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# ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 2 - 2020 Mata, 2020



# **RWANDA LAW REPORTS**

Law Report V. 2 - 2020 April, 2020





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## **IKINYARWANDA**

## ISHAKIRO

ABAGIZE KOMITE Y'UBWANDITSI	iii
KOMITE YEMEZA IMANZA	iv
IRIBURIRO	vii
IBIKUBIYE MURI IKI CYEGERANYO	viii
INYITO	viii
AMATEGEKO YASHINGIWEHO	ix
IMANZA ZIFASHISHIJWE	xi
AMAGAMBO MPINE	xiii
Re. KABASINGA	1
BRALIRWA v. GISA	35
ENTREPRISE TWAHIRWA FAUSTIN (ETF) BRALIRWA Ltd	
CANDARI v. MUKAMANA N'ABANDI	65
NIYIGENA v. NYIRISHEMA	
UBUSHINJACYAHA v. NIYOMURAGIJE	
UBUSHINJACYAHA v. NZITAKUZE	

## ABAGIZE KOMITE Y'UBWANDITSI

#### ITSINDA RY'ABANYAMATEGEKO BATEGUYE IMANZA

KAGABO U. Stephanie

KAVUTSE M. Claude

KUBWIMANA Jean Claude

MUJABI K. Naphtal

NINAHAZWA Roselyne

## 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	: Umwanditsi 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
<b>RUTAZANA Angeline</b>	: Umugenzuzi Mukuru w'Inkiko
KALIWABO Charles	: Umucamanza w' Urukiko rw'Ubujurire
Dr. KAYIHURA Didas	: Umuyobozi wa ILPD
<b>BWIZA N. Blanche</b>	: Umugenzuzi w'Inkiko
KIBUKA Jean Luc	: Umucamanza w'Urukiko 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
UWANTEGE Yvette	: Umwanditsi Mukuru mu Rukiko rw'Ubujurire
GIRANEZA Clémentine	: Umucamanza mu Rukiko Rwisumbuye
<b>BAGABO Faustin</b>	: Avoka mu Rugaga rw'Abavoka

## IRIBURIRO

Basomyi bacu,

Tunejejwe no kubagezaho Icyegeranyo cy'Ibyemezo by'Inkiko, Volime 2 [2020]. Nk'uko mubizi, tubahitiramo imanza zirimo inyigisho zikubiyemo bimwe mu bisubizo by'ibibazo muhura nabyo kenshi, haba mu mirimo yanyu ndetse no buzima bwa buri munsi.

Muri iyi nomero murasangamo imanza zirindwi (7) zirimo eshanu (5) zaburanishijwe mu mizi zikurikira: ebyiri (2) z'imbonezamubano, ebyiri (2) z'inshinjabyaha, na rumwe (1) rurebana n'ikirego gisaba kwemeza ko itegeko rinyuranye n'Itegeko Nshinga, mu gihe ebyiri (2) zisigaye zerekeye imiburanishirize y'imanza.

Nk'uko mumaze kubimenyera imanza ziri muri iki cyegeranyo ziboneka no kurubuga rwa murandasi rw'Urukiko rw'Ikirenga: <u>http://decisia.lexum.com/rlr/kn/nav.do.</u>

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 n'Urukiko rw'Ubujurire zikoreshwa hakurikijwe inyito ivugwa hasi.

### **INYITO**

### Imanza ziri muri iyi volime zikoreshwa muri ubu buryo: [2020] 2 RLR

## **AMATEGEKO YASHINGIWEHO**

Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe mu 2015, ingingo ya 29 n'iya 615
Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki, ingingo ya 146
Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, ingingo ya 49, 58, 60 niya 1515
Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 351
Itegeko N° 17/2018 ryo ku wa 13/04/2018 ryerekeye amasosiyete y'ubucuruzi, ingingo ya 14251
Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso n'itangwa ryabyo mu manza, ingingo ya 3
165
Itegeko Ngenga N° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana, (ryavanweho), ingingo 78
Itegeko Ngenga N°06/2012/OL ryo ku wa 14/09/2012 rigena imiterere, imikorere n'ububasha by'inkiko z'ubucuruzi, ingingo ya 2

Itegeko	$N^{o}$	30/2013	ryo	kuwa	24/05/2013	ryerekeye
imiburar	iishir	ize y'imanz	a z'ins	shinjaby	aha,	
ir	iging	o ya 165				
ir	iging	o ya 165				123

## IMANZA ZIFASHISHIJWE

Prosecutor vs Ntagerura, ICTR-99-46-A Judgment, 7 July 2006, par.306
Rural Development Solution Company Ltd v Akarere ka Nyabihu, RCOMAA 00020/2016/SC – RCOMAA 0025/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/04/2017
South Africa: Supreme Court of Appeal, S v Toms; S v Bruce (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802(A D); [1990] 2 All SA 248 (A) (30 March 1990)
Supreme Court of Canada, R. v. Beauregard, [1987] LRC (Const.)
Supreme Court of Canada, R v Smith, [1987] 1 S.C.R. 10456
Supreme Court of India, Mithu v. State of Punjab [1983] 2 SCR 6906
Supreme Court of the United States, Graham v. Florida, 560 U.S. 48 (2010)
Supreme Court of the United States, Lockett v. Ohio, 438 U.S. 586 (1978)
Ubushinjacyaha na Barakagwira Gilbert, RP 00062/2019/TGI/HYE, rwaciwe n' Urukiko Rwisumbuye rwa Huye ku wa 18/02/20196
Ubushinjacyaha na Barimenya Venant, RP00357/2018/TGI/NGOMA, rwaciwe n'Urukiko Rwisumbuye rwa NGOMA ku wa 14/06/20196

Ubushinjacyaha na	a Ntahorutaba	Wellars,	RP
00499/2018/TGI/MUS	rwaciwe n'Urukiko	Rwisumbuye	rwa
Musanze			6
United States Supreme (1976), July 2, 1976			
United States Supreme 76-5206, June 6, 1977		( )	-

