurikiranye, biba byabaye akato kandi ko banabonye ko akato

(social isolation) gashobora kwangiza umuntu mu mutwe kurusha ibiyobyabwenge.

[39] Col. Tom Byabagamba avuga ko asaba Urukiko ko rwamufungura by'agateganyo agakurikiranwa ari hanze, kuko ingingo ya 45 ya Mandela Rules ibuza ko umufungwa ashirwa mu kato mu gihe afite ikibazo cyo mu mutwe, cyangwa cy'ubuzima muri rusange, nitewe n'uko ako kato katuma icyo kibazo kiyongera, ku bimurena akaba yerekanye ko afite ikibazo cy'ubuzima butameze neza.

[40] Me Buhuru Pierre Célestin na Rtd Brig Gen Frank Kanyambo Rusagara, bavuga ko ikindi kimubangamiye, ari uko nta bwisanzure afite mu buzima bwe bwite (privacy) kuko hari za cameras zitunze ku cyumba cye ; ikindi kibazo gikomeye afite kikaba kijyanye nuko ntahateganyirijwe imikino n'indi myidagaduro ku mfungwa (aha barinubira ko badakora siporo).

[41] Abajuriye uko ari batatu bahuriye kandi ku kibazom kijyanye n'uko badahabwa uburenganzira bwo kubonana na ba Avoka babo iyo atari igihe cyo kuburana, ko hari hashize imyaka itatu batabonana nabo, kuko baherukanaga igihe urubanza rwabo rwasomwaga mu Rukiko Rukuru rwa Gisirikare ku itariki ya 30/03/2016, aba Avoka bakaba bongeye gukomorerwa ejo bundi mu kwa Gicurasi 2019, ari uko urubanza rw'ubujurire ruhamagawe, nyamara nta mpamvu nimwe yatuma Avoka abuzwa gusura uwo yunganira nk'uko biteganywa n'amahame mpuzamahanga ajyanye n'uburyo abantu bafunze bagomba gufatwa. Rtd Brig Gen Frank Kanyambo Rusagara na Col Tom Byabagamba binubira na none kuba batabemerera gusurwa n'imiryango yabo, mu gihe ingingo ya 43 (3) ya Mandela Rules, ivuga ko mu bihano byose umufungwa ashobora guhabwa kubera imyitwarire ye, hatabamo kwamburwa uburenganzira bwo

gusurwa n'umuryango we; bityo rero bakaba babona nta mpamvu nimwe ituma batabemerera gusurwa n'imiryango yabo nk'uko bimeze ku bandi bagororwa.

[42] Me Buhuru Pierre Célestin avuga ko ibisobanuro byatanzwe na Col. Kayigire Joseph, uyobora Military Police, igihe Urukiko rwajyaga mu iperereza aho abaregwa bafungiye, ko impamvu ituma uwo yunganira adasurwa ari ukubera imyitwarire ye, asanga imvugo ye itahabwa ishingiro, kuko iyo myitwarire itigeze igaragazwa. Byongeye kandi, ingingo ya 18 y'Amahame agenga abafungwa itanga uburenganzira k'umufungwa bwo gusurwa na Avoka we ; ariko ko n'ubwo igihe urubanza rwari rumaze gushyirwa kuri gahunda y'iburanisha y'Urukiko baje guha abaregwa uburenganzira bwo gusurwa na ba Avoka babo, Urukiko rwabonye ko aho baganirira nta bwisanzure buhari, kuko bavugana hari abandi bantu, mu gihe nyamara nta muntu wemerewe kumviriza ibyo Avoka aganira n'umukiliya we.

[43] Me Musore Gakunzi Valery, ashimangira ibyavuzwe na mugenzi we haruguru, avuga ko umuntu uregwa afite uburenganzira ahabwa n'amategeko bwo kunganirwa, igihe cyose akiburana kabone n'iyo urubanza rwaba rwararangiye rwarabaye ndakuka, ko kuba baramubujije gusura umukiliya we mu gihe cy'imyaka itatu (3) yose nta kundi byakwitwa uretse gufungirwa mu kato kavugwa mu masezerano mpuzamahanga ku iyicarubozo (voir PIDCP) no mu mabwiriza mpuzamahanga yitiriwe Nelson Mandela azwi ku izina rya Mandela Rules. Asoza asaba ko uwo yunganira afungurwa by'agateganyo kuko impungenge zo kwotsa igitutu abatangabuhamya Inkiko zari zifite, nta zigihari bitewe nuko yamaze gucurwa urubanza ku

rwego rwa mbere, ko ahubwo bibaye ngombwa yategekwa ibyo yakubahiriza mu gihe ari hanze.

[44] Me Musore Gakunzi Valery avuga ko imiburanire yabo yose igamije gushimangira ubusabe bwabo bunganira bwo gufungurwa by'agateganyo igihe urubanza ruriko kuburanishwa mu mizi, ko n'ubwo nawe yemera ko gufungwa ari ukwamburwa uburenganzira bwo kujya aho ushaka, asanga nta gufungwa neza kubaho kwatuma umuntu adahura n'abandi, ko ibyo Ubushinjacyaha buvuga ko aho Col.Tom Byabagamba na bagenzi be bari bahashyizwe kubera icyubahiro cyabo, abona atari byo kuko hari abandi ba Colonnels bafungiyeye ku Mulindi.

[45] Uhagarariye Ubushinjacyaha, Cpt.Faustin Nzakamwita, avuga ko akato abaregwa bavuga ko bafungiyemo nta kuri kurimo kuko nk'uko Urukiko rwabyiboneye, Rtd Brig Gen Frank Kanyambo Rusagara aryama ahantu hisanzuye, hari igitanda, umufariso, inzitiramibu, frigo, kandi muri icyo cyumba harimo ubwiherero, amazi n'amashanyarazi, ikindi kandi inzugi n'amadirishya birahagije ndetse birafungurwa. Ibyo kuvuga ko atabona aho akorera siporo, nabyo sibyo kuko imbere y'icyumba cye hari imbuga nini yatemberamo kandi nk'uko byagaragaye igihe cy'iperereza, abari aho basanze afite akagare ka siporo yanyonga, bityo rero, ibyo bavuga ko akorerwa iyicarubozo sibyo kandi umwunganizi we azi icyo iyicarubozo ari cyo, akaba yibaza niba koko gufungirwa ahantu ha wenyine ari iyicarubozo kandi nk'uko byagaragaye, aho bafungiyeye ntihabangamiye ikirenwamuntu kuko bafite ibyangombwa byose ndetse bemererwa ko imiryango yabo iboherereza amafaranga bakagura icyo bashatse, ko ariko batagomba kwirengagiza ko iyo ufunzwe hari ibyo udashobora kubona nk'uko ubyifuza, asaba Urukiko ko

rwazita kucyarujiyanye igihe rwari rugiye gukora iperereza kuko ibindi abagororwa bavuga ntaho bihuriye n'urubanza.

[46] Ku bijyanye no kuba hari inzugi n'amadirishya byishwe cyangwa hari cameras zashyizwe aho bafungiye, uhagarariye Ubushinjacyaha bwa Gisirikare abona nta kibazo kibirimo, kuko ziriya cameras zashyizweho mu rwego rwo gucungira abafungwa umutekano kandi ko ibihugu byose bifite amikoro bibikora. Ku bijyanye no kuba bafungiye muri extension ya Gereza ya Gisirikare ya Mulindi, avuga ko byatewe n'urwego barimo (rank bafite) ari nayo mpamvu aho bafungiye hatandukanye naho Rtd Sgt Kabayiza François afungiye kuko we afungiye mu nzu ya rusange. Yongeraho ko ikindi cyatumye nka Rtd Brig Gen Frank Kanyambo Rusagara avanwa muri Gereza ya Gisirikare ya Mulindi agashyirwa aho ari ubu, byatewe n'imyitwarire ye no kugirango adakomeza gushyira umwuka mubi mubandi bafungwa kuko yari yatangiye kubikora akiri muri Gereza ya Gisirikare ya Mukindi.

[47] Ubushinjacyaha buvuga ko ibi bibazo byose bijyanye n'aho abaregwa bafungiye, uburyo bafunzwe, isurwa ryabo, kwivuzwa n'ibindi bigomba guharirwa Management ya Gereza bafungiyemo, ko Ubuyobozi bwayo bujya gufata icyemezo cyo kugira ibintu bimwe na bimwe buba bubabujije mu gihe runaka, byatewe n'imyifatire yabo. Ku mvugo y'abaregwa ko badasurwa n'imiryango yabo, avuga ko nko kuri Col Tom Byabagamba, hari inyandiko yafatanywe zifitanye isano n'icyaha bakurikiranyweho, ko ariko nibahindura imyitwarire yabo bazakomorerwa bikongera gukorwa nk'uko mbere byari bimeze.

[48] Ubushinjacyaha buvuga ko Rtd Sgt Kabayiza François yavanywe muri Gereza ya Gisirikare ya Mulindi ajyanywa gufungirwa muri Military Police i Kanombe kubera inyungu ze,

kuko Ubuyobozi bwa Gereza bwagiraga ngo bumwegereze Umuganga w'inzobere muri Rwanda Military Hospital i Kanombe, ko ariko adashaka kuhaba yabisaba Military Police igahita imusubiza ku Mulindi, asoza avuga ko kubijyanye n'uburenganzira bwo gusurwa, Kabayiza we nta kibazo afite kuko umuryango we umusura.

[49] Ubushinjacyaha buvuga ko ibyo abaregwa bavuga ko bafungiyeye mu kato ataribyo, kuko Gereza ya Gisirikare yubahiriza amategeko nk'ayandi magereza, ko nta hantu igira ho gufungira mu kato kuko nta abahanishijwe icyo gihano ifite, naho ibyo bavuga ko bafungiyeye mu Kigo cya Gisirikare nabyo nta kuri kurimo, kukoaho bafungiyeye i Kanombe ari ishami (extension) rya Gereza ya Gisirikare ya Mulindi.

[50] Ubushinjacyaha buvuga ko ibyo Avoka wa Rtd Brig Gen Frank Kanyambo Rusagara avuga ko bumvirizwa iyo aganira n'umukiliya we, nta bimenyetso abitangira uretse kubivuga gusa, bityo bikaba nta gaciro byahabwa.

UKO URUKIKO RUBIBONA

[51] Ingingo ya 14 (1) niya (2) y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavugururwe muri 2015, iteganya ko “umuntu wese afite uburenganzira bwo kudahunzabanywa ku mubiri no mu mutwe. Ntawe ushobora kwicwa urubozo, gukorerwa ibibabaza umubiri cyangwa ngo akorerwe ibikorwa by'ubugome, ibikorwa bidakwiye umuntu cyangwa bimutesha agaciro”.

[52] Ingingo ya 22 y'Itegeko Nshinga rimaze kuvugwa, iteganya ko “umuntu wese afite uburenganzira bwo kuba ahantu hatunganye kandi hadafite ingaruka mbi ku buzima”.

[53] Ingingo ya 44 y'Amabwiriza Mpuzamahanga agenga uburyo abagororwa bafatwamo yitiriwe Mandela (Nelson Mandela rules) iteganya ko “akato (solitary confinement) ari ugufunga umugororwa igihe kingana n'amasaha 22 cyangwa umunsi wose nta muntu avugana nawe; gufungirwa mu kato bimara igihe kirekire ntibigomba kurenza iminsi 15 ikurikiranye⁶”.

[54] Ingingo ya 10 y'amahame agenga imicungire ya gereza riteganya ko “muri buri cyumba umunyururu agomba kuryamamo nijoro bigomba kuba bihuje n'amategeko y'isuku, hakurikijwe imiterere y'ibihe, nk'ibyerekereye ibipimo by'umwuka ukenerwa, ubuso ntaregwa bugenewe buri munyururu, urumuri, ubushyuhe n'umwuka.”

[55] Urukiko rurasanga, ibyo Rtd Brig Gen Frank Kanyambo Rusagara, Col Tom Byabagamba na Rtd Sgt Kabayiza François bavuga ko bafunzwe mu buryo bunyuranyije n'amategeko kubera ko bafungiye ahantu hanyuranye n'aho icyemezo cy'Urukiko cyategetse, ko aho kuba muri Gereza ya Gisirikare ya Mulindi, ahubwo bafungiye muri Military Police, nta shingiro bikwiye guhabwa, kuko kuba barindwa na Military Police ataricyo kigaragaza ko bafungiye muri kasho y'Ubugenacyaha bwa Gisirikare mu gihe uwo mutwe ushinze no kurinda abakatiwe

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

n'inkiko za gisirikare, ahubwo ubuyobozi bwa Military Police basobanuriye urukiko ko aho bafungiye ari ishami rya Gereza ya Gisirikare ya Mulindi, naho ku birebana n'amazu cyangwa ibyumba bagomba gufungirwamo, Urukiko rurasanga ari ikibazo kirebana n'imirere ya Gereza kuko ariyo ifite ububasha bwo gushyira umugororwa aho ibona ari ngombwa ikurikije ubuzima bwe, imimerere ye bwite, imyifatire ye, ubuzima yabayemo, icyubahiro cye, uburemere bw'ibyaha akurikiranyweho n'ibindi, ibi bigakorwa hubahirijwe uburenganzira bwe bw'ibanze n'agaciro gahabwa ikiremhamuntu, bityo akaba nta bimenyetso batanga byerekana ko aho bafungiye hanyuranyije n'amategeko kuko Ubuyobozi bwa Military Police n'Ubushinjacyaha basobanuye ko ari ishami rya Gereza ya Gisirikare ya Mulindi kandi ko bahabazanye kubera impamvu zumvikana zirimo nko kwegereza Sgt Kabayiza François abaganga ba RMH, bamukurikirana naho abandira hakaba harimo ikibazo cy'imyitwarire kuri Rtd Brig Gen Frank Kanyambo Rusagara bangaga ko akomeza gushyira umwuka mubi mu bandi bafungwa, bityo akaba ntaho bashingira bavuga ko bafungiwe ahantu hanyuranyije n'amategeko.

[56] Ku bivugwa na Rtd Brig Gen Frank Kanyambo Rusagara na Col Tom Byabagamba ko bafungiye mu kato kandi ko ibyo bisobanuye ko barimo gukorerwa iyicarubozo, ingingo ya 176 y'Itegeko N°01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'Amategeko ahana iteganya ko "Iyicarubozo ari igikorwa icyo ari cyo cyose kibabaza umubiri cyangwa ubwenge, cya kinyamaswa, gikoranywe ubugome cyangwa gitesha agaciro, gikozwe ku muntu ku bushake hagamijwe kumushakaho inkuru cyangwa ukwemera, kuryozwa igikorwa yakoze ubwe cyangwa akekweho kuba yakoze, cyangwa yakozwe n'undi uwo ariwe wese, hagamijwe kumutera ubwoba cyangwa kumushyiraho

agahato cyangwa kubikorera undi n'izindi mpamvu zose zishingiye ku ivangura iryo ari ryo ryose”.

[57] Ingingo ya 7 y'Amasezerano Mpuzamahanga mu bya Politiki n'Imbonezamubano yo ku wa 10/12/1966 yemejwe n'u Rwanda, iteganya ko “umuntu atagomba kwicwa urubozo cyangwa ngo agirirwe ibikorwa bibabaza umubiri, naho ingingo ya 10 (1) yayo igateganya ko buri muntu wese agomba gufatwa neza kandi hubahirijwe agaciro gakwiye ikiremhamuntu.”

[58] Ikibazo cy'abagororwa bafungirwa ahabonyine, cyagiye kivugwaho n'abantu benshi, nk'Akanama k'uburenganzira bwa muntu mu Muryango w'Abibumbye, gasesengura urubanza rwa Vuolanne vs. Finland, wari wareze Igihugu cye avuga ko yafungirwe ahawenyine, iyo Komite yasanze hagomba gusuzumwa umwihariko wa buri rubanza kugira ngo hemezwe niba kuba umuntu ufungirwe ahawenyine (contextual appraisal) bisobanuye ko aba yakorewe icyarubozo. Iyi Komite yemeje ko Vuolanne nta kato yashyizwemo kuko icyumba afungirwemo gifite ubuso bwa 2x3 metres, gifite amadirishya, uburiri, intebe, ameza n'umuriro w'amashanyarazi, kandi ko yemererwaga kujya hanze gukora imyitozo ngororamubiri no gufata umwuka wo hanze n'ubwo atari yemerewe kuvugana n'abandi bagororwa⁷.

[59] Uyu ni nawo murongo wafashwe n'Urukiko rw'i Burayi ku burenganzira bw'ikiremhamuntu, aho mu rubanza rwa Rohde v. Denmark rwemeje ko n'ubwo Rhode afungirwe ahawenyine, nta icyarubozo akorerwa kuko afungirwe mu cyumba gifite ubuso bungana na m² 6, kandi akaba yemerewe kumva radiyo, kureba televiziyo, gukora imyitozo hanze mu gihe kingana n'isaha imwe

⁷Communication N^o 265/1987, A. Vuolanne v. Finland (view adopted on 7 April 1989), in UN doc. GAOR, A/44/40, p.249, para.2.2 and p.250, para.2.6.

buri muni, ko yemerewe gutira ibitabo mu isomero rya gereza, ko avuzwa, ko avugana n'abakozi ba gereza harimo n'abamurinda, rimwe na rimwe n'abapolisi bamukoresha ibazwa cyangwa igihe yagiye mu Rukiko kuburana, ndetse ko yemerewe gusurwa n'umuryango we n'ubwo bavugana abamurinda bari hafi aho⁸ ; ibi kandi binahura n'ibyemejwe n'urwo Rukiko mu rubanza rwa Ramirez Sanchez v. France, rwaburanishijwe n'abacamanza 17, bagasanga kuba umugororwa afite ibyangombwa by'ibanze umuntu akenera mu cyumba ariyemurira, afite umwanya uhagije, ubwihereho, aho kwiyuhagira, afite ibitabo n'ibinyamakuru asoma,televiziyo na radiyo ndetse akagira aho atemberera hafi y'icyumba cye, aba afunzwe mu buryo bukwiye ikiremamwamuntu, ko kuba umuntu afungirwe ahawenyine ubwabyo bitafatwa nk'igikorwa kidakwiye ikiremamwamuntu. Basanze kandi kuba uwo mufungwa yaraturwaga rimwe mu cyumweru n'umupadiri na rimwe mu kwezi n'Abavoka be, atari afunzwe mu buryo bw'akato kuzuye (isolement social total) ko akato yarimo katari kari igice (isolement partiel).⁹

⁸ European commission of human right, R v. Denmark, application N°10263/83, PP.153-154: Commission concluded that having regard to the particular circumstances of the confinement in question , it was not of such of such severity as to fall within the scope of article 3 of the convention, because the applicant was kept in cell of approximately six square metres, that he was allowed to listen radio and watch television , he allowed exercise in open air for one hour every day , he could borrow books from prison library , he was in daily contact with the prison staff several times a day and sometimes also with other persons in connection with police interrogations and the courts hearings, he was under medical observation , and finally , that although he was subjected to restrictions with regard to visits during this period, he was allowed to receive controlled visits by his family.

⁹ Cour européenne des droits de l'homme, requête N° 59450/00: l'exclusion d'un détenu de la collectivité carcérale ne constitue pas en elle-même une sorte de traitement inhumain.

[60] Mu gusesengura urundi rubanza rw'uwitwa Gomez de Voituret v. Uruguay, Akanama k'uburenganzira bwa muntu mu Muryango w'Abibumbye kabonye ariko, ko kuba yari afungiyeye ahawenyine mu gihe kingana n'amezi arindwi (7) ari iyicarubozo kuko mu cyumba cye nta rumuri rw'izuba rwahageraga (natural light), ibyo bikaba bitubahirije agaciro gakwiye ikiremnamuntu, bityo kemeza ko ingingo ya 10 (1) y'Amasezerano Mpuzamahanga mu bya Politiki n'Imbonezambano¹⁰ itubahirijwe.

[61] Urukiko rurasanga, hashingiwe ku byemezo byafashwe mu nkiko z'ahandi zavuzwe haruguru, ndetse no ku isesengura ryakozwe n'Akanama k'uburenganzira bwa muntu mu Muryango w'Abibumbye ku manza zaciwe n'izo nkiko hasuzumwa ibirego by'abafungwa bavugaga ko kuba bafungiyeye mu cyumba cya bonyine ari iyicarubozo bakorerwa, hagomba kurebwa niba ibyo Rtd Brig Gen Frank Kanyambo Rusagara na Col Tom Byabagamba bavugaga ko kuba buri wese afungiyeye mu cyumba cya wenyine (solitary confinement) ari ugukorerwa iyicarubozo imbere y'amategeko y'u Rwanda n'Amasezerano Mpuzamahanga u Rwanda rwashyizeho umukono.

[62] Mu iperereza Urukiko rwakoreye aho abaregwa bafungiyeye, rwasanze Col. Tom Byabagamba na Rtd Brig Gen Frank Kanyambo Rusagara bahabwa iby'ibanze umugororwa akenera kuko icyumba buri wese abamo gifite ubuso buhagije, kirimo igitanda n'umufariso, inzitiramibu, ubwiherero bwo mu nzu, amazi, amashanyarazi; gifite inzugi n'amadirishya bihagije, buri wese afite kandi imbuga ashobora kugendagendamo igihe abishatse akaba yakota n'izuba. Byagaragariye Urukiko kandi ko

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

bakorerwa isuku, bafite ubamesera, bafite igare rya siporo bakoresha imyitozo ngororamubiri, kandi Col. Kayigire Joseph uyobora Military Police yarusobanuriye (bahari) ko imiryango yabo iboherereza amafaranga bibikira bakayagura ibyo bakeneye. Urukiko rurasanga kandi, kuvuga ko nta muntu babonana (human contact), atari byo, kuko bahura n'abakozi ba Gereza, bafite Umuganga wa Gereza ubasura uko bamukeneye, byaba ngombwa bakajyanwa kwa muganga, ndetse bahawe umusirikare ubafasha bakamutuma ibyo bakeneye byose, akabategurira amafunguro akanayabazanira.

[63] Ku birebana no gusurwa, Col Kayigire Joseph yabwiye Urukiko ko abagororwa basurwa n'imiryango n'inshuti zabo hakurikijwe amabwiriza ya Gereza, ko udasurwa ari uko umuryango we uba utabisabye kuko ntawe ubyangirwa, yongerako ko icyatumye muri iki gihe barahinduye gahunda y'isurwa ya Rtd Brig Gen Frank Kanyambo Rusagara na Col Tom Byabagamba, byatewe n'imyitwarire yabo, ko ariko nibayihindura bakubahiriza amabwiriza ya gereza, bazongererwa ibihe byo gusurwa, ibi byose bikaba byumvikanisha ko ibyo baburanisha ko bafungiyemo mu kato nta shingiro bifite.