## AMAGAMBO MPINE

Amategeko agenga ibimenyetso – Ibimenyetso mu manza nshinjabyaha – Ukwivuguruza k'umuburanyi – Amakimbirane hagati y'uregwa n'uwakorewe icyaha – Ukwivuguruza k'umuburanyi si ikimenyetso gihagije kimushinja icyaha mu gihe nta bindi bimenyetso simusiga bikimushinja, kuko adafite inshingano yo gutanga ibimenyetso bimushinja – Amakimbirane hagati y'uregwa n'uwakorewe icyaha ubwabyo si ikimemyetso kigaragaza ko uregwa yakoze icyaha ashinjwa

#### UBUSHINJACYAHA v. NIYOMURAGIJE......105

Ibimenyetso mu manza nshinjabyaha – Ibimenyetso biziguye (les preuves indirectes) – Ibimenyetso biziguye (les preuves indirectes) bigira agaciro iyo isesengura ryabyo ryerekana ko nta wundi mwanzuro byageraho uretse ibikorwa bigize icyaha ushinjwa akurikiranyweho.

#### UBUSHINJACYAHA v. NIYOMURAGIJE.....105

Amategeko agenga imanza mbonezamubano – Agaciro k'inyandiko – Inenge – Inyandiko nubwo yakorerwa imbere ya noteri ariko igakorwa hirengagijwe ibyo amategeko ateganya, ntabwo iyo nyandiko yahabwa agaciro.

#### CANDARI v. MUKAMANA N'ABANDI......65

Amategeko agenga imanza z'ubucuruzi – Isosiyete – Isosiyete idahamagarira rubanda kuyiguramo imigabane ifite umuyobozi umwe – Gusimbura umuyobozi wa Sosiyete – Icyemezo gitangwa n'Ikigo cy'Igihugu cy'Iterambere (RDB) n'icyo kigaragaza uwasimbuye umuyobozi wa sosiyete mu gihe bigaragara ko ari we munyamigabane umwe rukumbi.

ENTREPRISE TWAHIRWA FAUSTIN (ETF) Ltd v. BRALIRWA Ltd......49

Ububasha bw'inkiko – Ububasha bushingiye ku ndishyi zagenwe mu rubanza – Urugero rw'indishyi zagenwe n'umucamanza igihe habaye impaka nirwo rugomba gushingirwaho mu kwemeza niba ubujurire buri mu bubasha bw'Urukiko rw'Ikirenga, aho kuba gusa agaciro k'ikiburanwa katanzwe n'umuburanyi mu kirego cye. – Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingigo ya 7.

BRALIRWA v. GISA......35

Iyakirwa ry'ikirego – Ububasha byo kurega – Kugira ngo ikirego cyakirwe urega n'uregwa bagomba kuba bafite ububasha (qualité) – Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 3.

ENTREPRISE TWAHIRWA FAUSTIN (ETF) Ltd v. BRALIRWA Ltd......49 Amategeko agenga ubutaka – Umutungo utimukanwa – Inkomoko y'umutungo utimukanwa – Amasezerano y'ubugure – Amasezerano y'ubugure ubwayo gusa ntahagije gushingirwaho hemezwa ko umuntu ari nyiri umutungo utimukanwa ahubwo hagomba n'ukugaragazwa ko uwo awukomoraho nawe yari nyirawo Ntibihagije kuvuga ko umuntu ari nyir'umutungo utimukanwa hashingiwe ku masezerano y'ubugure, hagomba no kugaragazwa ibimenyetso by'uko uwo awukomoraho nawe yari nyirawo.

#### NIYIGENAV. NYIRISHEMA......85

Amategeko agenga umuryango – Umuryango – Izungura – Abana batabyawe na nyakwigendera ntabwo bamuzungura kuko ntaho baba bahuriye kereka bigaragara ko yabagize abe ku bw'amategeko. (adoption).

#### CANDARI v. MUKAMANA N'ABANDI......65

Umuryango – Imicungire y'umutungo w'abashingiranywe – Iyo abantu basezeranye ivangamutungo rusange, umwe muri bo ntashyire "réserve" (umwihariko) muri ayo masezerano, ku bijyanye n'umutungo yita uw'abana yashakanye, imitungo yose ifatwa ko ari iyabashyingiranywe.

CANDARI v. MUKAMANA N'ABANDI......65

Amategeko mpanabyaha – Ubwinjiracyaha bw'ubwicanyi – Kugira ngo habeho uburyozwacyaha ku cyaha cy'ubwiracyaha bw'ubwicanyi, ntibihagije gushingira gusa ku bikoresho cyangwa intwaro uregwa yafatanywe ahubwo hagomba kugaragazwa niba yari afite umugambi cyangwa ubushake bwo kwica – Itegeko N° 01/2012 ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko, ingingo ya 27.

#### UBUSHINJACYAHA v. NZITAKUZE.....121

Itegeko Inshinga – Ubutabera buboneye – Ubutabera buboneye bugizwe n'uruhererekane rw'ibigomba kubahirizwa mu migendekere y'urubanza hashingiwe ku mahame ateganywa n'amategeko (procedural due process) n'ubutabera bunogeye bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage (substantive due process) – Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe muri 2015 ingingo ya 29.

Re. KABASINGA.....1

Urubanza rutabera (fair trial) – Igihano ntayegayezwa – Igihano ntayegayezwa kinyuranye n'ihame ryo guca urubanza rutabera (fair trial) kuko uwo cyahamye ntashobora kujuririra ibirebana n'igihano bitewe n'uko umucamanza uburanisha ubujurire adashobora kugihindura bitewe n'uko nyine ari ntayegayezwa – Mu manza mpanabyaha, Umucamanza afite inshingano zo gutanga igihano gishingiye ku mikorere y'icyaha, ku myitwarire n'imibereho y'uwagikoze, ku muryango cyakorewemo no ku wagikorewe.