[64] Urukiko rurasannga ariko, hashingiwe ku biteganwya n'amabwiriza agenga imicungire y'amagereza, mu mutwe wa gatanu wayo, mu ihame rya 37, ateganya ko abafungwa bagomba kwemererwa, ariko babigenzurwamo, gushyikirana n'imiryango yabo n'iy'inshuti zabo zashobora kwizerwa, buri gihe runaka byaba mu nyandiko cyangwa se byaba gusurwa, bityo rero Col Tom Byabagamba na Rtd Brig Gen Frank Kanyambo Rusagara bakaba bagomba gusubizwa uburengazira bwo gusurwa n'imiryango yabo, bigakorwa hakurikijwe amabwiriza y'imicungire ya Gereza bafungiyemo.

[65] Urukiko rurasanga kuba Col. Tom Byabagamba na Rtd Brig Gen Frank Kanyambo Rusagara, buri wese afungiye mu cyumba cya wenyine, bitakwitwa iyicarubozo ubwabyo ku mpamvu zasobanuwe haruguru, kuko uburyo bafunzwemo bwubahirije uburenganzira bw'ikiremnamuntu, bitandukanye n'ibyo Urukiko rwasanze mu rubanza rwa Gomez de Voituret wareze igihugu cye Uruguay, kuko we icyumba yabagamo kitageragamo urumuri nk'uko byasobanuwe haruguru.

[66] Hashingiwe ku byasobanuwe haruguru, Urukiko rurasanga ifungurwa ry'agateganyo abaregwa basaba batarihabwa kuko impamvu bashingiraho babisaba, nta shingiro zifite.

III. ICYEMEZO CY'URUKIKO

[67] Rwemeje ko inzitizi yatanze na Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara na Rtd Sgt Kabayiza François yo gufungurwa by'agateganyo igihe bakiburana ubujurire bwabo, nta shingiro ifite.

[68] Rutegetse ko Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara na Rtd Sgt Kabayiza François bakomeza kuburana urubanza ku bujurire bwabo bafunzwe.

[69] Rutegetse ko Col. Tom Byabagamba na Rtd Brig Gen Frank Kanyambo Rusagara basubizwa uburenganzira bwo gusurwa n'imiryango yabo, bigakorwa hakurikijwe amabwiriza y'imicungire ya Gereza bafungiyemo.

[70] Rwemeje ko iburanisha ry'urubanza mumizi rizaba ku wa 24/07/2019, saa mbiri n'igice za mu gitondo.

[71] Ruvuze ko amagarama y'urubanza asubitswe

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REPORTS**

ENGLISH VERSION

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PREFACE

Esteemed readers,

This Volume IV [2019] is the last to be published in the year 2019. Throughout this year, we were pleased to receive your feedbacks indicating that you access the Law report and is of importance in your daily activities.

This volume contains six (6) cases including two (2) civil cases, two (2) commercial cases, one (1) administrative case and one (1) criminal case

Please be reminded that the published cases can be easily and quickly accessed on the website of the judiciary:
<http://decisia.lexum.com/rlr/en/nav.do>.

Dr NTEZILYAYO Faustin
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, the Court of appeal and Commercial High Court cited under the heading below:

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CASES IN MERITS

ADMINISTRATIVE CASE

KIGALI CITY v NDAKENGHERWA GASANA

[Rwanda SUPREME COURT –
RS/REV/INJUST/RAD00005/2018/SC (Kayitesi Z, P.J.,
Mutashya, and Cyanzayire J.) March 15, 2019]

*Administrative law – Disciplinary sanction – Criminal liability –
The fact that the Prosecution closed the file against an employee
in a criminal matter does not exonerate to be disciplinarily
punished.*

*Administrative law – Gross misconduct – Aggravative
circumstances of a fault –The fact that an employee who
committed gross negligence is a leader, who must be an example
to others in all acts that can defame his/her employer, it is an
aggravative circumstance of disciplinary fault.*

Fact: Ndakengerwa was a director general of social affairs in Kigali city together with his driver was sued by the Prosecution for having committed the crime of kidnapping and extortion by violence against Twahirwa, this was committed by locking him in vehicle and carried him to Kigali Rehabilitation Transit Center, at Gikondo for detaining, due to the person problem they had but after reaching to that center, the employees refused to detain him because they are only authorized to detain those brought by the police. The prosecution found it unnecessary to continue with the case and hence closed the file.

Kigali city requests him for explanations on the faults he committed using his position, to absent at work without permission and for not complying with the instructions of

construction while he was an employee in charge of building regulations in Kigali City; the latter was not satisfied with explanations he provided, after consulting Ministry in charge of public service, Kigali city dismissed him definitely due to the gross misconduct.

He appeared before the Public Service Commission, which replied to him that he was not unfairly treated. Ndakengerwa filed a claim to the Intermediate Court of Nyarugenge, requesting for the annulation of that decision because it was taken unlawfully and also requested for various damages. That Court found it with merit in part, ordered Kigali City to pay him damages for unfair dismissal and counsel fees.

Both parties were not contented and then appealed to the High Court, the Court held that the appeal of Ndakengerwa has merit in part and that of Kigali City lacks merit and the decision dismissing Ndakengerwa is nullified, ordered the Government of Rwanda to pay him the salary arrears and reinstate him on the job if not possible, it should give him damages.

Kigali City wrote to the Ombudsman Office requesting the review of that judgment due to injustice, after examining the issue of Kigali City, it wrote to the President of the Supreme Court requesting for a review of that judgment, based on the report of inspectorate general of the court, he decided to re-adjudicated the judgment. The Court examined firstly whether Ndakengerwa has committed the faults for which he was dismissed; if so, it examines whether he was imposed the appropriate sanction and if it was lawfully applied.

Regarding whether he has committed the faults for which he was dismissed, Kigali City states that for Ndakengerwa not have been found guilty for the offence he was accused of and the

Prosecution closed the file, does not exonerate him for the disciplinary fault he was accused of and that fault was to kidnap a person and there are irrevocable evidence proving the disciplinary fault he committed.

Regarding the fault of building in slums, Kigali City states that Ndakengerwa as a leader who was in charge of fighting the building in slums also did it as confirmed by the committee which went to the place where he was building after finding that he built another house after he was compensated.

In his defence, Ndakengerwa states that what Kigali City considers as disciplinary faults are not because the disciplinary committee examined it and found that they were not disciplinary faults, and ordered for his reinstatement and what he was sued for is not trying to detain persons in the center at his interest, rather it is the issue of contract between two persons, which was resolved to the police. He argues that even if it was a crime, he was not the one who would be punished for it, that is the reason why he was released by the Prosecution and he was given his belongs which were confiscated. Whereas, concerning the fact that he built in slums, he states that he did not build anything in slums after been given the compensation and the officer in charge of development in Kigali city visited that place and found that he did not build a house after being expropriated.

Facts: 1. The fact that the Prosecution closed the file against an employee in a criminal matter does not exonerate to be disciplinarily punished.

2. An employee who arrest and detain an innocent person by using his position of job, it is gross misconduct.

3. The fact that an employee who committed gross negligence is a leader, who must be an example to others in all acts that can defame his/her employer, is an aggravative circumstance of disciplinary fault.

**Ndakengerwa Gasana Aimable was fairly dismissed;
Overturns the rulings of the judgment
RADA00023/2017/HC/KIG-RADA
00027/2017/HC/KIG rectified by the judgment
RS/RECT/RAD 00003/2017/HC/KIG;
With the court fees to the public treasury.**

Statutes and statutory instruments referred to:

The constitution of the Republic of Rwanda of 2003 revised in 2015, articles 13 and 29.

Organic Law N°11/2013/OL of 11/09/2013 modifying and complementing the organic law N°61/2008 of 10/09/2008 on the leadership code of conduct, article 2 and 3.

Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 64.

Presidential Order N°65/01 of 4/3/2014 determining the sanction for public servants, article 5, 7 and 12.

Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service articles 3,76,78,80,81 and 98.

No case referred to.

Authors cited:

Georges Dupuis, Marie-Josée Guédon, Patrice Chretien, Droit Administratif, 10^{ème} Edition, Sirey, 2007

Judgment

I. BACKGROUND OF THE CASE

[1] Ndakengerwa Gasana Aimable was director-general in charge of welfare in the Kigali City. Together with Nsengiyumva Gilbert his driver, they were accused by the Prosecution for kidnapping Twahirwa Oswald and extortion by violence, which was committed when they locked him up in the car, took him to the Kigali Rehabilitation Transit Center at Gikondo, because of the personal issues they had. The documents in the case file indicate that the employees of that center refused to detain him because they are only authorized to detain those brought by the police. The prosecution found it unnecessary to continue with the case and hence closed the file on 17/12/2015.

[2] Ndakengerwa Gasana Aimable was requested by Kigali City to defend himself on the faults he committed using his post, being absent from work without permission from 04 to 11/09/2015, for not abiding with building regulations when he constructed on plot N° 385 which is situated in the area not supposed to be built and whereas he is in charge of building regulations in Kigali City. The explanations of Ndakengerwa Gasana Aimable did not contend the Kigali City, he was suspended and later on the opinion of Labour and Public Service (MIFOTRA), he was definitely dismissed.

[3] On 29/01/2016, the City of Kigali dismissed him definitely due to grave faults, he appeared before the Public Service Commission, which replied to him that he was not unfairly treated, that he was given a proportionate sanction. Ndakengerwa Gasana Aimable sued in the Intermediate Court of

Nyarugenge, requesting for the annulation of that decision because it was taken unlawfully and also requested for various damages. The case was given number RAD 00272/2016/TGI/NYGE, The Court found it with merit in part, ordered Kigali City to pay him damages worth of 11,520,738 Frw for unfair dismissal, and counsel fees of 1,000,000 Frw.

[4] The Intermediate Court of Nyarugenge in holding that he was unfairly dismissed based on the fact that the authorities of Kigali City knew that he was detained at the Police Station of Muhima since 04/09/2015 up to 11/09/2015 and for other faults for which he was dismissed did not prove it.

[5] Both parties were not contented and appealed in the High Court, the case was registered on N° RADA00023/2017/HC/KIG- N° RADA00027/2017/HC/KIG, and the judgment was rendered on 21/09/2017 whereby the Court held that the appeal of Ndakengerwa Gasana Aimable has merit in parts and that of Kigali City has no merit and the decision dismissing Ndakengerwa Gasana Aimable is nullified, ordered the Government of Rwanda to pay him the salary arrears of 26.820.060 Frw and reinstate him on the job if not possible, the Court ordered to give him damages of 8.046.018 Frw, he was also awarded procedural fees of 1.000.000 Frw. The judgment was rectified where it was written the Government of Rwanda to be written Kigali City.

[6] The motivation of the High Court was that Ndakengerwa Gasana Aimable indeed committed faults as it had been observed by the disciplinary committee of Kigali City but they would have been sanctioned by delay in promotion instead of dismissing him as done by Kigali City.

[7] After that judgment, Kigali City wrote to the Ombudsman Office requesting the review of that judgment due to injustice. The issue of Kigali City was examined by that Office and found injustice in the judgment N° RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG which was rendered on 21/09/2017 and wrote to the President of the Supreme Court requesting for a review of that judgment.

[8] The office of Ombudsman stated that judgment RADA00023/2017/HC/KIG- N° RADA00027/2017/HC/KIG rendered on 21/09/2017 by the High Court is vitiated with injustice on the following grounds :

The Office of Ombudsman stated that the Court based on Presidential Order N° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public employees and it also based on the Organic Law modifying and complementing the Organic Law N° 61/2008 of 10/09/2008 on the leadership code of conduct to dismiss Ndakengerwa Gasana Aimable.

The Office of Ombudsman finds that the fact that the disciplinary committee of Kigali City had recommended that Ndakengerwa Gasana Aimable be sanctioned with a delay in promotion and also the High Court found that sanction appropriate it is because the fault was in the second category that means that the fault should be sanctioned severely than reprimand and warning.

The Office of Ombudsman explains that article 20 of the Law N° 61/2008 of 10/09/2008 on the leadership code of conduct was not amended or repealed by the Organic Law N° 11/2013 of 11/09/2013, that article provides for the sanctions on the leader who has been found at fault, those

sanctions include written warning, written reprimand, dismissal and published dismissal, it is obvious that the heaviest sanction is dismissal; that is the reason why Ndakengerwa Gasana Aimable should have been dismissed which he has been given by Kigali City. Ndakengerwa Gasana Aimable was social affairs, thus, he is also governed by the organic law mentioned above, especially article 2(3)¹.

The Office of Ombudsman states that to sanction Ndakengerwa Gasana Aimable should have been based on the Organic law on the leadership code of conduct instead of the Presidential Order determining modalities of imposing disciplinary sanctions to public servants, according to hierarchy of the laws, and also article 5 paragraph one of Presidential Order N° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants provides that based on circumstances that aggravate the gravity of a fault, the competent authority may remove a sanction or impose a less or more serious sanction than the sanction provided for the fault.²

The Office of Ombudsman found that even if it had been based on that Presidential Order, nothing could prevent Kigali City to dismiss Ndakengerwa Gasana Aimable, in

¹ Senior officials: Cabinet Ministers, Ministers of State, Members of Parliament, Judges of the Supreme Court and other officials appointed by a Presidential Order as well as those appointed by a Prime Minister's Order to the Director General and those falling in the same job classification level

² Basing on circumstances that mitigate or aggravate the gravity of a fault as provided for in Articles 6 and 7 of this Order, the competent authority may remove a sanction or impose a less or more serious sanction than the sanction provided for the fault

case there aggravative circumstances of the gravity of a fault he committed, because he committed a serious fault.

[9] Thereafter, the office of Ombudsman wrote to the president of the Supreme Court requesting for a review of the judgment N° RADA00023/2017/HC/KIG-RADA 00027/2017/HC/KIG due to injustice, he examined the issue and based on the report of inspectorate general of the court, the case was recorded in the relevant registry for it to be re-adjudicated. The case was recorded on RS/INJUST/RAD 00005/2018/CS.

[10] The hearing was conducted in public on 05/02/2019, Kigali city was represented by state attorney Cyubahiro Fiat while Ndakengerwa Gasana Aimable was represented by counsel MUSIRIMU Jean Claude. In this case, the main issue to be examined is to determine whether Ndakengerwa Gasana Aimable was lawfully dismissed.

II. ANALYSIS OF THE LEGAL ISSUE

Determining whether Ndakengerwa Gasana Aimable was unlawfully dismissed.

[11] For the Court to be able to determine whether Ndakengerwa Gasana Aimable was either fairly or unfairly dismissed, it is important to first determine whether he committed the disciplinary faults for which he was dismissed and if so whether he was given the appropriate sanction and if it was applied in the right procedure.

Whether Ndakengerwa Gasana Aimable committed the disciplinary faults for which Kigali City based on to dismiss him.

[12] The counsel for Kigali City, Me Cyubahiro Fiat states that for Ndakengerwa Gasana Aimable not have been found guilty for the offence he was accused of and the Prosecution closed the file, does not exonerate him for the disciplinary fault he was accused of as provided by article 78 of the Law regulating civil servants.

[13] He also argues that Ndakengerwa Gasana Aimable was not being probed for the agreement of payment as he alleges but for the kidnapping of a person and there is evidence proving the disciplinary fault he committed even the Police who are stationed at the center he was going to detain him stated that he went there and requested them to detain him and they refused, he also does not deny that he did not go there.

[14] Regarding the fault of building in slums, Counsel Cyubahiro Fiat states that Ndakengerwa Gasana Aimable as a leader who was in charge of fighting the building in slums also did it as confirmed by the Committee which went to where he was building after finding that he built another house after he was given compensation.

[15] Ndakengerwa Gasana Aimable states that there is no injustice in the judgment rendered by the High Court and what the counsel for Kigali City considers as disciplinary faults are not as the disciplinary committee examined it and found that they were not disciplinary faults, and ordered for his reinstatement. On the issue of attempting to detain a person at Kigali Rehabilitation Transit Center, at Gikondo he denies it and states that he went there to request for the report from a lady who was

employed there called Kayitesi because she had spent many days without getting it.

[16] Ndakengerwa Gasana Aimable argues that the people they allege that he was going to detain those who were in his car, he had just given them a ride. He explains that he first met Twahirwa Oswald and gave him a ride and then met Nsengiyumva Gilbert and he also boarded and later he found that they had some issues of a loan, thus he had not kidnapped them as alleged by the counsel for Kigali City. He was asked if the employees at Kigali Rehabilitation Transit Center has any grudge against him and responded that there is none apart from that they lied.

[17] Counsel Musirimu Jean Claude assisting Ndakengerwa Gasana Aimable argues that his client was unfairly dismissed because he did not commit the disciplinary faults which were based on by Kigali City to dismiss him as they were also confirmed by the Committee against the injustice in Kigali City on 11/12/2015 and also the extraordinary meeting of Kigali City on 13/12/2015.

[18] He argue that the fault which Kigali City accuses Ndakengerwa Gasana Aimable of using the employees he leads of Kigali Rehabilitation Transit Center in his interests never happened because there is no evidence produced before the court to prove it, therefore the motivation of the Court in paragraph 35 should not be considered as injustice instead it's the motivation of the Judge. He states that Ndakengerwa Gasana Aimable was not accused of attempting to detain people at the Center in his interests but it was an issue of the contract concluded by two people, and those people settled the payment and the file was

closed at the Police. He also adds that even if it was an offense he is not the one to be penalized that is the reason he was released by the Prosecution and he was given his property which had been confiscated.

[19] Counsel Musirimu Jean Claude adds that the Kigali Rehabilitation Transit center is not an institution of civilian employees to the extent that it should be in the responsibilities of Ndakengerwa Gasana Aimable as alleged by the counsel for Kigali City. On the issue of the witness who testified that his client wanted to detain people, Counsel Musirimu Jean Claude argues that their testimony should not be considered because there is no written statement of their testimony.

[20] Ndakengerwa Gasana Aimable states that he did not build in a slum, he did not build any other building after he was compensated after the road had destroyed his house. He adds that two houses which are there are the ones which existed before in which he stored the materials got from where he was expropriated. His counsel state that the employee in charge of development in Kigali City visited that place and found no building constructed after being expropriated.

COURT'S DETERMINATION

[21] Article 80 of the Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service provides that no sanction can be applied before the accused is proved guilty. The Court, therefore, finds that its necessary to first determine whether Ndakengerwa Gasana Aimable is guilt of the disciplinary faults on which Kigali City based on to dismiss him.

[22] In the letter of 29/01/2016, the Mayor of Kigali City dismissed definitely Ndakengerwa Gasana Aimable, it states that he was dismissed for the following three disciplinary faults :

- a. For spending more than a week not reporting at work without informing his superior and when he reported at work, he did not inform in writing the reason for not fulfilling his duties ;
- b. Attempting to use employees of Kigali Rehabilitation Transit Center in his personal interests ;
- c. Violating the laws and regulations relating to building in Kigali City while he is a leader in charge of preventing building in slums.

Concerning the fault of being absent at work for a week without informing his superior.

[23] In the Judgment RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG, rendered by the High Court, paragraph 11, indicates that Ndakengerwa Gasana Aimable was detained by the police on 04/09/2015, and was provisionally released on 11/09/2015. The report made by the Disciplinary Committee in Kigali City on 27/11/2015 indicates that Ndakengerwa Gasana Aimable produced to them SMS he sent to the Mayor of Kigali City informing him that after being detained by the police last Friday he has been temporarily released and he will have to report to the police every Friday.

[24] The Court finds that it is obvious that seven days which Ndakengerwa Gasana Aimable was not at work (from 04/09/2015 up to 11/09/2015), was detained by the Police and he also immediately informed his superiors when he was released. The Court, therefore, finds that he is not guilty of that fault

because he wouldn't go to work while he is detained by the competent organ.

Concerning the fault of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his personal interests

[25] It is indicated in the dismissal letter of Ndakengerwa Gasana Aimable that he carried a person in his vehicle and dropped him to this center, he requests its employees to detain him because he is a thief. Those employees who interrogated or met with Ndakengerwa Gasana Aimable were heard by the disciplinary committee of Kigali city, they provided testimony which is indicated in the report of 27/11/2015, and it was signed on by all members of the committee.

[26] The four employees of RTC who were interrogated including the chief commander, all concurred that Ndakengerwa Gasana Aimable asked them to detain the person whom they were together in his car, saying that he is a thief but they refused. The statement of Ndakengerwa Gasana Aimable's advocate that nothing proves that the declarations which are in the report belong to them because they did not sign on the statement, the court finds it without merit because there is no reason for six persons who signed on the report of the disciplinary committee of Kigali city to lie.

[27] Among the pieces of evidence Ndakengerwa Gasana Aimable produces, proving that he did not commit that fault, there is a receipt document that is between Nsengiyumva Gilbert and Twahirwa Oswald (the one he was accused of trying to detain in RTC). That document indicates that Nsengiyumva Gilbert paid 400,000 Frw in damages to Twahirwa Oswald, the court finds it with no use in this case because apart from not explaining the

reason of those damages, it cannot exonerate the fault he was dismissed for.

[28] The arguments of Ndakengerwa Gasana Aimable that the Prosecution prosecuted him due to that receipt, and then it released him after finding that it is civil matters, this is another element of evidence of proving that he did not commit a fault. The court finds it without merit because the crime for which he was prosecuted, is to detain a person illegally not the payment. The court finds further the fact that the file was closed by the Prosecution is of no use to him, because if a person was not sued for criminal matters does not exonerate to be sanctioned professionally basing on what provided by article 78³ of the law N° 86/2013 of 11/09/2013 establishing the general statutes for public service. The provision of this article concurs to the explanation of the legal scholars Georges Dupuis, Marie-Josée Guédon and Patrice Chretien⁴ who confirm that the professional fault may be disciplinary and criminal sanctioned.

³ “The disciplinary sanction of a public servant shall be independent from criminal liability and punishment as provided by the criminal code to the extent that the same fault may cause both disciplinary procedure and criminal procedure/ *La sanction disciplinaire est indépendante de la responsabilité pénale et de la répression prévue par la législation pénale à tel point qu'un même fait peut déclencher des poursuites disciplinaires et pénales* »

⁴ “*Une faute professionnelle d'un fonctionnaire peut entraîner, à la fois, une répression disciplinaire et une répression pénale. Dans les deux cas, il s'agit d'édicter une sanction en réponse à une faute. Il existe toutefois une réelle indépendance des deux procédures. L'autonomie de la répression disciplinaire tient à son lien avec l'exercice d'une fonction : la faute est fonctionnelle et la peine l'est aussi, alors que la répression pénale concerne tous les individus pour des faits qui ne sont pas liés à une fonction, et que la sanction pénale ne vise pas le coupable dans sa fonction mais dans sa liberté ou sa propriété. Pratiquement, la décision de l'autorité disciplinaire ne lie*

[29] The other pieces of evidence which Ndakengerwa Gasana Aimable produces for proving that he did not commit the fault of using his subordinates in his personal interests, it is a report of commission against the injustice in Kigali city of 11/12/2015 and the minutes of the extraordinary meeting of the council of Kigali City that took place on 13/12/2015. The report of the commission against injustice indicates that organs that detained Ndakengerwa Gasana Aimable were the ones of his motive of being absence at work and found him not guilty. Therefore, the Court finds, the fact that the organs which prosecuted him closed the file, does not exonerate to be punished for disciplinary fault as it was explained, thus, this report is of no use in demonstrating whether the disciplinary fault was or not committed. The court also finds of no use the conclusions of the extraordinary meeting of the council of Kigali city because what is mentioned in it is that the council and the executive committee have first to talk on the issue of Ndakengerwa Gasana Aimable for one conclusion but the decision was not taken.

[30] Furthermore, the court finds without merit the arguments of Ndakengerwa Gasana Aimable that he could not provide the orders in RTC because it was not in his attribution, according to Organizational Chart of Kigali city, this center is one of the organs which he was Director General of Social Development. Ndakengerwa Gasana Aimable does not refuse that he went with Twahirwa Oswald and Nsengiyumva Gilbert in his car to RTC

jamais le juge pénal : de nombreux agissements sont des fautes disciplinaires sans être, pour autant, des délits.

De même, l'autorité disciplinaire n'est pas liée par la décision du juge pénal, sauf lorsque ce dernier s'est prononcé sur l'existence ou l'inexistence de certains faits : ses constatations matérielles s'imposent à l'autorité administrative » ; Georges DUPUIS, Marie-Josée GUÉDON, Patrice CHRETIEN, Droit Administratif, 10^{ème} Edition, Sirey, 2007, p. 381.

on the day in which they allege that he committed a fault. His arguments before the court that he went there to take the daily report which issued to the head of the department, the deputy of the center, the court finds it meaningless while he says that he is not related to RTC, in addition to that, he could request that report without going there.

[31] The court also finds that the arguments of Ndakengerwa Gasana Aimable's counsel that the fact Kigali city accepted to execute the judgment emphasizes that he did not commit a fault; is groundless because the application of the review of the judgment due to injustice does not prevent its execution basing on the provision of article 64, paragraph 1 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts.

[32] Basing on the motivation provided above, the court finds that Ndakengerwa Gasana Aimable has committed the fault of trying to use the employees of Kigali Rehabilitation Transit Center”(RTC) in his personal interest.

The fault of violating the laws and instruction related to constructing and urban planning in Kigali City

[33] Among the case file includes the report of 24/11/2015, taken by the group which was established by Kigali city to inspect the house located on plot N° 385 of Ndakengerwa Gasana Aimable. In that report, there is a photo of a small house of two doors which is constructed by old materials, the group members asked Ndakengerwa Gasana Aimable to demonstrate the authorization to build that house mentioned being a warehouse, if not he must remove it. The court is finding that the group members did not confirm whether the house was built after Ndakengerwa Gasana Aimable being expropriated due to the

public interest, or it was there before and he placed the materials which were on the expropriated houses as he uses in his pleadings.

[34] The report of 27/11/2015, the disciplinary committee in Kigali city, there is one named Muhinda Arthur, the officer in charge of construction in Gasabo district informed that committee that Ndakengerwa Gasana Aimable did not build the house, that it was there before the expropriation, it contains the materials of expropriated houses. The court finds that based on the report mentioned, Ndakengerwa Gasana Aimable did not commit the fault of violating the laws and instructions related to constructing and urban planning in Kigali city.

[35] Basing on the analysis conducted on all three faults that were filed against Ndakengerwa Gasana Aimable, the court finds that he commits one fault of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his personal interest.

Whether the sanction of dismissing Ndakengerwa Gasana Aimable definitely was fair and lawful applied

[36] Cyubahiro Fiat, the counsel of Kigali City state that Ndakengerwa Gasana Aimable was sanctioned on the bases of Presidential Order determining the sanction for public servants and on organic law regulating the conduct of public officials because he is a Director General in Kigali city. He states that in paragraphs 35, 36 and 37 of the judgment subjected to the review of judgment due to injustice, the High Court found Ndakengerwa Gasana Aimable guilty of the fault of trying to use the employees whose he was their superior in his personal interest, but it ruled that he should have been given the sanction proposed by the disciplinary committee, which is delay in promotion, provided by

article 12 litera 5 of Presidential Order N°65/01 of 4/3/2014 determining the sanction for public servants, it disregarded that even if the disciplinary committee found it like that, nothing can prevent the competent authority to find it differently according to the gravity of the committed fault.

[37] He further states that article 5 of Presidential Order N° 65/01 of 4/3/2014 mentioned above provides that according to the gravity of a disciplinary fault, the competent authority shall impose a disciplinary sanction more serious than the sanction provided for the misconduct ; whereas article 7 provides for aggravating circumstances. He explains that for Ndakengerwa Gasana Aimable, the gravity bases on concomitance of the faults he committed and on the fact that he attempted to detain a person illegally while he was a superior leader who has in his attribution to supervise the center which he wants to use in his personal interest. Counsel Cyubahiro Fiat states that all those motives aggravate the fault to the extent that Ndakengerwa Gasana Aimable was imposed the sanction of dismissing him definitely.

[38] Counsel Cyubahiro Fiat adds that Mayor of Kigali city gave the sanction based on the advisory opinion of the disciplinary committee on the sanction which should be imposed, and he sought for an advisory opinion to MIFOTRA which replied him that according to the gravity of the committed fault, that employee must be definitely dismissed. He states that Ndakengerwa Gasana Aimable wrote to the Public Service Commission, and it replied to him that he was lawfully sanctioned.

[39] Musirimu Jean Claude, the counsel for Ndakengerwa Gasana Aimable states that the High Court motivated that his client should not have been dismissed, rather, he should have

been sanctioned by the sanction provided by Presidential Order N°65/01 of 4/3/2014 determining the sanction for public servants, article 12 paragraph 2, even if he does not admit that fault.

[40] He further states that Kigali city applies wrongly the laws because for determining the aggravative circumstances, It applies the Presidential Order but for giving the sanction It applies the organic law regulating the conduct of public officials. He adds that even if his client does not admit the fault, the sanction of delaying to promote proposed by the disciplinary committee should have been given as the High Court ruled.

COURT'S DETERMINATION

[41] Article 98 of Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service provides that dismissal shall refer to a measure, pronounced in writing by a competent authority, of definitive expulsion of a public servant from public service as a result of gross misconduct. It provides also that gross misconduct shall be punished by a competent authority after consultation with the Minister.

[42] Article 3 of the mentioned law explained that gross misconduct is misconduct which depends on the seriousness of the act committed, omission or behavior displayed, circumstances, impact on public service, service delivered and beneficiaries of service.

[43] Basing on article 76 of law N° 86/2013 of 11/09/2013 mentioned above, gross misconduct shall be sanctioned by the sanctions of the second degree. Article 81 of that law indicates that the second degree sanctions shall be imposed by the

competent authority who appointed the public servant after consultation with the Minister. The mentioned Minister is Minister in charge of public service.

[44] Basing on these motivations provided by the Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service, to dismiss a public servant, he/she must commit gross misconduct. To decide that the committed fault is gross misconduct, the seriousness of the fault must be considered, the way it was committed and its consequences. Dismissal is one of the second degree sanctions, that are imposed by the authority who appointed the public servant after consultation with the Minister in charge of public service, that shall be done in writing form.

[45] As it was motivated above, Ndakengerwa Gasana Aimable committed a fault of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his interest, whereby he requested them to put in prison the person he called a thief. The Rwandan constitution law, in its article 13 provides that a human being is sacred and inviolable. Article 29 of this law also highlights the principle that the person is subjected to imprisonment when he/she committed a crime that is provided and punished by the law. The fact that Ndakengerwa Gasana Aimable tried to detain the innocent person, in a place which does not serve as prison, the court find that it is violating and bothering a person without considering the principles which are in his/her favour, that are highlighted by the Constitution of Rwanda, thus, this is gross misconduct. The court finds further that the fact that he committed that fault when he was a superior authority who must be an example for others and he had to prevent against any

act which can defame a government as his employer, this is an aggravative circumstance of a fault.

[46] According to the provisions of article 76 of the law N° 86/2013 of 11/09/2013 mentioned above, the gross negligence is sanctioned by a second degree sanction. The second degree shall be composed of the following sanctions : 1° delay in promotion ; 2° suspension from duties for a period not exceeding three (3) months without being paid ; 3° dismissal. The court finds that Ndakengerwa Gasana Aimable was under this statute as a public servant, but especially the organic law N° 11/2013/OL of 11/09/2013 modifying and complementing the Organic Law N° 61/2008 of 10/09/2008 on the leadership code of conduct, due to the position of Director General of social affairs he occupied. Article two and three of this organic law provide that leaders who are under this law are director general and the others who are on that level.

[47] Court finds the statements of Ndakengerwa Gasana Aimable's counsel that if he was guilty, he would have been sanctioned of delay in promotion, this should not be given the merit because this sanction is not among those provided by the organic law N° 11/2013/OL of 11/09/2013 on the leadership code of conduct and also this law had to be applied according to this principle of specialia generalibus derogant. His statements again that it would have been applied the orders of the disciplinary committee of Kigali city, which is to delay in promotion Ndakengerwa Gasana Aimable, the court finds it without merit because the final decision should be taken by the competent authority to sanction.

[48] Basing on the provision of article 20 of the mentioned organic law, the second degree sanction shall be imposed to the

authority who is guilty of gross negligence is dismissal or dismissal and be published in case it is of general interest. Therefore the Court finds that Ndakengerwa Gasana Aimable was given a sanction appropriate to the grave fault he committed.

[49] Court finds further that the sanction of dismissal that was imposed to Ndakengerwa Gasana Aimable was lawfully applied because it was imposed by the authority (mayor of Kigali city) who appointed him on position in writing according to the letter of 29/01/2016, and he did it after consulting the Minister in charge of public service as it was indicated by the letter of 11/12/2015⁵ and that of 27/01/2016⁶.

[50] Basing on motivations provided above, the court finds that Ndakengerwa Gasana Aimable has committed gross misconduct of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his personal interest, the sanction he was imposed of being dismissed, was the right sanction and it was lawfully imposed. Therefore, the court finds that it is not necessary to examine the damages he requested.

III. DECISION OF THE COURT

[51] Finds with merit the application of reviewing a judgment RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG rendered by the High Court on 07/11/2017 due to injustice ;

⁵ The letter of Mayor of Kigali city for consulting the Minister in charge of public service on the proposed sanction

⁶ The letter of Minister in charge of public service which advising on the sanction of dismissing Ndakengerwa Gasana Aimable

[52] Decides that Ndakengerwa Gasana Aimable was lawfully dismissed ;

[53] Sustains the decision of dismissing Ndakengerwa Gasana Aimable ;

[54] Overturns the rulings of the judgment RADA00023/2017/HC/KIG-RADA 00027/2017/HC/KIG rendered on 21/09/2017 by the High Court, that was rectified by the judgment N°RS/RECT/RAD 00003/2017/HC/KIG on 07/11/2017;

[55] Orders that the court fees be on the public treasury.

CIVIL CASES

MUTONI v NIWENSHUTI ET.AL

[Rwanda SUPREME COURT – RCAA0014/15/CS (Mutashya P.J., Nyirinkwaya and Karimunda, J.) December 01, 2017]

Family law – Cohabitation – Evidence – Evidence to prove cohabitation - When proving the private relationship between people does not require special elements of evidence, any mean which can establish that a man and a woman live as a husband and wife can be based on for making a decision.

Family law – Cohabitation – Property – Sharing of property accrued during cohabitation – Each doesn't need to demonstrate the quantity he/she contributed in acquiring or increasing those assets, instead those assets should have been acquired during that period when they cohabited because during their cohabitation everyone has something he /she contributes for the family.

Facts: Mutoni K. Jackeline lodged a third party opposition against the judgment RC0615/12/TGI/NYGE whereby Niwenshuti sued Mukambuguje, requesting to divide the assets they acquired in marriage for everyone to get a half of the money got from it (½), Mutoni K. Jackeline lodged a third party opposition claiming that she was also illegitimate Niwenshuti's wife, born two children together and they constructed that house together.

Niwenshuti and mukambuguje raised an objection of inadmissibility claiming that Mutoni K. Jackeline just had children with Niwenshuti and they were partners in the business they work together but they never lived as a husband and wife,

the Court overruled that objection because it found that she had interest in that case based on the fact that the Court ordered that the house she constructed with Niwenshuti be sold.

On the merit of the case, the Court found that apart from demonstrating that Niwenshuti Aloys was the one paying the taxes and the rent contract he had with the owners of the house which she worked in, there is no other proof that she jointly build the contested house, thus the Court found her claim without merit, therefore, it sustained the judgment which she had filed the third opposition. She was not contented with the decision and appealed to the High Court, which also found that she had failed to prove that she participated in the construction of the house in litigation, apart from following up on the construction activities, thus, it sustained the rulings of the appealed judgment.

She again appealed to the Supreme Court stating that the High Court held that Niwenshuti was not her husband but he just frequented her home to relax, this led to the conclusion of not sharing the house they built together, however, the former leader of Gatsata village, where they resided for the first time, the leader of Gikondo village and also that of Umurava village where they relocated, they attested that they lived as a husband and wife and he was the one paying the rent. She further explains that she met Niwenshuti when she was studying at Kabale in Uganda and begun to cohabit since 05/08/2005 and they had two children together and he showed her the celibacy certificate “*attestation de célibat*”, which brought more confidence to her, she took him to her parents in Nyagatare and he gave a dowry of 1,000,000 Frw, although there was no ceremony but the elders who received that dowry can testify it, she concludes arguing that Mukambuguje contributed nothing on the contested house because up to now he cannot demonstrate the activity she had for

her to jointly build the house with Niwenshuti, that is the reason she requests to be allocated her share on the contested house.

Niwenshuti states that he got married with Mukambuguje and the cause of dividing up the house is because Mukambuguje refused to sign for him to get a second loan on the pretext that he sired children out of the wedlock, he got angry and requested to share the house, he explains that he met with Mutoni K. Jackeline since 2003, the latter knew that he had another wife in Gatsata and he does not refuse that he attended he graduation “collation des grades” in Uganda as others did, that in that intimacy they had two children and he rented for her a house because he did not want her to continue living at her brothers home. He concludes by stating that attending her graduation, sending her to deposit money on her account, renting for her a house or the statements of the village leaders are not the ones to be based on to hold that he was her husband.

Mukambuguje argues that the origin of the conflict is the second loan which Niwenshuti wanted to get and she refused after knowing that he had sired out of the wedlock, he got angry and deserted the home for six months, filed a claim requesting to share the house after they shared he came back and she also welcomed him back because he was the one at fault, she does not understand how Mutoni K. Jackeline spent six years renting while she built a house. She concludes by stating that the only way those who lived like a husband and a wife without legally married can share the assets is by to demonstrate his/her participation in acquiring those assets, thus just alleging that she was illegitimate wife of Niwenshuti or they have children together do not give her the right on the house she did not build.

Held: 1. When proving the private relationship between people does not require special elements of evidence, any mean which can establish that a man and a woman live as a husband and wife can be based on for making a decision.

2. The documents issued by the local leaders where they resided or bills for rent that demonstrate that they lived in the same house are among the elements of evidence which can be based on to prove that they lived as a husband and wife.

3. Those who lived as wife and husband for them to share the property it is not necessary that each demonstrates the quantity he/she contributed in acquiring or increasing those assets, instead those assets should have been acquired during that period when they cohabited because during their cohabitation every one has something he /she contributes for the family.

4. The quantity contributed by a wife or husband towards the acquisition of the property or increase is not the one which gives woman or man the right to have a share on the property being litigated by the one they cohabitated together, instead it is an additional evidence that the property was acquired or increased during the period they cohabited even if one of them cannot give a detailed account his or her contribution.

5. Since the appellant knew that they were not wedded with Niwenshuti, she was aware that their relationship can come to an end anytime, thus, what he expected happened she should not consider it as a fault for which she can claim for damages.

Appeal has merit

The house belongs to both Niwenshuti Aloys, Mukambuguje Alodie and Mutoni K. Jackline, each has a share of a third (1/3) of its value;

Court fees on defendants.**Statutes and statutory instruments referred to:**

Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, article 39.

Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3.

Cases referred to:

Gatera Johnson and Kabarisa Teddy

RS/Inconst/Pén.0003/10/CS rendered on 07/01/2011 by the Supreme Court.

Nyirakamana et al. v. Mukasharangabo et. Al.,

RS/REV/INJUST CIV0007/15/CS rendered on 04/12/2015 by the Supreme Court.

Ahishakiye Jean v Namagabira Venantie RCAA0048/14/CS rendered on 11/03/2016 by the Supreme Court

Twahirwa Ahmed and Kaligirwa Rehema RCAA 0036/15/CS rendered on 17/11/2017 by the Supreme Court

Lothar Pettkus V. Rosa Becker [1980] rendered by the Supreme Court of Canada.

Baumgartner v Baumgartner [1987], rendered by the High Court of Australia.

Authors cited:

Francois Terré et Philippe Simler, Droit Civil: Les régimes matrimoniaux, Paris: Dalloz, 2015, p.734.

Memento Pratique, Droit de la Famille 2014-2015, Lavallos: Francis Lefebvre, 2014, p. 307.

Judgment

I. BACKGROUND OF THE CASE

[1] This case started in the Intermediate Court of Nyarugenge, whereby Niwenshuti Aloys sued Mukambuguje Alodie requesting to divide the assets they accumulated during their marriage for each one to get half of the proceeds ($\frac{1}{2}$).

[2] In the judgment RC0615/12/TGI/NYGE rendered on 03/05/2013, the Court found that even though they both agree that they lived as a husband and a wife and now they are no longer cohabiting is the reason why they should equally divide the property made of a house located on plot n° 753 according to article 39, paragraph 2, of the Law N° 59/2008 prevention and punishment of gender-based violence especially that division of the assets provided by that article is not based on the right from marriage contract, rather, it is the right on the property one of the spouses possesses, that right is based on the fact that they jointly acquired or share as it was ruled by the Supreme Court in the judgment RS/Inconst/Pén.0003/10/CS between Gatera Johnson and Kabarisa Teddy, it decided to sell the house, a half of the price be given to Niwenshuti Aloys, the other to Mukambuguje Alodie, the latter has to pay 410,000 Frw of the procedure and counsel fees to Niwenshuti Aloys

[3] Mutoni K. Jackline filed a third party opposition against that judgment claiming that she was also an illegitimate wife to Niwenshuti Aloys and had two children, they jointly built that house and thereafter she heard that there is a court order to share that house between Niwenshuti Aloys and Mukambuguje Alodie, and the latter contributed nothing on that house because it belongs

to her and Niwenshuti Aloys who built it and therefore, they are the ones to share it.

[4] Niwenshuti Aloys and Mukambuguje Alodie first raised an objection of inadmissibility of the claim of Mutoni K. Jackline on the ground that she only had children with Niwenshuti Aloys and they were business partners but never cohabitated.

[5] In the judgment RC0632/13/TGI/NYGE rendered on 31/03/2014, the Court overruled the objection of inadmissibility which was raised on the ground that Mutoni K. Jackline only had children with him but they were never legally married because she demonstrated the interest she has in the case based on the fact that the Court ordered house she built together with Niwenshuti Aloys be sold.

[6] In the merits of the case, the Court found that apart from only demonstrating that Niwenshuti Aloys used to pay taxes and the agreement for the rent with the owner of the houses they carried business in there is no proof that they jointly built the house together, thus, her claim lacks merit and sustained the rulings of the appealed judgment.

[7] Mutoni K. Jackline was not contented with the rulings and appealed to the High Court arguing that the previous court held that the house belongs to Niwenshuti Aloys and Mukambuguje Alodie while she is the one who jointly built it with.

[8] In the judgment RCA0176/14/HC/KIG rendered on 27/02/2015, the court found that Mutoni K. Jackline does not prove that he contributed in the construction of that house apart from following up on its construction and thus, sustained the rulings of the appealed judgment.

[9] Mutoni K. Jackline was not contented with the rulings and appealed to the Supreme Court arguing that:

- a. He produced to the court statements of witnesses demonstrating that she was a wife of Niwenshuti Aloys for eight years and had two children but those statements were not included in the copy of the judgment;
- b. The High Court misinterpreted article 39, paragraph 2 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender- based violence;
- c. The High Court held that Niwenshuti Aloys withdrew money from the bank account so that he can lend it to her without any basis in disregard that he withdrew it purposely for construction;
- d. The High Court held that Niwenshuti Aloys and Mukambuguje Alodie got married as a rejuvenation of their relationship while they did it after the lawsuits had begun to mislead the court;
- e. The Court was partial to Niwenshuti Aloys when it held that he was stolen « plan original » of the house in litigation, cheque book she used whenever she went to withdraw money, the stamp used at the workplace which are kept by Mutoni K. Jackline, without any proof because no theft case opened by Niwenshuti Aloys;
- f. She was ordered to pay 500,000 Frw of the procedural and counsel fees for dragging them in lawsuits while they are the ones that dragged her in those lawsuits;

[10] Mutoni K. Jackline also requests to this court to hold that Niwenshuti Aloys disgraced her and did not cater for the upbringing of the children they have and lied to her that he does not have another wife, thus, he should give her damages of 4,000,000 Frw and 2,500,000 Frw of counsel fees on all instances.