#### Re. KABASINGA.....1

Ubwisanzure n'ubwigenge bw'umucamanza – Igihano ntayegayezwa – Umucamanza afite ubwisanzure bwo kuburanisha no guca imanza mu nzira n'uburyo biteganywa n'amategeko, akabikora nta gitutu icyo ari cyo cyose cyaba icy'inzego za Leta, n'icy'abandi – Nta wavuga ko umucamanza yigenga mu gutanga igihano mu gihe agomba gutanga igihano ntayegayezwa kitajyanye n'uburemere bw'icyaha, uburyo cyakozwemo, n'igihe hari impamvu nyoroshyacyaha zikomeye zari gutuma

agabanyirizwa igihano – Itegeko Nshinga rya Repub	ulika
y'u Rwanda ryo muri 2003 ryavuguruwe muri 2	2015
ingingo ya 151.	
Re. KABASINGA	1

## IKIREGO GISABA KWEMEZA KO ITEGEKO RINYURANYE N'ITEGEKO

## **Re. KABASINGA**

#### [Rwanda URUKIKO RW'IKIRENGA – RS/INCONST/SPEC 00003/2019/SC (Rugege, P.J., Nyirinkwaya, Cyanzayire, Rukundakuvuga na Hitiyaremye, J.) 04 Ukuboza 2019]

Itegeko Inshinga – Ubutabera buboneye – Ubutabera buboneye bugizwe n'uruhererekane rw'ibigomba kubahirizwa mu migendekere y'urubanza hashingiwe ku mahame ateganywa n'amategeko (procedural due process) n'ubutabera bunogeye bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage (substantive due process) – Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe muri 2015 ingingo ya 29.

Itegeko Inshinga – Urubanza rutabera (fair trial) – Igihano ntayegayezwa – Igihano ntayegayezwa kinyuranye n'ihame ryo guca urubanza rutabera (fair trial) kuko uwo cyahamye ntashobora kujuririra ibirebana n'igihano bitewe n'uko umucamanza uburanisha ubujurire adashobora kugihindura bitewe n'uko nyine ari ntayegayezwa – Mu manza mpanabyaha, Umucamanza afite inshingano zo gutanga igihano gishingiye ku mikorere y'icyaha, ku myitwarire n'imibereho y'uwagikoze, ku muryango cyakorewemo no ku wagikorewe.

Itegeko Inshinga – Ubwisanzure n'ubwigenge bw'umucamanza – Igihano ntayegayezwa – Umucamanza afite ubwisanzure bwo kuburanisha no guca imanza mu nzira n'uburyo biteganywa n'amategeko, akabikora nta gitutu icyo aricyo cyose cyaba icy'inzego za Leta, n'icy'abandi – Nta wavuga ko umucamanza yigenga mu gutanga igihano mu gihe agomba gutanga igihano ntayegayezwa kitajyanye n'uburemere bw'icyaha, uburyo cyakozwemo, n'igihe hari impamvu nyoroshyacyaha zikomeye zari gutuma agabanyirizwa igihano – Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe muri 2015 ingingo ya 151.

**Incamake y'ikibazo:** Kabasinga Florida yatanze ikirego asaba Urukiko rw'Ikirenga kwemeza ko ingingo ya 133, igika cya gatanu y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "[....] iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha. Iyo ngingo inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 29 na 151, bitewe n'uko asanga ibangamiye uburenganzira ku butabera buboneye ikaba inabangamira ubwigenge bw'umucamanza mu gutanga ibihano.

Ko rero mu gihe hari ingingo y'itegeko ibuza gusuzuma impamvu nyoroshyacyaha, ituma uregwa washoboraga kugabanyirizwa ibihano, avutswa ubwo burenganzira ku butabera buboneye, kuko iyo haciwe urubanza, mu gutanga Umucamanza agomba ku igihano, kwita mpamvu nyoroshyacyaha iyo zihari kuko biri mu bigize uburenganzira ku butabera buboneye buteganywa n'Itegeko Nshinga. Asobanura ko imiterere ya gace k'iyo ingingo karebana no gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore, iteje ikibazo kuko igihano cya burundu kidashobora kugabanywa, hari abo kibangamira hakurikijwe imikorere y'icyaha bigatuma hari abahanwa cyane kurusha abandi kandi mu buryo busanzwe atariko byakagombye kugenda.

Kubirebana n'uko iyo ingingo inyuranyije n'ibiteganywa n'ingingo ya 151, 5° y'itegeko Nshinga, aho iyo ngingo iteganya

ko abacamanza bakora umurimo wabo w'Ubucamanza mu batavugirwamo n'ubutegetsi bwigenge kandi cyangwa ubuyobozi ubwo ari bwo bwose, avuga ko iyo urwego rushinga amategeko rushyizeho itegeko rizirika umucamanza ku buryo atabona umwanya n'ubwinyagamburiro bwo gushyira mu gaciro, ruba rumubujije umudendezo wo gutanga ubutabera buboneye buteganywa n'ingingo ya 29 y'itegeko Nshinga. Bityo basaba ko ingingo ya 133, agace ka kane y'Itegeko rihana ibyaha, ibuza umucamanza gutanga ubutabera buboneye ashingira ku mpamvu nyoroshyacyaha, yavaho kuko ituma umucamanza atigenga mu kazi ke, kuko ategetswe gutanga igifungo cya burundu gusa, ibyo bikaba binyuranyije n'ingingo ya 151 y'Itegeko Nshinga.

Leta y'u Rwanda ivuga ko ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranyije n'Itegeko Nshinga, ko ntaho ibangamiye uburenganzira ku butabera buboneye bw'uregwa kandi iyo ngingo ntaho ibangamiye ubwigenge bw'umucamanza kuko ntaho bigaragara ko abantu babuzwa uburenganzira ku butabera buboneye, ko ibyo uwareze avuga abishingira ku marangamutima. Ingingo ya 29 y'Itegeko Nshinga igaragaza uburenganzira umuntu afite kandi bugomba kubahirizwa kugira ngo ahabwe ubutabera buboneye, ariko ko urega atagaragaza uburyo ingingo iregerwa yica bumwe muri ubwo burenganzira

Naho ku birebana nuko iyo ingingo inyuranyije n'ingingo ya 151 y'itegeko Nshinga, ivuga ko nta rwego na rumwe rwabujije umucamanza ubwisanzure ndetse n'ubwigenge kubera ko mu mirimo akurikiza itegeko kandi rikaba rihari, bityo isanga iyo ingingo ntaho inyuranyije n'Itegeko Nshinga, mu ngingo yaryo ya 151. **Incamake y'icyemezo:** 1. Ubutabera buboneye bugizwe n'uruhererekane rw'ibigomba kubahirizwa mu migendekere y'urubanza hashingiwe ku mahame ateganywa n'amategeko (procedural due process) n'ubutabera bunogeye bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage (substantive due process).

2. Igihano ntayegayezwa kinyuranye n'ihame ryo guca urubanza rutabera (fair trial) kuko uwo cyahamye ntashobora kujuririra ibirebana n'igihano bitewe n'uko umucamanza uburanisha ubujurire adashobora kugihindura bitewe n'uko nyine ari ntayegayezwa.

3. Mu manza mpanabyaha, Umucamanza afite inshingano zo gutanga igihano gishingiye ku mikorere y'icyaha, ku myitwarire n'imibereho y'uwagikoze, ku muryango cyakorewemo no ku wagikorewe. Bityo kuba umucamanza adashobora gusuzuma no gushingira ku mpamvu nyoroshyacyaha igihe zihari, ngo agabanyirize igihano uwahamwe n'icyaha cyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, biba binyuranye n'ibiteganywa n'ingingo ya 29 y'Itegeko Nshinga ivuga ko buri muntu wese afite uburenganzira ku butabera buboneye, kuko bituma uwahamwe n'icyo cyaha hanishwa iginaho atari akwiye.

4. Umucamanza afite ubwisanzure bwo kuburanisha no guca imanza mu nzira n'uburyo biteganywa n'amategeko, akabikora nta gitutu icyo aricyo cyose cyaba icy'inzego za Leta, n'icy'abandi.

5. Nta wavuga ko umucamanza yigenga mu gutanga igihano mu gihe agomba gutanga igihano ntayegayezwa kitajyanye n'uburemere bw'icyaha, uburyo cyakozwemo, n'igihe hari

impamvu nyoroshyacyaha zikomeye zari gutuma agabanyirizwa igihano. Bityo n'ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibihano muri rusange ivuga ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranye n'ingingo ya 151,5<sup>0</sup> y'Itegeko Nshinga iteganya ko abacamanza bakora umurimo wabo w'ubucamanza mu bwigenge, kuko babujijwe gushingira ku mpamvu nyoroshyacyaha batanga igihano gikwiye.

#### Ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, igika cyayo cya gatanu kinyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015. Icyo gika kikaba nta gaciro gifite nkuko biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

#### Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003
ryavuguruwe muri 2015 ingingo ya 29 niya 61.
Itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha
n'ibihano muri rusange, ingingo ya 49, 58, 60 niya 151,
Itegeko Ngenga N° 01/2012/OL ryo kuwa 02/05/2012
rishyiraho igitabo cy'amategeko ahana, ingingo 78
(ryavanyeho)
Itegeko nº 09/2004 ryo ku wa 29/04/2004 ryerekeye imyitwarire
mu kazi k'ubucamanza, ingingo ya 4 niya 5
Masezerano Mpuzamahanga ku Burenganzira mu
by'Imbonezamubano na Politiki, ingingo ya 14.

#### Imanza zifashishijwe:

- Urubanza RP 00062/2019/TGI/HYE, Ubushinjacyaha na BARAKAGWIRA Gilbert rwaciwe n' Urukiko Rwisumbuye rwa Huye ku wa 18/02/2019.
- Urubanza RP00357/2018/TGI/NGOMA, Ubushinjacyaha na BARIMENYA Venant rwaciwe n'Urukiko Rwisumbuye rwa Ngoma, ku wa14/06/2019
- Urubanza RP 00499/2018/TGI/MUS, Ubushinjacyaha na NTAHORUTABA Wellars rwaciwe n'Urukiko Rwisumbuye rwa Musanze

#### Izo mu mahanga:

- United States Supreme Court, Jurek v. Texas, 428 U.S. 262 (1976), July 2, 1976
- United States Supreme Court, ROBERTS v. LOUISIANA (1977), No. 76-5206, June 6, 1977.
- Supreme Court of the United States, Lockett v. Ohio, 438 U.S. 586 (1978)
- Supreme Court of Canada, R. v. Beauregard, [1987] LRC (Const.)
- Supreme Court of Canada, R v Smith, [1987] 1 S.C.R. 1045
- South Africa: Supreme Court of Appeal, S v Toms; S v Bruce (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802(A
  - D); [1990] 2 All SA 248 (A) (30 March 1990)
- Supreme Court of the United States, Graham v. Florida, 560 U.S. 48 (2010)
- Supreme Court of India, Mithu v. State of Punjab [1983] 2 SCR 690

#### Ibitekerezo bya bahanga:

Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) Australian

Journal of Human Rights at ttp://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.ht ml/2001/14.html#Heading140. The label of life imprisonment in Australia: A principled or Populist approach to an ultimate sentence. John L Andeson, P. 748 available at http://www.austlii.edu.au/au/journals/UNSWLJ/2012/30 .html, accessed on 27 November 2019 Definition of due process, available at; https://dictionary.findlaw.com/legal-terms/d.html accessed on 2nd December 2019 2 John N. Ferdico. Criminal Procedure for the Criminal Justice Professional. Thomson, wads worth 9th Edition, P.22 The label of life imprisonment in Australia: A principled or Populist approach to an ultimate sentence. John L Anderson. P. 748 available at http://www.austlii.edu.au/au/journals/UNSWLJ/2012/30 .html, accessed on 27 November 2019 Mandatory Sentencing & the Independence of the Judiciary, available at: https://www.ruleoflaw.org.au/wpcontent/uploads/2015/11/MandatorySentencing.pdf, visited on November 30, 2019

## Urubanza

## I. IMITERERE Y'IKIREGO

[1] Kabasinga Florida yatanze ikirego asaba Urukiko rw'Ikirenga kwemeza ko ingingo ya 133, igika cya gatanu y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 29 na 151, bitewe n'uko asanga ibangamiye uburenganzira ku butabera buboneye ikaba inabangamira ubwigenge bw'umucamanza mu gutanga ibihano.