[11] The hearing was held in public on 30/05/2017, Mutoni K. Jackline assisted by Counsel Karangwayire Epiphane and Counsel Mukundamana Eric, Niwenshuti Aloys assisted by Counsel Kimanuka John while Mukambuguje Alodie assisted by Counsel Karega Blaise Pascal, The Court first examined the objection raised by Counsel Karega Blaise Pascal of inadmissibility of the appeal of Mutoni K. Jackline because he lost the case on first and second instance on the same ground and that even if the court finds that she did not lose on the same grounds, it should hold that one third (1/3) of the value of the house of 53,000,000 Frw which he sued for is not in the jurisdiction of the Supreme Court because it does not reach to 50,000,000 Frw, and even if it holds that it is in its jurisdiction it should reject it because it is the third appeal.

[12] On 30/06/2017, this Court overruled the objections raised and admitted the appeal, it ordered that the hearing will resume on 26/09/2017. On that date, the Court found that Niwenshuti Aloys had requested to postpone the hearing on the ground that he fell sick in Uganda while Mukambuguje Alodie, Counsel Kimanuka John and Counsel Karega Blaise Pascal were not present without a reason.

[13] The Court examined the grounds given by Niwenshuti Aloys, who has a counsel and found them baseless and found that it is a means to delay the case and fined him 100,000 Frw, while

Counsel Kimanuka John, assisting him and Counsel Karega Blaise Pascal, representing Mukambuguje Alodie, each was fined 200,000 Frw, but in the interest of justice based on the fact that the hearing should be while all parties present, the Court held that the defendants should be warned and summoned, the hearing was postponed on 24/10/2017.

[14] On that day the hearing was held in public, Mutoni K. Jackline assisted as before, Niwenshuti Aloys represented by Counsel Ruberwa Ngarukiye Silas, while Mukambuguje Alodie assisted by Counsel Kamushoshi Gandin.

II. ANALYSIS OF LEGAL ISSUES

II. 1. Whether Mutoni K. Jackline lived as a husband and a wife with Niwenshuti Aloys for them to share the house in litigation.

[15] Mutoni K. Jackline states that she appealed because the High Court held that Niwenshuti Aloys was not her husband rather he used to visit her often to relax and then, it did not share the house they jointly built r among them, while Kalisa Théoneste who was the chief of the village of Gatsata, where they first resided, Habimana ally, the chief of the village of Gikondo, even Ndagimana Athanase, chief of the village of Umurava where they successively shifted to, confirmed that she lived with him as her husband, and was the one paying rent fees. She further explains that she knew Niwenshuti Aloys since she was studying at Kabare in Uganda, they started living together since 05/08/2005, they had their firstborn on 23/04/2006, on 20/11/2011 they had their second born, in 2012, Niwenshuti Aloys showed her his celibacy certificate, whereby she trusted

him they went to her parents at Nyagatare and he gave a dowry of 1,000,000 Frw, though there were no big ceremony, the elders who received that dowry can testify it.

[16] She concludes in stating that on 20/08/2012 Mukambuguje Alodie told the leaders of Niboye cell that, she refused to give to Niwenshuti Aloys the titles of the house in litigation because he married another wife. On 13/11/2012, Niwenshuti Aloys wrote to the Land Registrar's office stating that Mukambuguje Alodie betrayed him and registered his house in her names while they are not legally married, concerning Judgment RC0915/12/TGI/NYGE rendered by Intermediate Court of Nyarugenge on 03/05/2013, this means that Mukambuguje Alodie testified that Niwenshuti Aloys had another wife, even Niwenshuti Aloys adduced that Mukambuguje Alodie did not contribute to the house in litigation, this is also emphasized by the fact that she can not indicate what was her occupation which could assist her to build jointly with Niwenshuti Aloys that house, this is the reason why she seeks justice and thus, benefit her part on that house.

[17] Her Counsel Mukundamana Eric states that Niwenshuti Aloys removed Mutoni K. Jackline from school, and they cohabitated for eight years (8), they shared business to "quartier commercial" as testified by witnesses, up to now the debits of Niwenshuti Aloys, commercial documents, cheque book and the cadastral map of that house are kept by Mutoni K. Jackline, the latter also, gave Niwenshuti Aloys a cheque of 500,000 Frw, all these elements of evidence indicate that they lived together as a wife and husband which was disregarded by the previous Court, and dismissed the request of Mutoni K. Jackline concerning her share on the house in litigation.

[18] Karangwayire Epiphanie, the Counsel for Mutoni K. Jackline states that Niwenshuti Aloys suddenly legally married Mukambuguje Alodie because he was aware that Mutoni K. Jackline started claiming her rights on the house in litigation, Mutoni K. Jackline immediately opposed that marriage so that the proceedings get closed, this means that before legal marriage, he was living with two wives, reason why Mutoni K. Jackline has to benefit her share on that house as it is provided by article 39 of the Law N° 59/2008 of 10/09/2008 preventing and punishing gender basic violence.

[19] Niwenshuti Aloys states that he married Mukambuguje Alodie in 1993, then in 1994 she came back, his brother called Rutamu Diogène gave him a land in which he built the house in litigation with a loan of 8,000,000 Frw given by the Bank Populaire to him conjointly with Mukambuguje Alodie, when he wanted to take another loan because the first was insufficient, Mukambuguje Alodie refused to sign with a pretext that he had children out of the wedlock and asked for the division of that house. He explains that he legally married Mukambuguje Alodie as a refusal of his status of cohabitation, meanwhile, he had met with Mutoni K. Jackline since 2003, the latter was aware that he has another wife who lives at Gatsata. He states that he does not deny that he attended her graduation in Uganda as it was attended by other guests, within that relationship, two children were born and he rented for her a house so that she can leave her brother's house. He concludes saying that to attend the graduation party, to deposit money on his account, to rent for her a house or the statements of the chiefs of villages are not the grounds to held that he was the husband of Mutoni K. Jackline, mostly because it is not the responsibility of local government authorities to affirm

that, reason why he prays the Court to hold that the appeal has no merit.

[20] His Counsel Ruberwa Ngarukiye Silas states that the subject matter, in this case, is not to determine whether Mutoni K. Jackline lived together with Niwenshuti Aloys as a wife and husband, because they don't deny that they have children or that, they were carrying business in the same house while each had his/her own business, rather, the subject matter is to know whether Mutoni K. Jackline has a share on the house in litigation. He explains that the documents in case file indicate that the land was given by Rutamu Diogène in 2006, Mukambuguje Alodie was among the signatory witnesses, on 05/08/2007 Mukambuguje Alodie and Niwenshuti Aloys conjointly requested a bank loan in 2008 they shifted in that house, all these happened in the presence of Mutoni K. Jackline and she did not do anything, in 2011 they got registered on that house and she did not object to that, he finds that the High Court correctly interpreted article 39 paragraph 2, of the Law N° 59/2008 of 10/09/2008 aforementioned because up to date, Mutoni K. Jackline can not indicate her input on that house so that she can claim her share.

[21] Mukambuguje Alodie states that the origin of disputes is the second loan requested by Niwenshuti Aloys which she denied her approval because she was aware that he had a children out of the wedlock, then he got hungry, he deserted, he spent six months without return, she filed a claim to Court while he was away, requesting to share that house, after sharing he came back and she received him because he is the one who faulted. She states that he does not understand how Mutoni K. Jackline spent six years renting while she has built a house, she requests the Court to

sustain the ruling of the appealed judgment and held that the appeal has no merit.

[22] Her Counsel Kamashoshi Gandin states that the way one of the partners who lived together in cohabitation can get rights to properties of the husband or the wife who lived together is to prove his/her input in the concerned property, that what is provided by article 39 of the Law N°59/2008 of 10/09/2008 aforementioned, he finds that the statements of Mutoni K. Jackline and her counsels that the latter was a cohabitant of Niwenshuti Aloys or that they had together children are not the reasons to get a share on the house she did not build.

COURT'S DETERMINATION

[23] Article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender- based violence provides that «Those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of the previous paragraph of this Article was living with many husbands/wives, he shall, first of all, share the commonly owned belongings with those husbands/wives equally ».

[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] The documents in case file contain a document of the chief of the village of Nyakaliba, Kalisa Théoneste, affirming that Niwenshuti Aloys and Mutoni K. Jackline live in that village as a wife and husband since 2006 up to December 2009; Nyamaswa

Eugène, the chief of the village of Kabeza, states in his document of 17/09/2013, that Niwenshuti Aloys and his wife Mutoni K. Jackline live in the house of Gabiro Grégoire in that same village since 27/12/2012, there is also a document of the Umurava village's committee testifying that Niwenshuti Patience and Niwenshuti Patrick were left by their father who went to another wife who is in the village of Mwijito in Kicukiro. they also contain the document of Kigali Investment Company(KIC) testifying that Mutoni K. Jackline run businesses in the shop N° B2 35 on basis of a contract signed by Niwenshuti Aloys, there is also a lease contract between Gabiro Grégoire and Niwenshuti Aloys of 27/12/2010 of 100,000 Frw per month (see Identification mark 26-30 and 115).

[26] The case file indicates that on 27/12/2011, Mutoni K. Jackline deposited 1,600,000 Frw, on the account N° 403-1085982-11 of Niwenshuti Aloys in BPR, "quartier commercial" branch, on 30/12/2011 she deposited 2,300,000 Frw, on 18/04/2012, she deposited 140,000 Frw, on 15/06/2012 she deposited 150,000 Frw, then on 19/06/2013, she signed a cheque for Niwenshuti Aloys of 500,000 Frw (Identification mark 22-25 and 75).

[27] The case file also contains a donation contract of a land concluded before notary between Rutamu Diogène and Niwenshuti Aloys of 15/01/2006, on that contract, Umukundwa Chantal and Mukambuguje Alodie signed as witnesses, it contains also a loan contract (contrat de prêt 357/2007) of 8,000,000 Frw between BPR and Niwenshuti Aloys conjointly with Mukambuguje Alodie, the loan had to be reimbursed not later than 05/07/2011 (Identification mark 103)

[28] The case file also contains the document of 30/07/2012, which is the letter that Niwenshuti Aloys wrote to the executive secretary of Niboye cell stating that due to the disputes he had with Mukambuguje Alodie, while is the one who keeps the titles of his house, he requests for its protection so that she can neither sale it nor mortgage it without him knowing, there is also a document of 13/11/2012, that Niwenshuti Aloys wrote to the president of the committee in charge of the land in Niboye sector requesting to solve the problem he has with Mukambuguje Alodie who got registered on the house he built on the land he received from his brother, she states that they jointly own that house while she has no share on it (identification mark 19- 20).

[29] The case file also contains a report on the disputes resolution between Niwenshuti and his wife Alodie made by the executive secretary of Niboye cell on 20/08/2012, whereby Mukambuguje Alodie stated that she refused to give Niwenshuti Aloys the titles of the house because of the disputes they had resulting from the fact that Niwenshuti was cohabitant with another wife; with regards to the report made by Havugimana Cléophas, who is in charge of economic development in village of Nyamugari, which affirms that Niwenshuti Aloys lived with his wife Mutoni K. Jackline in that village since 2006 up to 2010. The case file contains also, an affidavit of the hearing of 29/01/2015 before High Court, Ndagijimana who was the chief of Umurava village in Gisozi sector, he stated that Mutoni K. Jackline "she was living with her husband, he was the head of the family,... between 2011 and 2013..., this man claimed before me about the problem he had with his landlord and I attended the hearing of their case disputes, ...[the time he left] I was aware...and I informed all this to the person in charge of security that Mutoni came to see me... to tell me that his husband left her,

that she and her children do not have food and she used to come to Muganda and used to pay security fees also she was active in disputes resolution of other citizens (identification mark 71, 102 and 129).

[30] The Court finds that regarding the issue of proving cohabitation between husband and wife, Francois Terré and Philippe Simler state, that kind of private relation between persons does not require special element of evidence, but any possible means to prove that the wife and the husband lived together shall be based in taking a decision, the book of *Mémento Pratique* Francis Lefebvre, *Droit de la Famille* also indicates that in evidencing that two persons are living as wife and husband, any evidence may be based on including a document of authorities where they resided or an invoice resulting from a rental contract indicating that they were living together.¹

[31] The Court finds that Niwenshuti Aloys admits that he met with Mutoni K. Jackline since 2003, that time Mutoni K. Jackline was a student at Kabare in Uganda when she completed her studies he accompanied her to the graduation party, then they started carrying business together, the rent of the house they were trading in, have been paid by Niwenshuti Aloys, that time Mutoni K. Jackline was living at her brother, afterward he rented for her a house, and had two children, the rental contract of Gabiro Grégoire's house in Kabeza village indicates that Niwenshuti

¹ “ S’agissant d’une situation de fait, la preuve du concubinage peut être apportée par tous moyens: certificate de concubinage obtenu auprès de la mairie du domicile des concubins, ... quittances des loyers ou factures établies aux deux noms, relevés des comptes bancaires indiquant la même adresse, etc.” *Mémento Pratique, Droit de la Famille 2014-2015*, Lavallos: Francis Lefebvre, 2014, p. 307.

Aloys was in charge of rent, the chief of that village Nyamaswa Eugène, even Kalisa Théoneste, the chief of the village of Nyakaliba where they lived in beginning, affirm that Niwenshuti Aloys and Mutoni K. Jackline lived as wife and husband, thus, confirm without doubt that since 2005 they lived stably and continuously till the time they were separated.

[32] The Court also finds that Niwenshuti Aloys and Mutoni K. Jackline cohabited because Mukambuguje Alodie testified that Niwenshuti Aloys left her with children when she refused to consent to take the second loan after that she became informed that he cohabited with another wife with whom they gave birth to children, and also Niwenshuti Aloys does not deny for cohabiting with Mutoni K. Jackline though he intends to convince that it was to safeguard his children, he would not have rent for her a boutique, a dwelling house, participating in community works (Umuganda) where Mutoni K. Jackline resides, paying security fees, participating in disputes resolution for the residents, Mutoni K. Jackline kept his documents including bank checkbook and drawing of the house he was building, Mutoni K. Jackline used to make deposits on his account Niwenshuti Aloys concealed Mutoni K. Jackline that he has another wife, he remained in such situation till the Court ordered the house in litigation to be shared with Mukambuguje Alodie.

[33] With regard to whether Mutoni K. Jackline has rights over the house built while cohabiting with Niwenshuti Aloys, the Court finds, the statements of Counsel Ruberwa Ngarukiye Silas and Counsel Kamashoshi Gandin that guideline set by this Court in the petition seeking to annul the provisions alleged to be

unconstitutional filed by Gatera Johnson and Kabarisa Teddy² that each one of the cohabitants should prove his or her contribution to the property in litigation, these statements cannot be considered because in that case, the Court held that in case of separation cohabitants, they have to share the property when they co-own or co-acquired³. Co-ownership or acquisition does not imply that each should proof his contribution on the property or his role in increasing the value of that property, what is important is that property has to be acquired in that period of living together since what matters is that everyone contributes in one way or another.

[34] The court finds, it is demonstrated in paragraph 9 to 13, the Supreme Court took that decision basing on the case law of Hayward vs Giordani of New Zealand, and cases from Canada: Baumgartner vs Baumgartner, Beaudouin Daigeault vs Ricahrd Paul Eugene, Pettkus vs Becker, the Court also based on Homesteads acts of Manitoba(Canada), New Zealand Relationships act 1976 and laws of some provinces of Australia, these laws and cases affirm that those who live as husband and wife without legal marriage have equal rights over property co-owned or acquired together, particularly in the case between Pettkus vs Becker, the latter was given a half of land and beehives they owned stating that Rosa Becker contributed in the interests of the household that she paid the rent of their home house and other household expenses and he worked in the bees farm,

² See the case RS/Inconst/Pen.0003/10/CS rendered on 07/01/2011 by the Supreme Court, Gatera Johnson and Kabarisa Teddy petitioned for annulment of article 39 of the law N° 59/2008 of 10/09/2008 on prevention and punishment of gender- based violence because it contravenes with the Constitution of the Republic of Rwanda of 04 June 2003 as revised to date.

³ See paragraph 15 of the judgment (in fine)

therefore, since Niwenshuti Aloys does not deny for having accepted money from Mutoni K.Jackline to develop their household including construction of house in litigation, they also co-own business, all these prove that they live as husband and wife, hence, they have to share the property acquired together.

[35] The court also finds, the contribution of wife or that of husband does no matter because that contribution is not the one to bestow to the cohabiting partners' rights of sharing the property, but it can be considered as supplement proof that the property was got or that its value was increased while living together as wife and husband though one of the partners cannot prove his or her role. This was also decided so by this Court in the case between Nyirakamana Marciana et. al. vs Mukasharangabo Eugenie et.al whereby the Court held that even if Nyirakamana Marciana was not legally married to Karimunda Gérard, the fact that they lived together as wife and husband from 27/11/1970 until his death in 1994, she has the right to be given $\frac{1}{2}$ of the property jointly owned or belongings acquired together with Karimunda Gérard⁴, besides, in the case between Ahishakiye Jean vs Namagabira Venantie, this Court held that when a wife gave contribution of whatsoever nature to the household, it is sufficient ground for granting her rights to share with her husband the property they co-owned or acquired⁵, this also affirms that Mutoni K.Jackline has rights over the property acquired together with Niwenshuti Aloys.

⁴ See the judgment RS/REV/INJUST CIV 0007/15/CS rendered on 04/12/2015 by the Supreme Court, paragraph 30.

⁵ See the judgment RCAA0048/14/CS rendered on 11/03/2016 by the Supreme Court, paragraphs 26 and 17, the judgment RCAA0036/15/CS between Twahirwa Ahmed and Kaligirwa Rehema rendered on 17/11/2017 by the Supreme Court, paragraph 21.

[36] The Court further finds, when Niwenshuti Aloys and Mutoni K. Jackline lived together, on 15/01/2006, Niwenshuti Aloys concluded with Rutamu Diogene a donation contract of plot, Mukambuguje Alodie appears on that contract as a witness, in 2007, Mukambuguje Alodie together with Niwenshuti Aloys sought a loan of 8,000,000 Frw for constructing that house, both admit that they moved to that new house in 2008, this is also affirmed by Harerimana Gaspard, the chief of Mwijuto village who states that the house is theirs, that Niwenshuti Aloys and Mukambuguje Alodie reside in that house with their five children, this implies that from 2006 to 2012 Niwenshuti Aloys have two wives, consequently, both have to share that house pursuant to article 39 paragraph 2 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence mentioned above.

[37] In light of foregoing, the Court is of the view that Mutoni K. Jackline has right of 1/3 over the house built on plot UPI:1/03/09/02/753 located in Niboye Village, Kicukiro District, Kigali City, that is to say, 52,924,870 Frw/3 of the value of the house demonstrated by property valuer appointed by Mukambuguje Alodie in his report dated 02/07/2012 (identification mark 22-37) equivalent to 17,641,623 Frw to be paid by Niwenshuti Aloys together with Mukambuguje Alodie.

II.2. The basis of damages claimed

[38] Mutoni K. Jackline is claiming to hold that Niwenshuti Aloys did not respect her, that he did not care of the children's education; that he also lied to her for not having married to someone else, thus, she claims damages worth 4,000,000 Frw as well as counsel fees of 2,500,000 Frw.

[39] Niwenshuti Aloys, Mukambuguje Alodie and their advocates state that damages claimed are groundless because Mutoni K.Jackline did not contribute to the house in litigation. They explain that Mutoni K.Jackline established a caveat on that house so that it does not generate interests, thus, Niwenshuti Aloys requests moral damages of 3,000,000 Frw and 500,000 Frw for procedural fees, Mukambuguje Alodie also states that her activities were suspended, hence she claims damages worth 3,000,000 Frw, both, they request 2,000,000 Frw for counsel fees.

[40] Mutoni K. Jackline and her advocates argue that she should not be liable for damages because Niwenshuti Aloys and Mukambuguje Alodie deliberately seized the court, that they should not invoke the loss from that house while they live in Uganda, rather, they come to Rwanda for the court hearing. They add that she cannot be solvent in case she is ordered to pay damages since she cares for her children with her little salary because Niwenshuti Aloys refused to provide alimony.

COURT'S DETERMINATION

[41] The court finds that the damages should not be awarded basing on the fact that Niwenshuti Aloys left Mutoni K.Jackline though he may have lied that he has no legitimate wife because Mutoni K.Jackline accepted that at any time their union may end knowing that they are not legally married, in case of they are separated, she should not claim compensation from the separation.⁶

⁶ *Le concubinage est essentiellement précaire ; en ne se mariant pas, les concubins ont précisément voulu se réserver la liberté de rompre à leur gré cette liaison, chacun d'eux en s'y pretant, a accepté ce risqué, et ... celui qui le subit ne peut demander à*

[42] The Court finds that Mutoni K. Jackline fails to prove how Niwenshuti Aloys dishonored her, also, the issue of not caring for the children should not be examined in the present case because it is not among the grounds of the claim.

[43] However, the Court finds that Niwenshuti Aloys disregarded that he had two wives unlawfully and that in accordance with article 39 of the law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence mentioned above, those wives are equal before the law, therefore, damages and counsel fees that Niwenshuti Aloys and Mukambugu Alodie request are groundless and procedural fees requested by Niwenshuti Aloys should not be awarded because he is the one who initiated court proceedings and he loses the case.

[44] The Court finds that Mutoni K. Jackline was dragged into lawsuits by Niwenshuti Aloys together with Mukambugu Alodie, Mutoni K. Jackline came to defend herself which is reasonable, hence, she deserves to be awarded the counsel fees she claims, however, the fact that she does not prove that she paid 2,500,000 Frw as she claims, in court discretion, she is awarded 1,500,000 Frw at all instances, that amount has to be paid by Niwenshuti Aloys and Mukambugu Alodie jointly.

III. THE DECISION OF THE COURT

[45] Decides that the appeal of Mutoni K. Jackline has merit;

l'autre d'en réparer les conséquences." see Francois Terré et Philippe Simler, Droit Civil : Les régimes matrimoniaux, Paris, Dalloz, p.741

[46] Declares that the ruling of the case RCA 0176/14/HC/KIG rendered by the High Court on 23 February 2015 is overturned;

[47] Decides that the house situated on plot UPI 1/03/09/02/753 located at Mwijuto Village, Niboye Cell, Niboye Sector, Kicukiro District, Kigali City belongs to Niwenshuti Aloys, Mukambuguje Alodie and Mutoni K. Jackline, with a share of 1/3 to each of them ;

[48] Orders Niwenshuti Aloys, Mukambuguje Alodie to pay Mutoni K. Jackline 17,641,623 Frw equivalent to 1/3 of the value of the house situated on plot UPI 1/03/09/02/753 located at Mwijuto Village, Niboye Cell, Niboye Sector, Kicukiro District, Kigali City;

[49] Orders Niwenshuti Aloys, Mukambuguje Alodie to jointly pay Mutoni K. Jackline 1,500,000 Frw of the counsel fees;

[50] Orders Niwenshuti Aloys, Mukambuguje Alodie to jointly pay court fees.

SUCCESSION MUKAGAHIMA v. NGARAMBE

[Rwanda SUPREME COURT – RCAA0039/15/CS (Mugenzi
P.J., Nyirandabaruta and Gakwaya J.) 06 July 2018]

Criminal procedure – Claim for damages – Filing a civil action requesting for the annulment of a document differs from filing a claim of damages within criminal proceedings – Law relating to the code of criminal procedure, article 139.

Contract law – Contract of donation – A donation is made by authentic deed, written agreement or simple transfer to the beneficiary – Law N° 22/99 of 12/11/1999 completing civil code book I and instituting part 5 relating to matrimonial regime, donation and succession, article 27.

Facts: Ngarambe filed a claim before Nyarugenge Intermediate Court, requesting for the annulment of the documents relied on to grant “acte de notoriété” to Mukagahima Génèreuse for the house alleged by Ngarambe to be his, he requests the Court to order the registration of that house on his name, he also prays to order Mukagahima to give him damages, interests he lost and the counsel fees.

Mukagahima states that the claim of Ngarambe should not be admitted because the grounds of the claim have been litigated in another criminal case which she won and Ngarambe was a party to that case claiming for damages but his claim was inadmitted because Mukagahima was found not guilty. The Intermediate Court of Nyarugenge rendered the judgment holding that the claim of Ngarambe has no merit,

Ngarambe appealed before the High Court, stating that the Court rejected his claim basing on the criminal case while it has no link with the civil case because the parties and the subject matter are not identical. That Court rendered the judgment deciding that the appeal of Ngarambe has merit.

Mukagahimana was not contented with the rulings of that judgment and appealed before the Supreme Court stating that, the High Court should have declared that claim inadmissible, that the Court disregarded the evidence proving the origin of the property and the fact that she lived with Ngarambe as wife and husband.

And after, Mukagahima passed away, the Court examined first the issue of her children who have not yet the age of majority, examining how they should be represented in the hearing. The Court decided that it is needed to find a guadian for those minor children pursuant to Law gorverning persons and family.

Ngarambe states that article 139 of the Law relating to criminal procedure does not prohibit some one to file a civil claim on the grounds that are different from those ones he/she based on to file a claim for damages in criminal case. He also states that; the appellants contradict themselves because they state that Ngarambe made a donation but they deny the origin of his property.

Held: 1. Filing a civil action requesting for the annulment of a document differs from filing a claim of damages within criminal proceedings. Therefore, the claim is admitted.

2. A donation is made by authentic deed, written agreement or simple transfer to the beneficiary.

Appeal has merit.

The appealed judgment is reversed.

Statutes and Statutory instruments referred to:

Law N° 43/2013 of 16/06/2013 governing land in Rwanda, article 10.

Law N°30/2013 of 24/05/2013 relating to the code of criminal procedure, article 139.

Law N° 22/99 of 12/11/1999 completing civil code book I and instituting part 5 relating to matrimonial regime, donation and succession, article 27 and 28.

Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 106 and 162.

Law of 10/07/1888 governing contracts or obligations, article 258.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Ngarambe Jean filed a claim before the Intermediate Court of Nyarugenge requesting the annulment of land documents delivered by local government authorities for which they were relied on to grant Mukagahima Génèreuse “acte de notoriété” of the property composed of a house that Ngarambe Jean claims that it is his, he requests the Court to decide that property be registered on his name, and order Mukagahima Génèreuse to pay damages, interests he lost and counsel fees.

[2] Mukagahima Génèreuse raised an objection of inadmissibility of Ngarambe Jean's claim because the subject matter was adjudicated in another case RP0295/14/TGI/NYGE, rendered on 10/07/2014, in which Mukagahima Génèreuse was accused of the offence of fraudulent acquisition of documents issued by the competent authority and use of counterfeit documents, in this case Ngarambe Jean sued for damages but his claim was not admitted because Mukagahima Génèreuse was acquitted for those offences which are similar to those of civil case.

[3] The Intermediate Court of Nyarugenge rendered the judgment RC0742/14/TGI/Nyge on 24/03/2015, and held that the claim of Ngarambe Jean has no merit, because it found that in case RP0295/14/TGI/NYGE, the Court found Mukagahima Génèreuse not guilty of the offence of fraudulent acquisition of documents and use of counterfeit documents, and decided that there is no basis to annul those documents while they were legally delivered, and ordered Ngarambe Jean to give Mukagahima Génèreuse 500.000 Frw of counsel fees, damages for unnecessary law suits and procedural fees.

[4] Ngarambe Jean appealed before the High Court, stating that the lower court rejected his claim basing on criminal case whereas the cases are different because the parties and the subject matter are not identical. That Court rendered the judgment RCA0174/15/HC/KIG on 23/10/2015, and decided that the appeal of Ngarambe Jean has merit, it ordered the annulment of the certificates delivered by local authorities which include the certificate of 30/02/2009, the one of 28/08/2004, proof of land acquisition N° 1253//2004 and "acte de notoriété" of 27/07/2010, delivered on Mukagahima Génèreuse's name, and decided that

the house in litigation be registered on Ngarambe Jean, it also ordered Mukagahima G  n  reuse to pay Ngarambe Jean 1,225,000 Frw of damages and court fees.

[5] Mukagahimana G  n  reuse was not contented with the rulings of the case and appealed before this Court, stating that the High Court should not have admitted the claim and it disregarded the evidence of the origin of the property, she adds that the court disregarded that she lived together with Ngarambe Jean as wife and husband and that damages she was charged have no merit because she contributed to the construction of the house.

[6] The case was heard in public on 11/10/2016, on 10/01/2017 and on 18/04/2017, the Court examined the issue relating to those having capacity to take over the case on the side of Mukagahima G  n  reuse who died on 31/07/2016, Counsel Mugabonabandi Jean Maurice represented some of the heirs of Mukagahima G  n  reuse, while Ngarambe Jean was assisted by Counsel Kayitana Evode, the debate proceeded on the issue regarding how minor children are represented in court case.

[7] On 19/05/2017, the Court decided that a guardian be appointed for the minor children Ngarambe Bruce Kevin and Ngarambe Chris in accordance with the provisions of the Law N  32/2016 of 28/08/2016 governing the persons and family. They will be helped by Remera sector.

[8] The hearing of the case in merit was held in public on 22/05/2018, Mugabonabandi Jean Maurice representing Mugabo Aim   Fernand, Umulisa Murielle and Ndayisenga Sandrine (the guardian of Ngarambe Bruce Kevin), Counsel Bizimana Emmanuel and Counsel Safari Kizito represented Ngarambe Jean while Counsel Uwamahoro Marie Gr  ce represented Nzabandora

Ildephonse, the guardian of Ngarambe Chris. The heirs of Mukagahima Génèreuse explained their grounds of appeal, the representatives of Ngarambe Jean replied on them. On that day, the Court decided to adjourn the hearing so that the court conducts field investigation.

[9] The investigation was conducted on 21/03/2018, in Amajyambere village, Rukiri I cell, Remera sector, Gasabo district, Kigali city, where object in litigation is located, the Court heard the witnesses of both sides, the hearing was reopened on 22/05/2018, the parties were represented as before and were given opportunity to comment on the result of investigation and the statements of the witnesses.

II. ANALYSIS OF LEGAL ISSUES

1. Whether the claim of Ngarambe Jean should not have been admitted.

[10] Counsel Mugabonabandi Jean Maurice, who represents Mugabo Aimé Fernand, Umulisa Murielle and Ndayisenga Sandrine (the legal guardian of Ngarambe Bruce Kevin), states that the claim of Ngarambe Jean should not have been admitted by the lower Courts because article 139 of the Law relating to the code of criminal procedure prohibits a person to file an action in a criminal court and filing the same action in civil Court, he adds that the case file contains the judgment N° RP0295/14/TGI/NYGE which acquired the force of *res judicata*, whereby the Intermediate Court of Nyarugenge based on the testimony provided by the local authorities confirming that the property was registered on Mukagahima Génèreuse on request of Ngarambe Jean, this led to decide that Mukagahima Génèreuse is

not guilty, consequently, the claim for damages lodged by Ngarambe Jean was inadmitted.

[11] Counsel Mugabonabandi Jean Maurice states that the objection raised is not a new claim, that they raised it even in lower Courts, and that objection may be raised at any stage of proceedings, that Ngarambe Jean waited the case to acquire the force of *res judicata* without appeal, then he lodged a similar claim to that one of criminal case before civil Court whereas the laws prohibit that.

[12] Counsel Uwamahoro Marie Grâce, who represents Nzabandora Ildephonse states that article 139 of the Law relating to code of criminal procedure applies when the claim for damages is admitted and examined, the Claim of Ngarambe Jean was not admitted because Mukagahima Gènereuse was found not guilty, she finds that is possible to file that claim as civil action, because civil laws and criminal laws are separately independent, and the judge in civil case is not obliged to follow what a judge in criminal case did, she concludes that the civil claim must fall under the Law relating to the civil procedure.

[13] Counsel Bizimana Emmanuel who represents Ngarambe Jean, states that Mukagahima this grounds of appeal of Gènereuse's heirs should not be admitted because it is a new claim filed in appeal level while it was not litigated in lower Court, he links this with the provision which provides that a party appeals against irregularity in the judgment, that since the previous courts did not decide on inadmissibility of the claim, he finds no irregularity in the judgment, he adds that in case the court finds it otherwise, the court would hold that this ground of appeal has no merit because parties in criminal action and those

of civil action are different, he adds that the civil claim was not even admitted.

[14] Counsel Bizimana Emmanuel further states that article 139 of the Law relating to the code of criminal procedure prevents some one, who claimed damages within criminal proceedings, to claim for them in civil action basing on the same offence, but it does not prevent some one to file a claim with different grounds. With regard to criminal case that acquired force of *res judicata* and has not been subject to appeal, Counsel Bizimana Emmanuel states that, it is not true because their claim in criminal case was not examined and decided upon.

COURT'S DETERMINATION

[15] Article 139 of the Law N° 30/2013 of 24/05/2013 relating to the code of criminal procedure provides that "A person aggrieved by an offence who wishes to sue for damages may either file an action in a criminal court or a civil court. However, once the aggrieved person chooses to file his/her action in one court, either criminal or civil, he/she cannot later file the same action in another court".

[16] Article 106 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production provides that, "The authority of a final judgment extends only to the subject - matter of the judgement. It is necessary that the subject matter of the case be the same, that action be based on the same grounds, that the action be pending between the same parties and that the action be brought by or against the same parties in their original names."

[17] The case file indicates that in case N° RP0295/14/TGI/NYGE, Mukagahima Génèreuse was accused before the Intermediate Court of Nyarugenge for the offence of fraudulent acquisition documents to be issued by the competent authority and use of counterfeit document, Twiringiyimana Célestin was also accused in that case the offence usurpation of power, in that case, Ngarambe Jean sued for damages, the Court ruled on the case on 10/07/2014, it decided that Mukagahima Génèreuse and Twiringiyimana Célestin are not guilty, it also declared inadmissible the claim of damages filed by Ngarambe Jean.

[18] The case file also indicates that Ngarambe Jean after that judgment, he filed a case before the Intermediate Court of Nyarugenge in the case N° RC0742/14/TGI/NYGE, he requested the annulment of documents issued by local authorities which served to register his property composed of a house on Mukagahima Génèreuse, thus he seeks that the house be registered on his name, and be paid damages for being deprived the rights and interests from his house, he also requests the counsel fees.

[19] The Court finds that, what article 139 of the Law N° 30/2013 of 24/05/2013 mentioned above prohibits is, if some one takes the option of filing a claim of damages before the criminal Court, he can not change and file it before civil Court, this not what Ngarambe Jean did, because the claim he filed before Nyarugenge Intermediate Court in civil case is intended to annul the documents issued by local authorities, it has no link with the claim for damages he filed within criminal proceedings in the case N° RP0295/14/TGI/NYGE, when Mukagahima Génèreuse was prosecuted before the Intermediate Court of Nyarugenge for

the fraudulent acquisition of documents issued by the competent authority. And use of counterfeit documents Therefore, the Court finds without merit the statement of Counsel Mugabonabandi Jean Maurice that the claim of Ngarambe Jean should not have been admitted by previous courts because he filed a case before the criminal court and then before the civil court.

[20] The Court further finds that, as indicated above, to base on the principle that the judgment acquired force of *res judicata*, there should be claim with the same subject matter, between same parties and pleading in the same names as before. No one can pretend that the previous courts disregarded that principle with regard to that case because the criminal case N° RP 0295/14/TGI/NYGE, the case between the Prosecution and Mukagahima Génèreuse, is different from the present case, either regarding their nature because one is criminal while other is civil, or regarding the object of the claim and the parties, thus, the statement of the counsel for Mugabo Aimé Fernand, Umulisa Murielle and Ndayisenga Sandrine (the legal guardian of Ngarambe Bruce Kevin), that the Court disregarded the case which acquired the force of the *res judicata* has no merit.

[21] With regarding the statement of Counsel Bizimana Emmanuel that this ground of appeal concerning the objection raised by the heirs of Mukagahima Génèreuse for inadmissibility of Ngarambe Jean's claim must be dismissed because it is a new claim, the Supreme Court finds that this issue is not examined for the first time because the High Court referred to it and decided upon it in paragraph 12, thus that objection cannot be considered as new claim filed for the first time in this Court.

2. To know the owner of the property in litigation

[22] Counsel Mugabonabandi Jean Maurice states that in paragraph 18 and 19 of the judgment N° RP0295/14/TGI/NYGE, the Intermediate Court of Nyarugenge demonstrated the origin of the property as it was affirmed by local government authorities, thus, if there is a criminal case which held on the origin of the property, it cannot be quashed by the civil case.

[23] Counsel Mugabonabandi Jean Maurice further states that, the High Court based its decision on the document made in 1995 produced by Ngarambe Jean as proof of origin of the property while they indicated the irregularities of that document, because the person mentioned in that document is Ngarambe Jean Pierre, who is different from Ngarambe Jean, they also contest the donation because the donor did not sign the donation document. He explains that, it is not true where they argue that he put his fingerprint, instead, it looks like an ink poured on it, there is not even the signature of the receiver on that document, and the donor does not indicate the location of the land he donated.

[24] Counsel Mugabonabandi Jean Maurice also states that, the statment of the counsel for Ngarambe Jean that there should be a document proving that the latter really donated to Mukagahima Génèreuse the property in litigation, is false because the Law on succession provides that, the donation is valid even upon simple transfer to the receiver, it is no where provided that the donation is valid when it is written. He continues stating that, the statment of Ngarambe Jean that Mukagahima Génèreuse registered on her names that property in 2009 and 2010, while he was imprisoned, it is not true, because since 2004, those properties were registered on Mukagahima Génèreuse when she and Ngarambe Jean lived together, thus, he

prays to Court to base on the document of 2000 indicating that the old woman Ntacyobazi Anastasie donated to Mukagahima Génèreuse and Ngarambe Jean, the land in litigation.

[25] Regarding the statement of witnesses questioned in the investigation of 21/03/2018, Counsel Mugobonabandi Jean Maurice states that the testimony of Izere Valentine can help the Court, with regard to the documents which Ngarambe Jean requested for the annulment, Mukagahima Génèreuse was lawfully issued those documents, thus they should not be annulled, that, Twiringiyimana Célestin testified that, he was in village's committee since 2003 up to 2006, and get back into committee in 2009 up to now, he explained that Ngarambe Jean himself went before officials requesting to register the property to Mukagahima Génèreuse, this complies with the criminal case they filed to court; lastly Bakina indicated that he knows the history of the land in litigation because he said that he is aware of the time that land was donated to Ngarambe Jean and Mukagahima Génèreuse and that he signed as witness on the donation contract.

[26] Counsel Mugobonabandi Jean Maurice further argues that he does not agree with the testimonies of other witnesses, because Nzabandora Jimmy and Ngarambe Jean are full siblings, he can be biased due to their blood relation, and also he states that Ngarambe Jean was given the that land with a house when he was living with Mukagahima Génèreuse, whereas Ngarambe Jean stated that he was not living with her, they contradict each other while Ngarambe Jean is the one who introduced him to Court; that with regards to the witness Kanani, the court should take into consideration how Ngarambe Jean as an intellectual (Ingénieur) took a bricklayer assistant of 15 years old, who barely knows how

to write as a witness and protractor of a document which he produces as evidence of his claim; regarding the witness Mukampabuka Hélène, who states that there were pea nuts in the land, and contradicts with Kanani who states that there were grasses called *ibyicamahirwe* while they were all present; Radjab on his side states that, he begun building in 1999, which differ from the statements of the parties.

[27] Counsel Uwamahoro Marie Grâce states that Ngarambe Jean indicates that he was given the land by Ntacyobazi Anastasie, thus, he is the owner of the property, with regard to names of Ngarambe Jean-Pierre, he states that there was a mistake on the names, she adds that it was not possible for Ngarambe Jean to donate Mukagahima Gënëreuse without written and signed document, and that all donations received by Ngarambe Jean were in written contract, that the donation alleged to be awarded to Mukagahima Gënëreuse, could not be given orally.

[28] Counsel Uwamahoro Marie Grâce states that, the appellant make false statement by arguing that, on the donation document there is no the donor's signature because there is fingerprint, as regards to the fact that Mukagahima Gënëreuse was in possession of the property in litigation since 2004, she states that if the Supreme Court finds that the property belongs to Ngarambe Jean, Mukagahima Gënëreuse shall file a claim for her rights.

[29] Counsel Uwamahoro Marie Grâce continued stating that, there are evidence indicating that there are two donations, the first is that one made by Ntacyobazi Anastasie and concerns the land of 20x14metres given to Mukagahima Gënëreuse and Ngarambe Jean, then, Kigali city granted that land to Kizito Jean. She states

that the second one is indicated by the document of 27/02/1995, whereby Ntacyobazi Anastasie donated to Ngarambe Jean alone, which is the object of the claim in this case, thus, if the counsel for the heirs of Mukagahima G  n  reuse disagree with the fact that Ngarambe Jean was donated that land, they should prove the origin of the land that Ngarambe Jean gave her.

[30] With regard to the investigation, Counsel Uwamahoro Marie Gr  ce states that the testimony of Izere Valentine is irrelevant because she does not explain how Ngarambe Jean donated to Mukagahima G  n  reuse, that Twiringiyimana C  lestin also did not explain the exact point of the issue because he did not state that Ngarambe Jean donated to Mukagahima G  n  reuse, rather, it is a hearsay. Also the testimony of Bakina Jean is baseless because he stated that he came after the contract was concluded, they gave him a drink and he signed, while Nzabandora Jimmy and Kanani are indicating the origin of the property, they stated that the property belongs to Ngarambe Jean, thus, it has to be registered in his names.

[31] Counsel Bizimana Emmanuel states that the appellants contradict themselves because they state that Ngarambe Jean made a donation while they refute its origin, also, the date on which Mukagahima G  n  reuse indicated that she was awarded the land documents, coincide with the period for which Ngarambe Jean was imprisoned. He states that, the request of Counsel Mugabonabandi Jean Maurice that Ngarambe Jean and Mukagahima G  n  reuse should share because they lived and built that house together, he finds that, it is a new claim, which is prohibited by article 4 and 7 of the Law N   21/2012 of 14/06/2012 relating to civil procedure because they did not request for sharing they just mention it before the Supreme Court for the first

time. As regards to know whether Ngarambe Jean is the same as Ngarambe Jean-Pierre who is stated in the document made in 1995, he states that, he is the one and the proof is his baptism card which shows that his name is Jean-Pierre.

[32] Counsel Bizimana Emmanuel also states, the fact that Radjab did not prove that he was a bricklayer, this was not the purpose, and cannot weaken his statment, regarding the issue that Kanani was a bricklayer assistant working with an ingeneer, no law was violated, He concluded stating that as Ngarambe Jean appears on the donation contract, as there is no document which replace the first one, the Court should base on this to decide that the property belongs to Ngarambe Jean.

[33] Counsel Safari Kizito states that regarding the origin of the property, Bakina Bernard cannot help the Court, because he came after the contract was already concluded, that he was given a drink and he signed, that Twiringiyimana Célestin does not reveal the truth because he was accused in criminal case together with Mukagahima Génèreuse; the testimony of Nzabandora Jimmy who explained that Ngarambe Jean was the only one to be donated is the right version, his testimony cannot be dismissed because of being a brother of Ngarambe Jean,concerning Kanani and Mukampabuka Hélène, the fact that one can see pea nuts and other some thing else, it depends on their choice whereasRadjab, he revealed that he does not know the origin of the land, that he started building in 1999, and that Ngarambe Jean was only one he used to see, this should also be considered.

COURT'S DETERMINATION

[34] Article 162 of the Law N° 15/2004 of 12/06/2004, relating to evidence and its production, provides that testimonial evidence is statements made in court by an individual regarding what he or she personally saw or heard with that is relevant to the object of trial.

[35] Article 27 of the Law N° 22/99 of 12/11/1999 completing book one of civil code and establishing book five relating to matrimonial regimes, donations and successions provided that donation is made by authentic deed, written agreement or simple transfer. While article 28 of that Law provides that, The inter vivos donation takes effect on the date of its acceptance. The receiver of the donation may accept it in writing or verbally.

[36] The case file indicates that, at time Mukagahima Génèreuse was accused before the Intermediate Court of Nyarugenge in the case N° RP0295/14/TGI/NYGE, the offence of fraudulent acquisition of documents issued by the competent authority, and use of counterfeit documents the Court found her not guilty basing on the testimony of witnesses including Twiringiyimana Célestin and Nibisekere Louis, who testify that, at time they were authorities of local government, they received Ngarambe Jean, requesting to register the property to Mukagahima Génèreuse, because he was stating that he is about to separate with his first wife, and wanted to register that property to Mukagahima Génèreuse, his second wife so that the child they gave birth together will survive, that there is also a document indicating that it is a land from the ancestors which shows that Ngarambe Jean and Mukagahima Génèreuse were given a piece of land with a house by Ntacyobazi Anastasie, therefore, the fact

that Ngarambe Jean sought for registering that piece of land in the names of Mukagahima Génèreuse, the latter had to accept it.