[2] Iyo ngingo ya 133, igika cya gatanu y'itegeko N° 68/2018 ryo ku wa 30/08/2018 iteganya ko: "[....] Iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha. [...]".

[3] Leta y'u Rwanda ivuga ko ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranyije n'Itegeko Nshinga, ko ntaho ibangamiye uburenganzira ku butabera buboneye bw'uregwa kandi iyo ngingo ntaho ibangamiye ubwigenge bw'umucamanza.

[4] Urubanza rwaburanishijwe mu ruhame n'Urukiko rw'Ikirenga ku wa 06/11/2019, Kabasinga Florida watanze ikirego yunganiwe na Me Rwagitare Fred Fiston na Me Mugabonabandi Jean Maurice, Leta y'u Rwanda ihagarariwe na Me Batsinda Aline.

## II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

#### Kumenya niba igika cya gatanu cy'ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kinyuranije n'ingingo ya 29 y'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015.

[5] Kabasinga Florida n'abamwunganira bavuga ko ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 29 y'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015 ivuga ko buri wese afite uburenganzira ku butabera buboneye. Bakomeza bavuga ko agace k'ingingo ya 133 kanyuranye n'Itegeko Nshinga ari akavuga ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha.

[6] Basobanura ko iyo haciwe urubanza hagatangwa igihano hitawe ku mpamvu nyoroshyacyaha iyo zihari, biri mu bigize uburenganzira ku butabera buboneye buteganywa n'Itegeko Nshinga. Ko rero mu gihe hari ingingo y'itegeko ibuza gusuzuma izo mpamvu nyoroshyacyaha, ituma uregwa washoboraga kugabanyirizwa ibihano, avutswa ubwo burenganzira ku butabera buboneye. Bakomeza basobanura ko imiterere y'ingingo ya 133, agace kayo karebana no gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore, iteje ikibazo kuko igihano cya burundu kidashobora kugabanywa, hari abo kibangamira hakurikijwe imikorere y'icyaha bigatuma hari abahanwa cyane kurusha abandi kandi mu buryo busanzwe atariko byakagombye kugenda. [7] Batanga urugero rw'ushobora guhamwa n'icyaha cyo gusambanya umwana ufite imyaka iri hagati ya 14 na 18, yagikoze afite imyaka iri hejuru ya 50, ko we ashobora kugabanyirizwa ibihano agahanishwa igifungo cy'imyaka 25, naho ufite imyaka 19 wasambanye n'ufite 17 babyumvikanyeho, nyuma bakabana nk'umugabo n'umugore azahanishwa igifungo cya burundu kidashobora kugabanywa. Basanga ibyo binyuranye n'Itegeko Nshinga mu ngingo yaryo ya 29, bagasaba ko ingingo ya 133 ibiteganya, yavanwaho.

[8] Me Batsinda Aline uhagarariye Leta y'u Rwanda avuga ko ibiteganywa n' ingingo ya 133 y'itegeko riteganya ibyaha n'ibihano muri rusange, bitanyuranye n'Itegeko Nshinga kuko ntaho bigaragara ko abantu babuzwa uburenganzira ku butabera buboneye, ko ibyo uwareze avuga abishingira ku marangamutima.

Akomeza avuga ko ingingo ya 29 y'Itegeko Nshinga [9] uburenganzira umuntu afite kandi bugomba igaragaza kubahirizwa kugira ngo ahabwe ubutabera buboneye, ariko ko urega muri uru rubanza atagaragaza uburyo ingingo ya 133 y'itegeko riteganya ibyaha n'ibihano muri rusange yica bumwe muri ubwo burenganzira. Ntiyerekana niba iyo ngingo itubahiriza uburenganzira buteganywa mu ngingo ya 29 ari bwo kumenyesha imiterere n'impamvu z'icyaha akurikiranyweho, uregwa uburenganzira bwo kwiregura no kunganirwa, ubwo gufatwa nk'umwere kugeza igihe Urukiko rubifitiye ububasha ruhamije uregwa icyaha, uburenganzira bwo kuburanira imbere y'Urukiko rubifitive ububasha, ubwo kudakurikiranwa, kudafatwa. kudafungwa cyangwa kudahanirwa ibyo ukurikiranwe yakoze, cyangwa atakoze iyo amategeko y'igihugu cyangwa amategeko mpuzamahanga atabifataga nk'icyaha igihe byakorwaga.

[10] Asoza avuga ko ibijyanye n'ubutabera buboneye Umushingamategeko yabyitayeho, ko ntaho ingingo ya 133 inyuranyije n'ingingo ya 29 y'Itegeko Nshinga, ko ahubwo izo ngingo zombi zijyanye hakurikijwe ibiteganywa mu gace ka 4 k'ingingo ya 29, aho iteganya ko ibyaha n'ibihano bijyanye nabyo biteganywa n'amategeko. Ibyo urega yasobanuye mu kirego cye, asanga ashaka kuvanga ubukure mu rwego rusanzwe (social) no mu rwego rw'amategeko. Asoza asaba ko Urukiko rwakwemeza ko ingingo ya 133 itanyuranye n'ingingo ya 29 y'Itegeko Nshinga.

## UKO URUKIKO RUBIBONA

[11] Ingingo ya 29 y'Itegeko Nshinga ivuga ko: "Buri muntu wese afite uburenganzira ku butabera buboneye, [...]". Iyo ngingo ikomeza irondora bimwe mu bigize ubwo burenganzira.