[37] The grounds based on in the judgment N° RP0295/14/TGI/NYGE rendered by the Intermediate Court of Nyarugenge, were pointed out by witnesses during court investigation, whereby witness Bakina Bernard told the Court that the old woman Ntacyobazi Anastasie donated a land to Ngarambe Jean and his wife Mukagahima Génèreuse and by that time they were living as wife and husband. Twiringiyimana Célestin, states that, for the land to be registered on Mukagahima Génèreuse, Ngarambe Jean brought her and asked to register the land on his wife, Izere Valentine states that she was a chief of the village since 2010, though she states that she does not know the origin of the property, she stated that what she knows is that Mukagahima Génèreuse presented a certificate indicating that she is registered on that property, which they based on to give her the “acte de notoriété”.

[38] The Court finds, the fact that Ngarambe Jean made a donation to Mukagahima Génèreuse and asked local authorities to register it on her that registration itself suffices and it is not contrary to article 27 of the Law N° 22/99 of 12/11/1999 relating to matrimonial regimes, donations and successions mentioned above which was in force that time, because that article provides that the donation can be simply handled to the receiver, this means that since Ngarambe Jean transferred the donation to his wife through local authorities and applied for its registration on her names, it was not necessary to establish either an authentic deed or private deed for that donation, this is contrary to the findings of the High Court, meaning counsel for Ngarambe Jean

made false statement that Mukagahima Génèreuse sought for registering the land and a house while Ngarambe was imprisoned.

[39] The Court finds that basing on article 10 of the Law N° 43/2013 of 16/06/2013 governing the use and management of land in Rwanda, the land in litigation was donated to Mukagahima Génèreuse as a gift, thus, there is no basis to annul the certificates of local authorities which gave her the right to register that property on her names because she got them lawfully.

[40] Basing on motivations above, the Court finds that the property in litigation belonged to Mukagahima Génèreuse, thus, it should be given to her heirs because she passed away.

[41] The Court finds, regarding the fact that Ntacyobazi Anastasie donated that property to Ngarambe Jean alone, it does not make any change because, he gave that property to Mukagahima Génèreuse as a donation.

3. Whether the heirs of Mukagahima Génèreuse are entitled to damages they request

[42] In his court submissions, Counsel Mugabonabandi Jean Maurice representing the heirs of Mukagahima Génèreuse, stated that the Court awarded Ngarambe Jean unjustified damages equivalent to 1,225,000Frw because he should not have won the case, instead, Ngarambe Jean should be the one to pay to Mukagahima Génèreuse damages because he drags her in unnecessary law suit, he prays the Supreme Court to rectify the mistakes committed by the High Court, and overtuns the damages awarded, rather, Mukagahima Génèreuse's heirs should be awarded damages she requested in previous courts, counsel

fees for all previous levels and procedural fees, all damages they request worth 5,000,000 Frw.

[43] In his court submissions, Counsel Kizito Safari representing Ngarambe Jean stated that damages awarded to Ngarambe Jean by the High Court were worthy because he was deprived rights to his property, this led him to file a court case seeking for justice. He lodged a cross appeal stating that damages for being deprived the rights to the house equal to 100,000 Frw are insufficient compared to moral prejudice that Ngarambe Jean suffered, he requests the Supreme Court to award him all damages he requested equal to 3,000,000 Frw, material damages equal to 200,000 Frw every month, since 2010, procedural fee equal to 500,000 Frw and counsel fees equal to 1,500,000 Frw at this level in addition to those awarded in the appealed judgment.

COURT'S DETERMINATION

[44] Article 258 of civil code book 3, provides that “any act of a man, which causes damage to another obliges the person by whose fault it happened to repair it”.

[45] The Court finds that as it has been proven that the property belongs to Mukagahima G  n  reuse, it implies that Ngarambe Jean was not deprived the rights to the property, thus, the damages he has been awarded by the High Court have to be cancelled, rather the heirs of Mukagahima G  n  reuse are the ones to be awarded damages of 300,000 Frw for procedural fees and 500,000 Frw for counsel fees at this level because it is worthy, with regard to moral damages, they can not be awarded because they failed to prove them.

III. DECISION OF THE COURT

[46] Decides that the appeal lodged by Mukagahima Génèreuse and pleaded by her children Aimé Fernand, Umulisa Murielle, Ngarambe Bruce Kevin and Ngarambe Chris, has merit;

[47] Decides that the judgment N° RCA0174/15/HC/KIG rendered on 23/10/2015 by the High Court is reversed ;

[48] Decides that the property in litigation belongs to Mukagahima Génèreuse, and has to be given to her children Mugabo Aimé Fernand, Umulisa Murielle, Ngarambe Bruce Kevin and Ngarambe Chris who are entitled to inherit her ;

[49] Orders Ngarambe Jean to pay the heirs of Mukagahima Génèreuse damages equal to 800,000 Frw as motivated above ;

[50] Orders Ngarambe Jean to pay the court fees equal to 100,000Frw.

COMMERCIAL CASES

**EXPERTS CONSULTANTS UNITED
INC, UGANDA Ltd (ECU) v. ROYAL
HASKONING DHV(Pty) Ltd**

[Rwanda SUPREME COURT – RCOMA00007/2017/SC
(Rugege, P.J., Cyanzayire and Mutashya, J.) December 07,
2018]

Contract law – contract – The typographical error is not a ground to render a contract null and void.

Arbitration – Arbitration clause – Arbitration award – An arbitration clause which forms the basic part of a commercial contract shall be treated as an agreement irrespective of the other terms of the basic contract – When the intent of the parties concerning the arbitration procedure is not respected is a ground for nullification of the arbitration award – Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, article 9 and 31

Fact: ROYAL HASKONING DHV (Pty) Ltd concluded a sub consultancy contract with EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd to jointly do a part of the work which ROYAL HASKONING DHV (Pty)Ltd contracted with the Ministry of Infrastructure in Rwanda. They consented that in case of the disputes, there will be the intervention of arbitrator whom both parties will choose, he will be appointed in accordance to the South African Law and also the arbitration procedure will be consented on by both parties, they also agreed that failure to such agreement, the current *conduct of arbitration* published by Association of Arbitrators shall be applied.

Thereafter, the disputes raised because EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd was not paid as it was provided by the contract, it requested ROYAL HASKONING DHV (Pty)Ltd to appoint its arbitrator who will jointly work with its arbitrator but refused it. Therefore, EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd filed a claim to the Commercial Court requested for appointing an arbitrator to settle the dispute, then, that Court appointed an arbitrator.

ROYAL HASKONING DHV (Pty) Ltd applied third party opposition against that judgment, the Commercial Court rejected its claim because it was filed after the prescription of one month from the day it became aware the rulings of the judgment it applied the third party for. It filed again a claim to the Commercial High Court praying for case review, the court also found it without merit.

In arbitration, the bench found with merit the claim of Experts Consultants United INC, Uganda, Ltd because Royal Haskoning DHV (Pty) Ltd breached the contract, it ordered Royal Haskoning DHV (Pty) Ltd to pay the value of the contract which remained to be performed and the interest of four years, moral damages, transport fees, accommodation and arbitrator fees.

ROYAL HASKONING DHV (Pty) Ltd filed a claim to the Commercial High Court requesting for quashing the arbitration award because it was unlawful, the Court quashed the arbitration award on the ground that it was contrary to the contract concluded by both parties because the arbitrator was appointed by the Commercial Court and he applied the laws which were not those of the *association of arbitrators* while both parties did not agree on the ruling procedure, thus, the arbitration award should be quashed, it ordered EXPERTS CONSULTANTS UNITED INC,

Uganda, Ltd to give to ROYAL HASKONING DHV (Pty) Ltd damages which includes procedure and counsel fees.

EXPERTS CONSULTANTS UNITED INC, UGANDA appealed to the Supreme Court stating that the arbitration award should not be quashed because it was lawfully. ROYAL HASKONING DHV(Pty)Ltd raised an objection of lack of the jurisdiction of the Supreme Court but the court found it without merit.

Before the hearing on merit, ROYAL HASKONING DHV (Pty)Ltd raised another objection that even if there was no article when the appeal was filed which prevent to appeal against the ruling of Commercial High Court on arbitration award; but the fact that the law which prevents to appeal against that decision is promulgated and the case is continuing, the decision on the competence must be quashed because the procedural laws are immediately implemented. Whereas Experts Consultants United states that the law which Royal Haskoning DHV Ltd bases on, was promulgated after appealing was made, therefore, no reason could prevent the admission of the appeal, because the law which was into force did not prevent it. The court ruled that even if the procedural rules are applied immediately, what was done before are lawful and remains with its value.

Regarding with whether Arbitration Act of 1965 mentioned in the contract is that of South Africa, EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd states that both parties did not well explain and the fact that they did not agree on an arbitrator, the Rwandan law should be applied as both parties consented in clause 2.4 of the contract. It further explains that even if both parties did not mention the applicable law, it finds that there was an error on year, instead of writing 2008 because the law on arbitration and conciliation in commercial matters in Rwanda is

promulgated in that year, they wrote 1965. It explains that it requested for conciliation but ROYAL HASKONING DHV (Pty)Ltd refused it, the rest was to apply Rwandan laws, the fact that they applied KIAC law is not contrary to the agreement of both parties since it is recognized arbitration institution in Rwanda.

ROYAL HASKONING DHV (Pty) Ltd defends in stating that what must be considered in this case is clause 2.4 related to language and hearing on merit and that of 9.1 provides for the procedure of arbitration, it states that the arguments of EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd that it is not the South African law that should be applied is not true, because the conduct of Association of Arbitrators should have been applied, as KIAC replied to them that it was not provided under the contract, apart from they renovate the contract and adding it, therefore, what was done are contrary to the agreement of both parties which was the ground of Commercial High Court to quash the arbitration award because it was unlawful.

Held:1. Even if the procedure laws are applied immediately, what was done before remains with its value.

2. An arbitration clause that forms the basic part of a commercial contract shall be treated as an agreement irrespective of the other terms of the basic contract.

3. The typographical error is not a ground to render a contract null and void. Thus, the fact that they did not write that the arbitration law of 1965 and association of arbitrators both provided in clause 9.1 of the contract are of South Africa does not remove the intent of the contract that the applicable law and procedure are those of South Africa.

4. When the intent of the parties concerning the arbitration procedure is not respected is a ground for nullification of the arbitration award Appeal has no merit

Quashes the arbitration award.

The deposited court fees are equivalent to expenses incurred in this case.

Statutes and statutory instruments referred to:

Law N° 45/2011 of 25/11/2011 governing contracts in Rwanda, article 64 and 66.

Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, articles 9 and 31.

No case referred to.

Authors cited:

Larry A. DIMATTEO “International Business Law and the Legal Environment, A Transactional Approach.”

Judgment

I.BACKGROUND OF THE CASE

[1] SSI ENGINEERS AND ENVIRONMENT CONSULTANTS (Pty) which later became ROYAL HASKONING DHV (Pty) Ltd, on 12/10/2010 concluded a contract (sub consultancy) with EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd, UGANDA Ltd to jointly do a part of the work which ROYAL HASKONING DHV(Pty)Ltd had to do for the Ministry of Infrastructure in Rwanda.

[2] ROYAL HASKONING DHV (Pty) Ltd states that they agreed in that contract that in case of disputes they will be submitted to a single arbitrator who will be appointed according to the arbitration law of South Africa, and also the procedure will be consented by both parties, in case of failure to agree the applied laws will be those that were promulgated by the association of arbitrators which will be in force at the time of appointing the arbitrator.

[3] Thereafter, the disputes raised due to the fact EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd was not paid as it was provided by the contract, it requested ROYAL HASKONING DHV (Pty)Ltd to name its arbitrator who can its arbitrator but it refused it. EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd filed a claim to the Commercial Court requested for appointing an arbitrator to settle the dispute which it has with ROYAL HASKONING DHV(Pty)Ltd, the case was recorded on RCOM0610/15/TC/NYGE and it was rendered by the Court on 30/04/2015, whereby it appointed Me Rubasha Herbert as an arbitrator.

[4] ROYAL HASKONING DHV (Pty) Ltd applied third party opposition against that judgment and it was recorded N° RCOM0619/15/TC/NYGE, the Commercial Court rejected its claim because it filed after the prescription of one month from the day it was aware the rulings of the judgment it applied the third party for.

[5] ROYAL HASKONING DHV (Pty) Ltd appeal against those rulings to the commercial high court, it was recorded on N° RCOMA00122/2016/CHC/HCC, the Court rendered that judgment on 29/07/2016 and found without merit the appeal of

ROYAL HASKONING DHV(Pty)Ltd, it ordered to pay 2,500,000 Frw to ECU Ltd of the Counsel and procedure fees.

[6] ROYAL HASKONING DHV(Pty) Ltd filed again a claim to the Commercial High Court praying for a case review of the judgment N° RCOMA00122/2016/CHC/HCC, the case was rendered on 03/11/2016, the Court held that the ground which ROYAL HASKONING DHV (Pty) Ltd relies on for applying for a case review none of them is similar to those provided by the law, therefore, it's claim is inadmissible, it ordered it to pay 600,000 Frw of the counsel and Procedure fees.

[7] The appointed arbitrator conducted the hearing in default of ROYAL HASKONING DHV (Pty) Ltd, he rendered the award on 16/09/2016 and found with merit the claim of EXPERTS CONSULTANTS UNITED INC, Uganda, Ltd because ROYAL HASKONING DHV (Pty) Ltd breached the contract, it ordered ROYAL HASKONING DHV (Pty) Ltd to pay to ECU Ltd 47,993USD of the value for the rest of the contract, interests of 34,556USD for four years, this implies that $\frac{47,993 \times 18}{100} = 8,639USD \times 4 = 34,556$, moral damages for transport and accommodation worth 18,400USD and to pay the arbitrator fees of 10,000 USD.

[8] ROYAL HASKONING DHV (Pty) Ltd filed a claim to the Commercial High Court requesting for quashing the arbitration award because it was unlawful, the Commercial High Court rendered a judgment on 29/09/2017, and quashed the arbitration award on the ground that it was contrary to the contract concluded by parties, it ordered EXPERTS CONSULTANTS UNITED INC, Uganda, Ltd to give to

ROYAL HASKONING DHV (Pty) Ltd 650,000 Frw of damages which includes procedure and counsel fees.

[9] In ruling, the Court relied on the fact that the parties consented in their contract “Association Agreement Document” in clause 9, that in case of arbitration, there will be one arbitrator according to the South African law of 1965 as it was amended to date, and also the hearing of that arbitration will be conducted according to what both parties will be agreed, it will follow the procedure provided in law of arbitration. The parties agreed in the second part of that clause that the arbitrator who will be appointed must be agreed on by both parties.

[10] It motivated that basing on that clause of the contract which they agreed on, it found that there have been appointed one arbitrator who was consented on by both parties, and conducting that arbitration based on arbitration law in South Africa in 1965 as it was amended to date, follows the procedure which they agreed on, failure to do so, they will apply procedure law promulgated by the association of arbitrators, however, it was not done because the appointment of an arbitrator did not follow the South African law and the proceedings were did not follow the law of the association of arbitrators that was into force by that time as it was agreed on by parties in the contract.

[11] It further motivated that apart from an arbitrator who would have been appointed in accordance to the South African law, he had to settle the disputes basing on that arbitral proceedings law and disputes itself, therefore the fact that the arbitrator was appointed by the Commercial Court and applied the laws which are not that of arbitration association, in case both parties did not agree on the proceedings, the award rendered

should be quashed because it is contrary to contract concluded by the parties.

[12] EXPERTS CONSULTANTS UNITED INC, UGANDA on 28/10/2017, appealed to the Supreme Court stating that the arbitration award of 16/09/2016 should not be quashed because it was lawfully rendered.

[13] ROYAL HASKONING DHV(Pty)Ltd raised an objection of lack of jurisdiction of the Supreme Court stating that EXPERTS CONSULTANTS UNITED INC, UGANDA appealed as it is an ordinary judgment which is not the case, disregarding that the arbitration awards are not subject to appeal, and this is a position of the Supreme Court of Canada.

[14] On 08/06/2018, the Court found without merit that objection and proceeded with the hearing of the case on merit.

[15] The hearing in public resumed again on 06/11/2018, EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd represented by Counsel Munderere Léopold together with Counsel Mitsindo Tom while ROYAL HASKONING DHV (Pty) Ltd was represented by Counsel Bizimana Emmanuel.

[16] Before the hearing on merit, Counsel BIZIMANA Emmanuel bases on article 74, paragraph 3, of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure¹ and on article 82 of the Law N°

¹, However, if a judge believes that there are acts performed in breach of the law, he/she may decide the reopening of the hearing or modify some acts after hearing parties and provide reasons therefor.

30/2018 of 02/06/2018 determining the jurisdiction of courts², states that seeing that the bench is changed, it can examine the decision taken on jurisdiction and changes it because it is unlawful according to articles mentioned above, thus if the bench finds that the appeal did not fall into the jurisdiction of the Supreme Court, it held that the appeal was inadmissible, and the decision on jurisdiction that was taken by the previous bench be quashed. He adds that the fact that there is a decision, it cannot prevent the other bench to examine it again.

[17] He continues arguing that there was no article which prevents appealing against the ruling of Commercial High Court on the arbitration award at the time of lodging this appeal, the one who is not satisfied with it he could file a claim against it but he was not allowed to appeal against its decision, thus, the fact that there is a law which explains it well and the case is still proceeding, the decision on the jurisdiction of the court should be quashed because the procedure laws take effect immediately after its promulgation.

[18] Munderere Léopold, the counsel for EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd states that the arguments of counsel Bizimana Emmanuel are groundless because there is no way the court can re-examine the decision it took. The court may examine the time of which the judgment was subjected to appeal if there was a law which prevents those kinds of the judgment to be appealed, that the law which counsel Bizimana Emmanuel mentions, concerns with the other judgments which can be appealed in this court but it does not

², The Commercial High Court also examines the legality of awards rendered by the arbitrators. Judgments rendered by the Commercial High Court on the actions mentioned in Paragraph 4 of this Article are not subject to appeal.

concern the judgments which are appealed before its promulgation.

[19] Counsel Mitsindo Tom states that the law which Me Bizimana Emmanuel bases on was promulgated on 02/06/2018 while the judgment had already been appealed, therefore, there was no ground to reject the appeal because the law which was in force allowed it.

[20] The court deliberated on that objection and held that even if the procedure law takes effect immediately, the previous ruling remains valid because it was lawful; it ordered that hearing continues with the examination of grounds of appeal of EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd relates to whether the arbitration award of 16/09/2016 was lawful.

II. ANALYSIS OF THE LEGAL ISSUE

Whether the appointment of the arbitrator and award he made whether on the merit of the issue or in the procedure are in accordance to what the parties agreed in their contract (Association Agreement Document)

[21] Munderere Léopold, the counsel for EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd states that the rulings of the judge in paragraph 17 of the judgment RCOM 0005/2017/CHC/HCC that was rendered by the Commercial High Court the arbitrator settled the disputes without basing on the Law they agreed on, is baseless, because the contract which was concluded by both parties, it is not provided that the South African law shall be the one applied, this issue was examined by the Commercial Court of Nyarugenge and ruled that it is not indicated that the South African law is the one to be applied, it

should also be noted that the judgment became binding, this is the reason why the arbitrator was appointed based on Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters in Rwanda.

[22] He states that in rendering the judgment, clause 2.4 and 9.1 of the contract concluded by both parties should be read together, because clause 2.4 paragraph 1 both parties agreed on language, whereas in paragraph 2, they agreed on applicable law which is the Rwandan Law, in clause 9.1, they agreed that the arbitration act of 1965 will be applied but they did not mention that it is that of South Africa. He adds that if the court interprets clause 9.1 which provides for arbitration, it will find that both parties agreed on the arbitrator and the law was the Arbitration act of 1965, but in case of failure to agree, the Rwandan law will be applicable.

[23] He adds that ROYAL HASKONING DHV (Pty) Ltd lost all cases related to the appointment of arbitrator, even if it is not clear that the mentioned arbitration act of 1965 is that of South Africa, it would have been applied if both parties had agreed on it, thus, an arbitrator based on the law of KIAC³ because both parties had not agreed on the Arbitration Act of 1965, rather they consented that in case of agreement of both parties the law of Association of Arbitration will be applicable.

[24] He states that none of those companies, have its headquarter in Rwanda, that is the reason why they agreed to apply Rwandan law, in case of disagreement on the Arbitration Act 1965.

³ KIGALI INTERNATIONAL ARBITRATION CENTRE

[25] Concerning with determining whether the arbitration act 1965 mentioned in the contract is that of South Africa, Counsel Munderere Léopold replied that he cannot comment on it because it can be that of South Africa or Uganda because both parties did not explain it well, and the fact that failed to agree on arbitrator, the Rwanda law was applicable as it was agreed on by both parties in clause 2,4 of the contract.

[26] Counsel Mitsindo Tom argues that even if both parties did not clearly state applicable law, he realizes that they erred on the year, instead of writing 2008 because the law on arbitration and conciliation in commercial matters is of that year, they wrote 1965. He states that EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd requested ROYAL HASKONING DHV (Pty)Ltd to appoint an arbitrator but it refused, so it had to apply the Rwandan Law, that the fact they applied the law of KIAC law, it not different from what both parties agreed on because it is an institution recognized in Rwanda that has arbitration in its attribution.

[27] Bizimana, the counsel for ROYAL HASKONING DHV (Pty) Ltd states what must be considered in this case is clause 2.4 and that of 9.1 of the contract which both parties concluded, that clause 2.4 is related to language and hearing of the case on merit, that of 9.1 provides for the procedure of arbitration, that the arguments of the counsel for EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd that it is not the South African law that should be applied is not true, what should be considered on that issue is the document they had especially the letter of 12/06/2014 which EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd wrote to KIAC and the latter replied that it is not provided, except if they amend their contract and incorporate it,

this implies that they knew themselves that during the arbitration the South African law will be applied.

[28] He further states that the arguments of the counsel for EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd that in case of disagreement the law of KIIAC will be applied, it is not true because Conduct of Association of Arbitrators was the one to be applied as it was stated by KIIAC, therefore, what was done is in breach of the contract concluded by both parties, that was the reason why the Commercial High Court quashed the arbitration award since it was unlawfully.

COURT'S DETERMINATION

[29] Article 9 of the Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters provides that “arbitration agreement is an agreement by both parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement” whereas paragraph 2 of this article provides that “The arbitration agreement shall be in writing”.

[30] Article 31 of that law mentioned above provides that “the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”.

[31] Article 64 of the Law 45/2011 of 25/11/2011 governing contracts provides that contracts made in accordance with the law

shall be binding between parties and that contract shall be performed in good faith⁴

[32] Paragraph 1 of clause 2.4 of the contract which EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd, and ROYAL HASKONING DHV (Pty) Ltd concluded, they agreed that the language of the contract shall be English, paragraph 2 of that clause provides that the law which shall be applied in performing the contract is Rwandan law⁵.

[33] Clause 9.1 of that agreement, both parties agreed that the arbitration shall be performed by single arbitrator as it is provided by the arbitration law of 1965 which was into force at the time of concluding that contract, the proceedings shall be consented by the parties, failed to so, the conduct of arbitration shall be applied as it was published by Association of Arbitrators current at the date the arbitrator is appointed⁶.

[34] The Court finds that in interpreting the contract which both parties conclude, the purpose and promise under the contract should be considered as it is provided by article 66 of the Law N°45/2011 of 25/11/2011 governing contract in Rwanda⁷

⁴ 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

⁵ The Language of the Agreement shall be the English language

The law which is to apply to this Agreement shall be the Laws of the Republic of Rwanda

⁶ Arbitration shall be by a single arbitrator in accordance with the provisions of Arbitration Act of 1965 as amended and shall be conducted in accordance with such procedure as may be agreed between the parties or, failing such agreement, in accordance with the rules for the conduct of Arbitrations published by the Association of Arbitrators current at the date the arbitrator is appointed

⁷ Interpret a contract or a clause thereof is to give the meaning of the purpose and promise under the contract

[35] The court is finding that as article 9 of law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters provides that the arbitration agreement may be the contract itself or the special addendum may be done for it; this implies that the arbitration agreement is special so that it can have value at the time of performing the contract even if it is determined to be invalid, the provision of this article is similar to the statement of the law scholar Larry A.DiMATTEO in his book “International Business Law and the Legal Environment, A Transactional Approach”, page 12 that the arbitration agreement independent⁸.

[36] Supreme Court bases on that article mentioned above and the explanations provided by the law scholar in arbitration, it concurs with the motivations provided by the Commercial High Court that the purpose of the parties in arbitration contract is a single arbitrator as it is provided in arbitration act of 1965⁹, the parties shall conclude about arbitration procedure, failure of such agreement, the current rule of Conduct of Association of Arbitrators shall be applied at the date the arbitrator is appointed¹⁰, the arbitrator must be accepted by the consultant and his sub-consultant.

⁸ The Severability principle recognizes the arbitration clause in a contract as a separate agreement independent of the contract. Therefore, a law is needed to determine the validity of the arbitration clause. Also, if viewed as a separate agreement, then It can be enforced even if the underlying of a contract is determined to be invalid or unenforceable

⁹ Arbitration ACT 42 of 1965 as amended by Justice Laws Rationalisation Act 18 of 1996; General Law Amendment Act 49 of 1996 and Prevention and Combating of Corrupt Activities Act 12 of 2004, specifically in its provision 9 which provided that: « *Unless a contrary intention is expressed in the arbitration agreement, the reference shall be to a single arbitrator* »

¹⁰ The Association of Arbitrators (Southern Africa) Rules for the Conduct of Arbitrations 2013 edition standard procedure rules

[37] The Court finds further that the interpretation of clause 9.1 of the contract both parties concluded, it cannot be considered together with clause 2.4 of that contract as the counsel for EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd used in their pleadings, because as it was motivated above, the arbitration contract is independent, even if it is a part of contract in general, which means that in deciding on merit, clause 2.4 paragraph 2 of that contract concluded by both parties concerns with the applicable laws chosen by parties themselves in case of resolving the dispute in merit (Substantive Laws) will be based on, whereas, clause 9.1 of the contract concerns with the conduct and the procedure rules.

[38] The court finds, the fact that the parties did not include in their contract that Arbitration Act of 1965 and Association of Arbitrators mentioned in clause 9.1 are from South Africa, does not remove that the purpose of the contractors is to apply the South African law and the conduct of South Africa because SSI Engineers and Environment Consultants (Pty) Ltd which became ROYAL HASKONING DHV (Pty) Ltd offered a job, is South African company and these mentioned laws in contract are from South Africa, EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd failed to prove that these laws are Rwandan laws or elsewhere, while it is obvious that in Rwanda the applicable law for the arbitration matters is regulated by law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, whereas the organ which has arbitration in its attribution is KIAC (Kigali International Arbitration Centre)

[39] Basing on article 64 of the Law N° 45/2011 of 25/11/2011 governing contracts in Rwanda mentioned above and on motivation provided in this case, the court is finding that

arbitrator Me Rubasha Herbert the award he took was contrary to the contract concluded by both parties, therefore, that award should be quashed as it was ruled by the Commercial high court.

Damages requested by parties

[40] EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd states that in case it will be proven that ROYAL HASKONING DHV (Pty) Ltd filed unnecessary lawsuit for escaping the liabilities from the faults it committed, despite it the court ordered it to pay the damages, counsel and procedure fees; this must be changed at the supreme court level, then ROYAL HASKONING DHV (Pty) Ltd shall pay to EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd 3,000,000 Frw which includes moral damages, counsel and procedural fees.

[41] ROYAL HASKONING DHV (Pty) Ltd states that the rulings of Commercial High Court is lawful because it quashed the award which was bothered its interest since it was taken contrary the contract both parties concluded, thus, the amount which EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd was charged must be sustained and adding 3,000,000 Frw which includes 2,000,000 Frw of the counsel fees and 1,000,000 Frw of the procedure fees.

COURT'S DETERMINATION

[42] Article 258 of the civil code book III provides that “any act of man, which causes damage to another obliges the person by whose fault it happened to be held liable”

[43] Regarding this case, the court is finding the fact that EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd

appealed against the judgment, led ROYAL HASKONING DHV (Pty) Ltd to hire the advocates which made it to suffer loss, that loss must be paid by EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd because it lost the case, therefore, ROYAL HASKONING DHV (Pty) Ltd is awarded in the discretion of the court 1,000,000 Frw which includes procedure and counsel fees.

[44] Concerning damages requested by EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd, the Court find them without merit because it lost the case.

III. DECISION OF THE COURT

[45] Finds without merit the appeal of EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd;

[46] Quashes the arbitration award of Counsel Rubasha Herbert taken on 16/09/2016;

[47] Sustains the rulings of the judgment RCOM00005/2017/HCC/CHC rendered by the commercial high court;

[48] Orders EXPERTS CONSULTANTS UNITED, Inc Uganda to pay to ROYAL HASKONING DHV (Pty) Ltd 1,000,000Frw of the procedure and counsel fees;

[49] Orders that court fees deposited by EXPERTS CONSULTANTS UNITED INC, UGANDA Ltd are equal to the expenses of the case.

MININTCO Ltd v. DOBUSJES Ltd

[Rwanda COMMERCIAL HIGH COURT –
RCOMA00402/2017/CHC/HCC (Mutajiri, P.J.) 29 December
2017]

Intellectual property – The right on trademark – A company with a registered trademark has the right to sue who counterfeits it or a trader who has products that confuse his/her products.

Intellectual property – Destroying counterfeit products – The court is under no obligation to order that the products with counterfeit trademark be destroyed because it can order to be destroyed or to be removed from the market in its discretion – Law N° 31/2009 of 26/10/2009 on the protection of intellectual property, article 284.

Facts: MININTCO ® Ltd registered the trademark of KANTA in the Rwanda Development Board (RDB). That company learned that DOBUSJES Ltd imported products with a trademark KANTO BLACK HAIR DYE, counterfeiting that of KANTA, which confuses with it. Therefore, it sued DOBUSJES Ltd in the Commercial Court of Nyarugenge requesting that those products with the counterfeit trademark be destroyed.

In its judgment, the Court held that the trademark of KANTO which are on the products imported in Rwanda by DOBUSJES Ltd is a counterfeit of KANTA which was registered by MININTCO ® Ltd which causes confusion, however it held that the products should not be destroyed but it ordered DOBUSJES Ltd not to sell those products on the Rwandan market. MININTCO ® Ltd was not contented by that decision and

appealed in the Commercial High Court claiming that the previous court refused to that that those products bearing the trademark of KANTO Black Hair Dye be destroyed, did not award it the damages resulting from the loss caused, it was silent on the issue of publishing the judgment in the most popular newspapers, it requested for the damages for being dragged in unnecessary lawsuits, procedural and counsel fees.

The court first examined the objection of lack of legal standing of the plaintiff on the ground that he cannot sue someone on for counterfeiting the trademark without proving that he is an industrialist and also the defendant should not be sued because it's not an industry but is a trader who buys products and resell them as they are without changing anything.

On that objection, MININTCO ® Ltd states that it has no merit because as a commercial company with a moral personality that registered its trademark in Rwanda has the right to sue whoever counterfeits it, therefore DOBUSJES Ltd issued for importing products with counterfeit trademarks which confuse. The Court overruled the objection because MININTCO ® Ltd has the right to sue whoever infringes on its trademark rights.

In its defence, DOBUSJES argues that the claim of MININTCO that it is misinterpreting the law because it does not provide that the judge has to decide in any case to destroy those products (*peut ordonner non doit ordonner*), therefore in his discretion he found that those products should not be destroyed, furthermore the trademark of MININTCO Ltd was not counterfeited because it did not get the products of KANTO from the industry but from the shop. Regarding the damages requested by MININTICO for the loss caused, it argues that they should not be awarded because it was awarded damages in the summary claim case and moreover those damages are requested in the merits of the case and in case

they are awarded it would mean that they would have been awarded twice, DOBUSJES also requests for procedural and counsel fees.

Held: 1. A company with a registered trademark has the right to sue who counterfeits it or a trader who has products that confuse his/her products. Therefore, MININTCO Ltd has the right to sue anyone who infringes on its trademark.

2. The court is under no obligation to order that the products with counterfeit trademark be destroyed because it can order to be destroyed or to be removed from the market in its discretion.

3. The damages resulting from the loss requested by the appellant are not awarded because it failed to prove the loss caused by the products of the defendant especially that those products never accessed the market.

The appeal lacks merit.

Statute and statutory instrument referred to:

Law N° 31/2009 of 26/10/2009 on the protection of intellectual property, article 284.

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative, article 2.

No cases referred to.

Judgment

I.BRIEF BACKGROUND OF THE CASE

[1] This case started at Commercial Court of Nyarugenge, whereby MININTCO Ltd sued DOBUSJES Ltd requesting to destroy its boxes which have a trademark of KANTO Black Hair Dye.

[2] The origin of this issue is that on 10/04/2012, the Registrar General issued a certificate for the registration of a trademark of "KANTA BRAND" to MININTCO ® Ltd pursuant to the Law N°31/2009 of 26/10/2009 on the protection of intellectual property.

[3] MININTCO ® Ltd sued claiming that DOBUSJES Ltd imported 99 boxes which have the trademark of KANTO BLACK HAIR DYE, and those boxes were seized at custom because they had a trade mark counterfeiting the trade mark of KANTA; that is why it sued requesting to be confiscated and destroyed and the cost of destroying them be paid by the owner; if there are any put on the market to be withdrawn, because to use and import in Rwanda the products of KANTO BLACK HAIR DYE which counterfeits those of KANTA is unfair competition and it is contrary to the law and trust because it counterfeits of KANTA and it confuseson.

[4] It further requests that the importer should inform MININTCO ® Ltd the names of the other people, commercial companies and factory which participate in distributing the products that have the trademark of KANTO and it requests also

that it should be ordered to pay MININTCO ® Ltd various damages.

[5] DOBUSJES Ltd pleaded stating that it bought in bulky those products from China, it did not know that the product has some problems, that after reaching in Rwanda it was surprised by the seizure of its products at the customs because they were counterfeit. it requested that the claim of MININTCO ® Ltd should not be admitted because the plaintiff lacks the legal standing to sue and the defendants to be sued since the subject matter is counterfeiting the other's innovation especially that DOBUSJES Ltd has no industry for it to manufacture KANTO the counterfeits of KANTA.

[6] In rendering the judgment the Court overruled the objection on inadmissibility of the claim raised by DOBUSJES, held that the claim of MININTCO has merit in parts, held that the trademark of KANTO which is on the products imported by DOBUSJES Ltd is a counterfeit of KANTA which was registered in Rwanda by MININTCO ® Ltd, held that it causes confusion however that the products should not be destroyed. It ordered DOBUSJES Ltd not to bring those products with the trademark of KANTO on the Rwandan market and ordered it to pay court fees, procedural and counsel fees to MININTCO ® Ltd.

[7] MININTCO ® Ltd was not contented with the decision , thus Counsel MHAYIMANA Isaie appealed claiming that for the court to rule that the 99 boxes of « KANTO Black Hair Dye » should not be destroyed because DOBUSJES imported them with no intention of causing harm to MININTCO (R) Ltd, it disregarded the provisions of article 258 and 284 of the law on the protection of intellectual property, the Court did not award MININTCO ® Ltd damages resulting from the loss it incurred

due to various unfair activities of DOBUSJES, the court was silent on the issue of the judgment being published in the most popular newspapers . He concludes by requesting damages for being dragged in frivolous litigations, procedural and counsel fees.

[8] In response to the grounds of appeal, KIGALI PARTNERS IN LAW states that they are baseless because as decided by the court, in importing the products of KANTO, Dobusjes ltd had no ill intentions of sabotaging MININTCO ®LTD on the ground that it was not the only product it brought but it bought it together with others. It concludes by requesting for procedural and counsel fees.

[9] In this case the issues to be examined are, whether the Court had to order that the 99 boxes of « KANTO Black Hair Dye » had to be destroyed, whether the court had to order that MININTCO ® Ltd be awarded damages for the loss it incurred, whether the judgment had to be published in the most popular newspapers, whether the damages for frivolous litigation, procedural and counsel fees claimed by MININTCO ® Ltd and those requested by DOBUSJES should be awarded.

II. ANALYSIS OF THE LEGAL ISSUE

Determining whether the plaintiff and the defendant has the legal standing

[10] Counsel Mutarindwa Félix and Counsel Ndagijimana Augustin state that the court should first examine the objection which was raised in the Commercial Court which was rejected, whereby they find neither the plaintiff nor defendants have the legal standing. The defendant should not be sued for infringement

of the innovation while he is not an industry but a merchant who only buys goods and sells them as they are. The plaintiff also has no standing to sue for infringement of the innovation while he cannot demonstrate that he has an industry or he used to have the industry but not known.

[11] Counsel Mhayimana Isaie state that MININTCO Ltd has the legal standing on the claim of infringement of the innovation on its product of KANTA because it is a commercial company with legal personality. It is suing for infringement on its rights as a company that registered its trademark in Rwanda. Whereby it should be protected but DOBSJES Ltd infringed it. DOBUSJES Ltd issued for infringing on the trademark of KANTA, whereby it did it from China, whereby it imported the products labeled KANTO which was infringing on the trademark KANTA and was caught with them and up to now they are still seized at customs. Thus there is no way DOBUSJES Ltd could claim that MININTCO has no standing to sue DOBUSJES for infringement as held by the Commercial High Court.

COURT'S DETERMINATION

[12] Article 2 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative provides that « claim cannot be accepted in court unless the plaintiff has the status, interest, and capacity to bring the suit. The provisions of Paragraph One of this Article shall also apply to the associations, organizations, and institutions without legal status which cannot file cases before courts without precluding their possibility to be sued.»

[13] The Court finds the arguments of DOBUSJES Ltd that the claim should not be admitted because neither the plaintiff nor the defendant lack the legal standing especially that the defendant sued for infringement on others products is not an industry but a business person who buys in wholesale are groundless because MININTCO not being an industry producing KANTA does not preclude as a company which registered the trademark of KANTA from having the interest, legal standing and capacity provided by article 2 of the Law N° 21/2012 of 14/06/2012 mentioned above, therefore it has all the right to sue anyone who infringes or unlawfully use that trademark.

[14] The Court finds that DOBUSJES Ltd not being an industry producing KANTA do not exonerate it from being sued because what is being sued for is infringing and selling of a product with a trademark which causes confusion of KANTO Black Hair Dye, for DOBUSJES Ltd to be sued does not require that it is the one which produces that product which causes the confusion especially that among the claims against it is selling and supplying that product.

Whether the Court should have ordered to destroy the 99 boxes of 99 « KANTO Black Hair Dye »

[15] Counsel Mhayimana Isaie states that the Judge violated the law in not deciding that those boxes be destroyed. And another issue is that on his motion the judge brought the issuer of bad faith and good faith while there is a law in place, and this is not the first time that Murekatete the director of DOBUSJOS Ltd had engaged in those activities because he had done it before.

[16] He further states that MININTCO ® Ltd was not contented by the decision in paragraph 47 of the appealed

judgment and the motivations in paragraph 29 regarding the refusal to destroy the 99 boxes of KANTO Black Hair Dye seized at the customs, since the Court also had declared that those products were counterfeit which also brought confusion, which was seized at the customs in order to prevent them from being sold at the Rwandan market: its therefore not understandable how the Court can change and accept that DOBUSJES be given those products and even allowed to sell them abroad. Its also not understandable how the Court disregarded the evidence produced demonstrating how DOBUSJES and its director MUREKATETE Fabiola have been engaging in the activities of importing the products infringing on the innovation of KANTA, and also disregarded article 5.1 and 258 and also 284 of the Law on the protection of intellectual property which details and provides penalties for the counterfeit products and suddenly it changed and held that DOBUSJES did not act in bad faith when it imported KANTO in Rwanda which is counterfeit and causes confusion. And among the produced evidence demonstrated the bad faith of DOBUSJES. In its pleadings, DOSUBJES never contested the bad faith it had instead it stated that it does not want MININTCO Ltd to continue monopolizing that product, see how it explains it in paragraph 20 of the judgment. There are statements made by MUREKATETE Fabiola, the Director of DOBUSJES on the letter dated 11/07/2012 which MININTCO Ltd wrote to DOBUSJES Ltd warning it to stop selling counterfeit KANTA. At that time DOBUSJES Ltd accepted that it had a few of them which it was supplied by people it does not know where they get them from. There is no hair dye of KANTA produced in China. It is manufactured in India but sold only in Africa. Therefore there is no reason the Chinese should manufacture counterfeit products that they could not use themselves. Instead, its known by everyone that the merchants (including DOBUSJES Ltd) are

the ones who go to China to order for those counterfeit products because they cannot be allowed to buy the original KANTA in India. Therefore DOBUSJES Ltd goes to China with an original KANTA and orders the Chinese to counterfeit it and later they bring them for sale and that is when they were seized. Its not understandable how after five years (2012-2017) DOBUSJES warned to stop its activities of importing the hair dye counterfeiting KANTA, the Court held that DOBUSJES did not have the bad faith (See the letter dated 11/7/2012 MININTCO Ltd wrote to DOBUSJES Ltd requesting it to stop selling counterfeited KANTA and it also accepted that indeed it sells them) which was registered in Rwanda.

[17] The certificate RW-M100000413 of 10/04/2012 for registering the trademark. Article 284 of the law on the protection of intellectual property which the Court based on in paragraph 28 provides that where imported goods have been found to be infringing or are causing serious injury to intellectual property right, the competent court may order the destruction of infringing goods and the disposal of them outside the channels of commerce in such a way as to preclude injury to the owner. While article 280 provides for a competent court may take special border measures aimed at preventing the importation of goods which infringe intellectual property rights conferred in Rwanda. These two provisions complement each other. Instead the previous Court should have noted that the seized products if were released to DOBUSJES Ltd in Rwanda where the trademark of KANTA was registered and had to be protected, then all the claims of MININTCO Ltd would be in vain, because DOBUSJES Ltd would have been given a chance to continue in unfair activities it is used to. The seizure would have no importance in case the Court found that counterfeit and confusion were done but instead

of DOBUSJES Ltd being punished for it was just told to not put it on the Rwanda market because it can also sell it secretly. Therefore according to the articles indicated above by the Court, MININTCO (R) finds that the decision on those seized 99 boxes is being destroyed and at the expense of DOBUSJES as it has been held in similar cases.

[18] Counsel Mutarindwa Félix and Counsel Ndagijimana Augustin argue that the arguments of counsel Mhayimana Isaie are baseless because he is misinterpreting the law because it does not provide that the judge has to decide in any case to destroy those products (*peut ordonner non doit ordonner*), therefore in his discretion he found that those products should not be destroyed. On the issue of *bad faith (bonne ou mauvaise foi)* he argues that his client brought those products without any intent to cause a loss to MININTCO Ltd, and the judge did what the law provides for him. They also argue that their client brought many varieties and that the KANTO product was the first time to be imported. Basing on the letter written in the year 2012 is unrealistic because by that time DOMUSJOS did not import goods but it brought goods within the country, that letter was written to many traders and at that time his clients replied and indicated that it was KANTA which is not the subject matter now. They argue that the evidence of KANTO produced they refute it because it is not the same as the ones seized in the customs that he should have proved that the box he submitted is among those seized at customs.

[19] They further argue that as held by the Court indeed Dobusjes ltd in importing the products of KANTO it did not harbour any bad faith against MININTCO ® LTD because that was not the only product it imported but it imported it together with other 16 products which it brought from one shop called

chenmin import&exort co, ltd where many people usually buy goods.

[20] Regarding the issue of infringing on the trademark of MININTCO ® LTD, he states that it's not true because DOBUSJES Ltd did not get that product from the industry but in the shop. That shop also got it from WENLING JINGHUI COSMETIC CO, LTD as the elements of evidence on the annex indicate.

[21] On the issue of the case laws which MININTCO pursued the Court to rely on, he finds that they are not similar with this one at hand because the subject matter is not the same and even the parties accept that the products they imported are KANTA which have the same name of KANTA which belongs to MININTCO ® Ltd whereas their imported products do not have the same name and they were not ordered to be manufactured but they were brought from a known shop.

[22] They conclude making a statement on the letter cited by MININTCO wrote in 2012, arguing that it stated traders who import product and they put a trademark of KANTA. By then DOBUSJES was not an importer and what it replied were boxes which were brought which had a mark KANTA it is not the product of HAIR DYE which is a gist of action in this case.

COURT'S DETERMINATION

[23] Article 284 of the Law N° 31/2009 of 26/10/2009 on the protection of intellectual property provides that provides that where imported goods have been found to be infringing or are causing serious injury to intellectual property right, the

competent court may order the destruction of infringing goods and the disposal of them outside the channels of commerce in such a way as to preclude injury to the owner.