[12] Iyo ngingo ya 29 y'Itegeko Nshinga igaragaza bimwe mu bigize uburenganzira ku butabera buboneye. Nkuko bigaragazwa n'imyandikire y'iyo ngingo, ntabwo ibigize uburenganzira ku butabera buboneye byarondowe byose. Hakoreshejwe ijambo burimo, mu cyongereza "includes". Ibi bivuze ko uretse ibivugwa muri iyo ngingo ya 29, hari n'ibindi bigize uburenganzira ku butabera buboneye.

[13] Ubutabera buboneye busobanurwa mu buryo butandukanye, hari ubutabera buboneye bushingiye ku migendekere procedural due process: a course of formal proceedings (such as legal proceedings) carried out regularly and <u>in accordance with established rules and principles<sup>1</sup></u>. Ni ukuvuga uruhererekane rw'ibigomba kubahirizwa mu migendekere y'urubanza hashingiwe ku mahame ateganywa n'amategeko. Hari n'Ubutabera buboneye bushingiye ku biteganywa n'itegeko <u>substantive due process: protection against enactement of</u> <u>arbitrary and unreasonable legislation or other measures that</u> <u>would violate peoples'rights.<sup>2</sup></u> Ubu buryo bwo bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage.

[14] Ikibazo gisigaye ni ukumenya niba ibirebana no gusuzuma impamvu nyoroshyacyaha n'itangwa ry'igihano gikwiye, nabyo biri mu bigize uburenganzira ku butabera buboneye. Kuri iki kibazo, Urukiko rusanga mu manza nshinjabyaha, uburenganzira ku butabera buboneye butangirana n'ibikorwa by'iperereza, bugakomereza ku bikorwa by'ikurikiranacyaha, iby'iburanisha n'itangwa ry'ibihano ku byaha biteganyijwe n'amategeko ahana. Bivuze ko n'ibirebana n'isuzumwa ry'impamvu nyoroshyacyaha n'ibihano biri mu gice cy'iburanisha, nabyo bigomba kubahiriza amahame agize ubutabera buboneye kuri izo ngingo.

[15] Ingingo ya 49, igika cya mbere y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange igaragaraza ibyo umucamanza akurikiza mu gutanga igihano. Iyo ngingo ya 49 igira iti: "Umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara,

12 \_\_\_\_

<sup>&</sup>lt;sup>1</sup> Definition of due process, available at ; https://dictionary.findlaw.com/legal-terms/d.html accessed on 2nd December 2019

<sup>&</sup>lt;sup>2</sup> John N. Ferdico. Criminal Procedure for the Criminal Justice Professional. Thomson, wadsworth 9th Edition, P.22

imibereho ye bwite n'uburyo icyaha cyakozwemo. [...]". Urukiko rusanga ibiteganywa n'iyi ngingo ari byo bigenderwaho n'Umucamanza mu kugena igihano; kunyuranya nabyo, byaba ari ukunyuranya n'ibigize uburenganzira ku butabera buboneye mu itangwa ry'igihano.

Ingingo ya 133 y'itegeko Nº 68/2018 iteganya igihano [16] cya burundu ku wahamwe n'icyaha cyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore. Iyo ngingo ntiyemera ko icyo gihano kigabanywa kubera impamvu nyoroshyacyaha. Ibyo bikaba bivuguruza kuba Umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye uregwa agikora, uko yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo nkuko biteganywa n'ingingo ya 49 ivugwa mu gika kibanziriza iki. Hakurikijwe uko ingingo ya 133, igika kirebana n'uwahamwe n'icyaha cyo gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore iteye, bigaragara ko ububasha bw'Umucamanza ku wahamwe n'icyo cyaha, bugarukira gusa ku kwemeza ko ahamwa n'icyaha, naho ibishingirwaho hatangwa igihano, nta bubasha abifiteho kuko igihano cy'igifungo cya burundu giteganywa n'itegeko cyagizwe ntayegayezwa. Ibi bikaba binyuranye n'ibiteganywa n'ingingo ya 49 iteganya ibyo umucamanza ashingiraho atanga igihano.

[17] Igihano ntayegayezwa kandi kinanyuranye n'ihame ryo guca urubanza rutabera (fair trial) riboneka mu Masezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki <sup>3</sup> mu ngingo ya 14 (5) ivuga ko: "Everyone convicted of

<sup>&</sup>lt;sup>3</sup> International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. U Rwanda ruyemeza ku wa 12/02/1975 (reba Itegeko Teka No 8/75 ryo ku wa 12/02/1975, Igazeti ya Leta n° 5 of 01/03/1975

a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal and according to law". Icyo iyi ngingo iteganya n'uko uwahamwe n'icyaha afite uburenganzira bwo kujuririra urukiko ruri hejuru y'urwaciye urubanza rumuhamya icyaha. Ku birebana n'igihano ntayegayezwa giteganywa ku cyaha runaka, uwo cyahamye ntashobora kujuririra ibirebana n'igihano kuko umucamanza uburanisha ubujurire adashobora kugihindura bitewe n'uko nyine ari ntayegayezwa. Ibi kandi byanavuzwe n'Intumwa yihariye y'Umuryango w'Abibumbye ku bwigenge bw'ubucamanza (The United Nations Special Rapporteur on the Independence of the Judiciary). Yagize ati: "[...] the right of appeal contained in Article 14(5): [...] is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards"<sup>4</sup>. N'uwahamwe n'icyaha cyo gusambanya umwana byakurikiwe no kubana nk'umugore n'umugabo, kujuririra igihano cyo gufungwa burundu ntacyo byamumarira kuko icyo gihano kidashobora guhindurwa. Bityo, ibyo bikaba binyuranye n'ingingo ya 14 (5) iyugwa muri iki gika.