[24] The Court finds that the main issue to be examined is to determine whether the 99 boxes of 99 KANTO Black Hair Dye have to be destroyed because it's the ground of appeal and was the subject of the debate in the appeal, the issue of the products being counterfeit was not a ground of the appeal.

[25] The Court finds that as held by the previous judge in paragraph 27 of the appealed judgment that the product of KANTO Black Hair Dye is counterfeit and it causes confusion on the product of KANTA and he ruled that it should not be sold in Rwanda but it should not be destroyed he did not err because article 284 of the Law N° 31/2009 of 26/10/2009 mentioned above does not impose the judge to order the products to be destroyed but it provides that the judge can order those products to be destroyed;

[26] The Court finds that the claims of the counsels of MININTCO Ltd that the 99 boxes be destroyed is baseless because as explained by the previous judge that the importer is not the one who made the trademark of KANTO Black Hair Dye, but she brought it at wholesale like any other products and importing it in Rwanda there is no proof that he had a bad faith against MININTCO ® Ltd, this court also finds that to order DOBUSJES Ltd to destroy those products might cause it irreversible loss, instead as held by the previous judge its not allowed to sell them in Rwanda meaning that it has to take its products from Rwanda.

Whether the judgment should have been published in a widely read newspaper

[27] Counsel Mhayimana Isaie states that among the claims of MININTCO ® Ltd to the Court was to order DOBUSJES Ltd that the judgment on this claim should be published in the most popular newspapers in Rwanda like Imvaho Nshya, the new times, igihe.com on the cost of DOBUSJES when the court finds unfair competition on the part of DOBUSJES Ltd, but the Court was silent on that issue. That is the reason he prays to this court to make that order

[28] Counsel Mutarindwa Félix states that the one who has the interest to publish the judgment in the most read newspaper is the one to pay since it is not prohibited by the law.

[29] Counsel Ndagijimana state that even when the judgment is pronounced it is deemed to be published, therefore he does not require to request that publication from the Court, if the outcome is pleasant to it, then it can publish it.

COURT'S DETERMINATION

[30] The Court finds that the arguments of MININTCO Ltd that the judgment should have been published in the most popular newspapers are groundless because for BUSJES being ordered not to sell those products in Rwanda and even there are no other similar products which MININTCO Ltd can possess that DOBUSJES put them on the market for the publication of that judgment to be aimed at informing people that those products are prohibited therefore there is no reason for the judge to order for

the publication of that judgment, however in case MININTCO Ltd wishes to publish it can do it in its interests.

Whether the court should have been awarded to MININTCO ® Ltd for the loss it incurred

[31] Counsel Mhayimana Isaie state that MININTCO Ltd was not awarded damages in the summary procedure RCOM 00654/2017/TC/Nyge as if it was at fault and even the damages for the loss caused by the activities of DOBUSJES Ltd of counterfeit and confusing the trading is carried out for which it was found reliable. MININTCO ® Ltd after noticing that the case N° RCOM 0149/2017/TC/Nyge was given a far date of 06/04/2017 and considering the laws governing the summary procedures because after those products being seized should not have exceeded ten days , it wrote to the president of the Commercial Court requesting that the case should be scheduled to a near date (see letters sent on IECMS) was not responded to that is the reason he applied for the summary procedure aimed at the seizure of those 99 boxes which was in customs in the judgment N° RCOM 0311/2017/TC/Nyge, the Court ordered for the seizure of twenty working days , after those days it filed a claim based on article 277 of the law on the protection of the intellectual property because the principal case was not yet heard and registered on number RCOM 00654/2017/TC/Nyge.

[32] MININTCO Ltd requests for the procedural and counsel fees and even the court fees paid on that case equal to 1,000,000 Frw and moral damages for the activities of DOBUSJES Ltd of counterfeit and causing confusion against MININTCO Ltd of 5,000,000 Frw based on the loss it incurred because of DOBUSJES Ltd which led it into lawsuits. The court should base those damages on the 99 boxes whereby each

contains 24 small boxes which contain 12 bottles of KANTO considering that each bottle buys at least two hundred Rwandan francs, that is also the numbers of bottles for KANTA, thus the loss for MININTCO Ltd is caused by those counterfeit products imported by DOBUSJES Ltd because it should have been KANTA imported but KANTO was imported and it loses its profits.

[33] The counsel for the defendant argues that those damages should not be awarded because they filed a summary procedure and were awarded damages and those damages are requested together with the principal claim, therefore their request is aimed at the double payments and should not be awarded because they lost the summary procedure case.

[34] They further argue that instead DOBUSJES Ltd is the one which should have been awarded those damages in that case although it was not awarded and even on merits it was not awarded. On the damages resulting from the trademark which confuses, they again state that they are baseless because the plaintiff was not able to demonstrate what happened was intended to prejudice MININTCO Ltd.

[35] On the issue of the damages for the loss incurred, he argues that they should not be awarded because it does not prove that loss. And if its damages to be awarded to the (une personne morale) it should not be awarded.

[36] Counsel Ndagijimana Augustin states that concerning the damages for the summary procedure claims which they were awarded should not have been awarded to them because such damages are not awarded in the principal cases. He state that its MININTCO Ltd which caused many lawsuits because it's the one

which on occasion requested to extend the seizure of those products.

[37] He further argues that MININTCO ® Ltd has spent almost five years without importing KANTA because of taxes it was charged, it is not understandable how someone can prohibit people from importing those products while he also does not import them, the law on consumer protection should be consulted on this issue. He adds that those products are of standard quality as proved.

[38] On the issue of whether damages were awarded in the summary procedure case, they responded that they were awarded, but case N° RCOMA00162/2017/CHC/HCC which was removed from the registry was produced in which damages provided by the practice notice of the President of Supreme Court was awarded.

COURT'S DETERMINATION

[39] Article 320, paragraph 4 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that damages and other expenses incurred in the summary claim case are filed with the principal claim.

[40] The Court finds that the damages for the loss requested by MININTCO ® Ltd should not be awarded because it has not proved the loss it incurred due to the products of DOBUSJES Ltd especially that those products were not sold on the market for the trade of MININTCO ® Ltd to be prejudiced.

[41] The Court finds the damages for the procedural and counsel fees which are requested for the case N° RCOM00311/2017/TC/NYGE and N° RCOM 00654/2017/TC/Nyge are groundless because as the case N° RCOM 00311/2017/TC/NYGE those damages were awarded in the principal case which is being appealed as indicated in paragraph 37 and 49 of that judgment.

[42] In the case N° RCOM00654/2017/TC/Nyge those damages were not requested in the first instance, so they cannot be awarded because he does not prove them.

Whether the procedural and counsel fees claimed by MININTCO ® Ltd should be awarded

[43] Counsel Mhayimana Isaie states that MININTCO ® Ltd is claiming for damages for being dragged in lawsuits unnecessary, procedural and counsel fees 1,000,000 Frw because of the illegal activities of DOBUSJES Ltd led to lawsuits and hired the service of advocates which was not necessary.

[44] KIGALI PARTNERS IN LAW states that the requested damages should not be awarded and even that which was awarded to it should be annulled because it is unlawful. Another one is that MININTCO ® Ltd is the one which initiated the lawsuits willingly.

COURT'S DETERMINATION

[45] The court finds that those damages should not be awarded because the claimant loses the case.

Whether the procedural and counsel fees claimed by DOBUSJES should be awarded

[46] The counsels for DOBUSJES Ltd state that since MININTCO ® Ltd initiated lawsuits against DOBUSJES it has been summoned in more than 5 cases and it would send a counsel and it would incur other expenses, that is the reason it is requesting in the discretion of the court to be awarded 2,000,000 Frw.

[47] Counsel Mhayimana Isaie states that MININTCO LTD finds that those damages have no merit because the lawsuits were caused by the activities of DOBUSJES Ltd of importing counterfeit products which infringe on the product of KANTA which is registered in Rwanda. Therefore it should not claim for damages because it's the one which caused it because MININTCO Ltd had to protect its rights.

COURT'S DETERMINATION

[48] Article 258 of the Law 30 July 1888 establishing civil code (CCBIII) provides that any act or omission by a man that causes another injury, requires that the former, due to the wrongly act committed, to repair it.'

[49] The Court finds that the damages for procedural and counsel fees requested by DOBUSJES Ltd has merit and they are based on article 258 of the decree Law of 30 July 1888 mentioned above, because MININTCO ® Ltd after winning the case on the first instance appealed and led DOBUSJES Ltd to incur expenses on that appeal and as explained the appeal has no merit, therefore it is reliable for the loss it caused to DOBUSJES Ltd, thus it

should pay 700,000 for procedural and counsel fees awarded in the discretion of the court because the one requested is excessive

III. DECISION OF THE COURT

[50] Admits the appeal of MININTCO ® Ltd, but on its examination, it finds it without merit.

[51] Sustains judgment RCOM 00149/2017/TC/NYGE.

[52] Orders MININTCO ® Ltd to pay DOBUSJES Ltd 700,000Frw for procedural and counsel fees on the appellant level.

[53] Orders that the products of DOBUSJES Ltd with a trademark of KANTO Black Hair Dye are prohibited to be sold on the Rwandan market, customs should release them and it gets elsewhere it takes them.

[54] Orders that the 75,000 Frw of the court fees which MININTCO ® Ltd paid remains in the government treasury.

CRIMINAL CASE

PROSECUTION v. Col. BYABAGAMBA ET.AL

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

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

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

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

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

The accused did not contend with the rulings of the judgment, consequently, they appealed to the Supreme Court, after restructuring of the judicial organs, the case was transferred to

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

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

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

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

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

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

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

3. With regard to medical insurance for a detained person, type of insurance scheme does not matter, instead, what is important is to ensure that a detained person is properly treated, the fact that he/she is treated using medical insurance contrary to his or her choice should not be a ground for provisional release.
4. The right to medical secrecy for a detained person has to go hand in hand with the functions of the authority of the prison of protecting those in their custody, however, all have to be applied without violating each other.
5. Prisoners have the right to supervised family and friends contact whether by writing or by visit, therefore, the accused have to get back the rights to family contact.

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

Statute and statutory instruments referred to:

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

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

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

International Covenant on Civil and Political Rights of 19/12/1966 adopted by Rwanda on 12/02/1975, article 7 and 10 paragraph one.

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

African Charter on Human and Peoples Rights 27/06/1981,
adopted by Rwanda on 11/11/1981 and ratified on
17/05/1983, article 16 paragraph one.

United Nations standard minimum rules for the treatment of
prisoners (Nelson Mandela Rules), rule 13 and 44

Case laws referred to:

Bagosora v. the Prosecutor, ICTR, Case N^o. ICTR-98-41-A,
Decision on Aloys Ntabakuze's Motions for Provisional
Release and Leave to File Corrigendum, 2 September
2009.

Prosecutor v. Rašić, ICTY, Case N^o. IT-98-32/1-R77.2-A,
Judgement, 16 November 2012.

Karemera et al. v. the Prosecutor, ICTR, Case N^o. ICTR-98-44-
A, Decision on Mathiew Ngirumpatse's Motion for
Provisional Release, 11 December 2012.

Rhode v. Denmark, European Court of Human rights,
application N^o10263/83

Ramirez Sanchez v. France, European Court of Human rights,
application N^o59450/00

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started before Military High Court where the
Military Prosecution accused Col. Tom Byabagamba, Rtd
Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza
Francois for the offences mentioned above, that court
rendered the judgment N^o RP0006/014/HCM on 31/03/2016

holding that Col. Tom Byabagamba is guilty for inciting insurrection or trouble, for an act aimed at tarnishing the image of the Country or the Government while he was a leader, for concealing objects which would facilitate the prosecution of a crime or misdemeanour, identification of evidence or punishment of the offender and for contempt of the national flag, the court also held that Rtd Brig Gen Frank Kanyambo Rusagara is guilty of inciting insurrection or trouble, for an act aimed at tarnishing the image of the Country or the Government while he was a leader, for possessing gun illegally, it further held that Rtd. Sgt Kabayiza Francois is not guilty of possessing a gun illegally, it decided that he is guilty of concealing objects which would facilitate the prosecution of a crime or misdemeanour, identification of evidence or punishment of the offender, that he has to be sentenced.

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

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

[4] Before the Court of Appeal, the Military prosecution raised an objection for inadmissibility of the appeal stating that it was not legally filed. Col. Tom Byabagamba, Rtd Brig Gen Frank Kanyambo Rusagara, and Rtd.Sgt Kabayiza Francois also raised

an objection seeking for provisional release and plead at liberty, they stated that the provisional release they claim is based on article 105 paragraph 1 and 2 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure.

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

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

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

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

[9] On 28/06/2019, the court made an order to the authority of the Military police where Rtd. Sgt Kabayiza Francois is

detained, to take him to the physician who treats him for examination and issue a report containing his health situation and whether his illness requires to be admitted in hospital or if he can get treatment and return to prison as usual.

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

II. ANALYSIS OF LEGAL ISSUE

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

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

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

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

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

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

that in their medical treatment, they are not given specialist physicians of the diseases which they suffer from.

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

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

[17] Counsel Munyandatwa S. Nkuba Milton states article 14 and 15 of the Constitution of the Republic of Rwanda provides that a human being has right to medical treatment and that a human being is sacred, but Rtd. Sgt. Kabayiza Francois was

subject to violence since his arrest which caused illness he suffers from, he, therefore, requests to court the provisional release to enable him looking for a physician at his choice.

[18] The Prosecution states, the fact that the accused are sick (Rtd Brig Gen Frank Kanyambo Rusagara invokes that he suffers from an enlarged prostate) it should not result for releasing them because this motive is not provided by the law, to be relied on in deciding that the accused has to be provisionally released. It adds that the provisional release they request before the Court, they base on article 105 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure mentioned above, which is wrong, instead, they should base their request on article 184 of that law which provides that the accused may petition the Court seized of the appeal to grant him/her provisional release.

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

COURT'S DETERMINATION

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

[21] Article 21 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 provides that **all** Rwandans have the right to

good health whereas article 22 provides that everyone has the right to live in a clean and healthy environment.

[22] Article 16, paragraph one of the African Charter on Human and Peoples Rights of 27/06/1981, adopted by Rwanda on 11/11/1981 and ratified on 17/05/1983¹ stipulates that every individual shall have the right to enjoy the best attainable state of physical and mental health. Paragraph 2 stipulates that the States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

[23] Article 10, paragraph one of the International Covenant on Civil and Political Rights of 19//12/1966 adopted by Rwanda on 12/02/1975² stipulates that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 12 of International Covenant on Economic, Social and Cultural Rights of 19/12/1966 ratified by Rwanda on 12/02/1975³ stipulates that The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Paragraph 2, litera d) of that article adds that the steps to be taken by the States parties to achieve the full realization of this right shall include the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[24] Article 25, paragraph one of the United Nations Universal Declaration of Human Rights of 10/12/1948 stipulates that

¹ See the Law N°10/1983 of 17/05/1983

² See Decree-Law N°85/75 of 12/02/1975.

³ See Decree-Law N°85/75 of 12/02/1975.

Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing, and medical care and necessary social services.

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

- a) The provision of health care for prisoners is State responsibility. Prisoners should enjoy the same standards of health care that are available in the community. (rule 24)
- b) Every prison shall have in place a health care services with qualified personnel, and paying particular attention to prisoners with special health care needs. (rule 25)
- c) The health care services shall maintain an individual medical file on all prisoners and all prisoners should be granted access to their files upon request. A prisoner may appoint a third party to access his or her medical file. (rule 26)
- d) All prisoners shall ensure prompt access to medical attention in urgent cases and receive appropriate treatment by specialized staff. (rule 27)

[26] With regard to the provisional release due to exceptional reasons of sickness while the case in appeal is pending, the International Criminal Tribunal for Rwanda and International Criminal Court for former Yugoslavia, all held that there is no

common principle to be relied on by courts, but those special circumstances are assessed considering particularities of every case.⁴ Those courts motivated that the special circumstances in which the accused is granted provisional release, have to be based on an acute justification in relation to humanity.⁵

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

[28] The court finds that every person has the right to social welfare so that he or she takes care of his or her health, hence,

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

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

article 25 paragraph one of the Universal Declarations of Human Rights of 10/12/1948 provides that everyone is given chance to food, medical care, clothing, etc.

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

[30] With regard to the issue for which Rtd Brig Gen Frank Kanyambo Rusagara submits that the medical secret is not respected when consulting the physician, the court finds that

though the patient has right to be examined in privacy, a detained person cannot be considered as other persons, it is reasonable that he is accompanied for his security purpose and that of others as well as that of the country, that right to medical secrecy has to go hand in hand with the functions of the authority of the prison of protecting those in their custody, however, all have to be applied without violating each other.

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

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

expressed this desire whereas if he was taken to Kanombe hospital, it would have transferred him if found necessary.

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

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

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

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

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

[37] Col. Tom Byabagamba explains that he is incarcerated in solitary because he is detained alone without any human contact, that he cannot even meet Rtd Brig Gen Frank Kanyambo Rusagara considered to be his accomplice. He wonders why he is incarcerated in such conditions whereas offences alleged to have committed are not sanctioned by imprisonment with special provisions, he adds that this is a torture they are facing since the standard minimum rules often known as Nelson Mandela rules prohibits such imprisonment conditions particularly its article 43 which provides that in no circumstances may restrictions or disciplinary sanctions amount to torture especially that solitary confinement should not exceed time period of 15 consecutive days and article of the above-mentioned rules stipulates that prisoners shall be informed of the nature of the accusations against them, that he was unfortunately not informed of the grounds of his solitary confinement.

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

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

[40] Counsel Buhuru Pierre Celestin and Rtd Brig Gen Frank Kanyambo Rusagara state that the later has another concern in

relation to lack of sports facilities for prisoners (they claim that they cannot get involved in physical exercises).

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

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

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

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

[45] The Prosecution contends that the accused are not incarcerated in solitary confinement because as found by the Court, Rtd Brig Gen Frank Kanyambo Rusagara stays in a wide place, with a bed and mattress, mosquito net, fridge, self-contained room, water and electricity, It add that doors and windows are sufficient. And that he made the wrong statement that he has no place for physical exercises because there is a wide ground in front of his room, in addition during investigation, the participants saw that he has sport bicycle, therefore they falsely state that they face torture especially that his advocate knows what torture is, the Prosecution wonders whether being detained

alone should be considered as torture, It adds that as it was demonstrated, their place of detention complies with standards conditions for human health since they possess all equipment and they are also allowed to receive money from families for satisfying their needs, however, they should not ignore that incarcerated person is deprived some rights, It prays the court to consider the purpose of its investigation because the statements of the detainees have no link with the case.

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

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

the offenses for which they are prosecuted, that if they change behaviors, they would get previous conditions.

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

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

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

COURT'S DETERMINATION

[51] Article 14(1) and (2) of the Constitution of the Republic of Rwanda of 2003 revised in 2015 provides that everyone has the right to physical and mental integrity. No one shall be

subjected to torture or physical abuse, or cruel, inhuman or degrading treatment.

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

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

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

[55] The Court finds without merit the statements of Brig. Gen. Frank Kanyambo Rusagara, Col. Tom Byabagamba and that of Rtd.Sgt Kabayiza Francois, that they are detained illegally because they are incarcerated in a place different from the one ordered by the Court, that they are detained at Military police instead of Mulindi Military prison, the fact that military police watches over their security does not prove that they are detained

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

in Military investigation cell whereas that Military unit is also in charge of security for the convicts of Military Courts, the Military police authorities explained to Court that the accused are detained in a branch of Mulindi Military prison, with regard to rooms of incarceration, the Court is of the view that this issue should be handled by the management of the prison since it is in right position to place a prisoner where it finds appropriate considering his/her health conditions, social status conducts, background, honour, severity of the offenses, etc, these must respect his/her fundamental rights as well as human dignity, therefore, they fail to prove that they are detained in illegal place since Military police authorities and the Prosecution explained that they stay in a branch of Mulindi Military prison and that they were brought in that detention place due to reasonable grounds including those of facilitating Rtd. Sgt Kabayiza Francois to stay near his physicians from RMH and that for others, the management of the prison wanted to avoid Brig. Gen. Frank Kanyambo Rusagara's disruptive influence among other detainees, hence, the allegations of illegitimate detention place are groundless.

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

or intimidating him/her or coercing him/her or a third person or for any other reason based on discrimination of any kind.

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

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

[59] This position is similar to that of European Court on Human Rights in the case Rohde v.Denmark whereby the Court held that Rohde was not facing torture even though he was incarcerated alone because the applicant was kept in cell of approximately six square metres, that he was allowed to listen radio and watch television , he was allowed exercise in open air

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

for one hour every day , he could borrow books from prison library , he was in daily contact with the prison staff several times a day and sometimes also with other persons in connection with police interrogations and the courts hearings, he was under medical observation, and finally, that although he was subjected to restrictions with regard to visits during this period, he was allowed to receive controlled visits by his family⁸, this precedent was also upheld by the same Court in the case of Ramirez Sanchez vs France, the case adjudicated by 17 judges and found out that when a detained person possesses room materials with sufficient space, toilet, bathroom, books and newspapers, television and radio, walking place, in such conditions he/she is treated with humanity and with respect for the inherent dignity of the human person, that being held alone in detention place should not merely be considered as an inhuman act. The judges also found, the fact that a detained person used to meet a priest once a week and once a month with his defense counsel, he was not detained in total isolation confinement, that he was not in partial isolation.⁹

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

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

[60] In its assessment on the case of Gomez de Voituret vs Uruguay, United Nations Commission on human rights qualified his incarceration as torture since the applicant was incarcerated alone for 7 months and natural lighting could not reach his room, hence there was no respect of the dignity of human person, therefore they concluded that article 10(1) of the International Covenant on Civil and Political Rights¹⁰ was violated.

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

[62] In court investigation carried out on the detention place, the Court found that Col. Tom Byabagamba and Brig. Gen. Frank Kanyambo Rusagara can satisfy primary needs for a detained person because each one of them stays in a self-contained room with sufficient space, a bed and mattress, mosquito net, water and electricity, windows and doors, they also have space where they can get sunlight. It was also found that cleanliness and washing are done for them, they also have a sports bicycle, in addition, Col. Kayigire Joseph, chief of Military Police explained that the accused get money from families to enable them to satisfy their needs. The Court further finds the statements of the accused of

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

not having human contact cannot be taken into consideration, because they meet prison staff, physician who regularly treats them and in case of need they are taken to hospital, they were also given a military who helps for any arrangement including cooking and serving them meals.

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

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

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

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

III. THE DECISION OF THE COURT

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

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

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

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

[71] Holds that the Court fees are suspended.

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