[18] Ingingo ya 49 igika cya kabiri y'iri Tegeko yemera ko hashobora kubaho impurirane y'impamvu nkomezacyaha n'impamvu nyoroshyacyaha mu rubanza rumwe ndetse ikanagaragaza uko zitabwaho mu guca urubanza mu magambo

<sup>&</sup>lt;sup>4</sup> Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) Australian Journal of Human Rights at http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#H eading140.

akurikira: "Iyo hari impurirane z'impamvu zashingirwaho, umucamanza agomba kwita ku rutonde rukurikira mu kugena igihano: 10 impamvu nkomezacyaha; 2° impamvu nyoroshyacyaha". Kuba itegeko ryemera ko umucamanza yita ku mpamvu nkomezacyaha no ku mpamvu nyoroshyacyaha icyarimwe, Urukiko rusanga ibyo ari kimwe mu bigize uburenganzira ku butabera buboneye. Kuba rifata kubana nk'umugabo n'umugore nk'impamvu nkomezacyaha ku wasambanyije umwana, rigakumira umucamanza gushingira ku mpamvu nyoroshyacyaha yabona ngo abe yagabanya ibihano, binyuranye n'ihame ry'uko buri wese afite uburenganzira ku butabera buboneye ku birebana n'ibihano.

Ibiteganywa n'ingingo ya 49 ko Umucamanza asuzuma [19] nkomezacyaha icyarimwe impamvu n'impamvu nvoroshyacyaha, ni ihame ryemewe n'ahandi kandi itegeko rinyuranyije naryo riba rigomba kuvaho. Urugero ni urubanza Jurek v. Texas rwaciwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika, ruhereye no kuzindi manza rwaciye rwavuze ko mu guhana hagomba kwitabwa ku mpamvu nyoroshyacyaha, itegeko ryabuza kwita kuri izo mpamvu riba rinyuranye n'Itegeko Nshinga. Rwagize ruti: "But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in Woodson v. North Carolina, [428 U.S.,] at 303-305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in Woodson and Roberts v. Louisiana [ 428 U.S. 325 (1976)]. A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. "Thus, in order

to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."5. Ingingo ya 58 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "Umucamanza ubwe ni we ugena niba impamvu nyoroshyacyaha zemezwa n'umucamanza zahabwa agaciro. Kwemeza impamvu cyemezo nyoroshyacyaha bigomba gusobanurwa mu cy'urukiko". Iya 59 iyuga zimwe mu mpamvu nyoroshyacyaha zemezwa n'umucamanza. Ibiteganywa n'izi ngingo, bishingiye ku nshingano umucamanza afite mu manza mpanabyaha zo gutanga igihano gishingiye ku mikorere y'icyaha, ku myitwarire n'imibereho y'uwagikoze, ku muryango cyakorewemo no ku wagikorewe. Ibi bikaba ari muri bimwe bigize ubutabera buboneye, Itegeko cyangwa ingingo yaryo yatuma bitagerwaho yaba inyuranye n'Itegeko Nshinga. Nkuko byemejwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika, mu rubanza ROBERTS v. LOUISIANA, uca urubanza agomba kwita ku mpamvu nyoroshyacyaha zaba izirebana n'uregwa cyangwa izirebana n'icyaha, itegeko ryanga ko izo mpamvu zisuzumwa rifatwa nk'irinyuranye n'Itegeko Nshinga. Rwabivuze muri aya magambo: "As we emphasized [...], it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the [Louisiana] statute does not allow for consideration of particularized mitigating factors, it is unconstitutional<sup>6</sup>".

16

<sup>&</sup>lt;sup>5</sup> U 6 United States Supreme Court, ROBERTS v. LOUISIANA (1977), No. 76-5206, June 6, 1977.nited States Supreme Court, Jurek v. Texas, 428 U.S. 262 (1976), July 2, 1976

<sup>&</sup>lt;sup>6</sup> United States Supreme Court, ROBERTS v. LOUISIANA (1977), No. 76-5206, June 6, 1977.

[20] Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, rifata ibikorwa bitandukanye nk'icyaha cyo gusambanya umwana iyo byakorewe ku muntu utarageza ku myaka cumi n'umunani. Igihano kuri icyo cyaha kiri hagati y'igifungo cy'imyaka makumyabiri (20) na makumyabiri n'itanu (25). Iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore bifatwa nk'impamvu nkomezacyaha, igihano kikaba igifungo cya burundu kidashora kugabanywa kubera impamvu nyoroshyacyaha kuko itegeko ritabibuza. Itegeko ariko ntirifata gusambanya umwana igihe kirekire nk'impamvu nkomezacyaha iyo batabanye nk'umugabo n'umugore. Ibi na byo bikaba bitumvikana.

gushingirwaho [21] Harebwe ibishobora nk'impamvu nyoroshyacyaha, Urukiko rusanga hari ibyumvikana byatuma uwahamwe no gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore agabanyirizwa ibihano, kurusha uwahamwe n'icyo cyaha ariko batabanye nk'umugabo n'umugore. Ntibyumvikana ukuntu uwahamwe no gusambanya umwana aruta cyane mu myaka y'ubukure, yarabikoze ku gahato, akamwangiza, ashobora kugabanyirizwa ibihano hashingiwe ku mpamvu nyoroshyacyaha, mu gihe uwagikoze afite imyaka 19, ubana n'uwagikorewe ufite imyaka 17 nk'umugabo n'umugore ku bwumvikane bwa bombi, ndetse bashobora no kuba barabyaye abana, babana mu bwumvikane bagamije kubaka umuryango, ahanishwa igifungo cya burundu kidashobora kugabanywa. Hari n'ababana kuko babona aribyo byakoroshya ubuzima bwabo, nk'igihe bombi cyangwa umwe muri bo ari imfubyi nta bundi bufasha bafite.

[22] Ibi ntabwo ari ibishoboka gusa ahubwo bigaragara mu manza zaciwe. Urugero ni urubanza RP 00062/2019/TGI/HYE

17

rwaciwe n' Urukiko Rwisumbuye rwa Huye kuwa 18/02/2019, aho Ubushinjacyaha bwaregaga uwitwa Barakagwira Gilbert w'imyaka 19, icyaha cyo gusambanya umwana w'umukobwa w'imyaka 16, akaza kumutera inda, maze aba bombi bagafata icyemezo cyo kubana nk'umugore n'umugabo, ariko ababyeyi b'umukobwa bakaza kumukurayo amaze yo ijoro rimwe gusa. Muri uru rubanza uwarezwe yemeye icyaha ndetse avuga ko uwo yateye inda bakundanaga, uwakorewe icyaha nawe yemeraga ko yakundanye n'uwamuteye inda ndetse bakemeranywa kubana nyuma y'uko amuteye inda. Urukiko rwahamije Barakagwira Gilbert icyaha cyo gusambanya umwanya ndetse rumukatira igifungo cya burundu nkuko amategeko abiteganya, kuko nyuma yo kumusambanya baje kubana nk'umugore n'umugabo umunsi umwe nk'uko uregwa abyiyemerera. Uregwa muri urwo rubanza afite imyaka 19 y'amavuko gusa, ku buryo nk'uko amategeko y'u Rwanda abiteganya nawe ubwe adafite ububasha bwo kuba yasezerana byemewe n'amategeko.

[23] Mu rundi rubanza rwaciwe n'Urukiko Rwisumbuye rwa Ngoma, Barimenya Venant w'imyaka 66, wari uzi ko abana n'ubwandu bw'agakoko gatera SIDA, yahamwe n'icyaha cyo gusambanya abana babiri, umwe ufite imyaka itanu undi ufite imyaka 10. Yahanishijwe gufungwa burundu. Naho mu rubanza RP 00499/2018/TGI/MUS rwaciwe n'Urukiko Rwisumbuye rwa Musanze, Ntahorutaba Wellars w'imyaka iri hagati ya 18 na 19, yahamwe n'icyaha cyo gusambanya umwana w'imyaka 16 bumvikanye, yamuteye inda ndetse babana nk'umugabo n'umugore. Ubushinjacyaha bwari bwamusabiye gufungwa imyaka 20, Ntahorutaba Wellars ariko Urukiko rumuhanisha gufungwa burundu. Izi manza zombi zivugwa muri iki gika zatanzwemo igihano cya burundu hashingiwe ku ngingo ya 133, igika cya gatanu. Nkuko bigaragarira buri wese, imikorere y'icyaha kuri aba bantu bombi iratandukanye cyane, ingaruka z'icyaha ku bakorewe icyaha ziratandukanye. Iyo hataza kuba hari igihano ntayegayezwa, Umucamanza yashoboraga gutanga ibihano bitandukanye yitaye ku mwihariko wa buri wese. Hakaba hakwibazwa niba ubutabera bwaragezweho muri izo manza za Barakagwira Gilbert na Ntahorutaba Wellars.

[24] Imiterere y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ku birebana no guhana icyaha cyo gusambanya abana, igaragaza ko ryashatse kugihana ryihanukiriye bitewe n'ingaruka zacyo. Urukiko rwemera rudashidikanya ko icyaha cyo gusambanya umwana ari kibi kandi ko kigomba guhanwa. Ariko mu kugihana ntibikuraho uburenganzira uregwa afite bwo guhabwa ubutabera buboneye burimo no kugabanyirizwa igihano igihe hari impamvu nyoroshyacyaha.

[25] Muri rusange, kuba umucamanza adashobora gusuzuma no gushingira ku mpamvu nyoroshyacyaha igihe zihari, ngo agabanyirize igihano uwahamwe n'icyaha cyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, Urukiko rusanga binyuranye n'ibiteganywa n'ingingo ya 29 y'Itegeko Nshinga ivuga ko buri muntu wese afite uburenganzira ku butabera buboneye, kuko bituma uwahamwe n'icyo cyaha ahanishwa iginaho atari akwiye. Ingingo y'itegeko ibigena gutyo, igomba kuvaho nkuko byavuzwe mu rubanza Lockett v. Ohio "A statute that prevents the sentencer in capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty, and, when the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments<sup>7</sup>". Nubwo uru rubanza rwarebaga igihano cy'urupfu kidateganyijwe mu mategeko y'u Rwanda, ibyo ruvuga byanavugwa ku gihano kiremereye kurusha ibindi aricyo gufungwa burundu.

[26] N'ubusanzwe abahanga ntibavuga rumwe ku gihano cy'igifungo cya burundu, kuko hari abavuga ko gitesha agaciro amwe mu mahame mpuzamahanga y'imihanire, nko kuba igihano gikwiye gushingira ku buremere bw'icyaha cyakozwe ndetse no kubaha agaciro ka muntu : mandatory sentence of life imprisonment arguably undermines a number of established common law and internationally recognised sentencing principles, including proportionality, equality before the law and respect for human dignity.<sup>8</sup>

[27] Hashingiwe ku bisobanuro bitanzwe mu bika bibanziriza iki, Urukiko rusanga ibiteganywa n'ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 iteganya ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranye na rimwe mu mahame agize uburenganzira ku butabera buboneye rivuga ko umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo

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<sup>&</sup>lt;sup>7</sup> Supreme Court of the United States, Lockett v. Ohio, 438 U.S. 586 (1978)

<sup>&</sup>lt;sup>8</sup> The label of life imprisonment in Australia: A pricipled or Populist approach to an ultimate sentence. John L Andeson. P. 748 available at http://www.austlii.edu.au/au/journals/UNSWLJ/2012/30.html, accessed on 27 November 2019

icyaha cyakozwemo, ikaba inyuranye n'ingingo ya 29 y'Itegeko Nshinga.

## Kumenya niba igika cya gatanu cy'ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kinyuranije n'ingingo ya 151 y'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015.

[28] Kabasinga Florida n'abamwunganira bavuga ko ingingo ya 133 y'itegeko ryavuzwe haruguru inyuranyije n'ibiteganywa n'ingingo ya 151, 50 y'itegeko Nshinga, aho iyo ngingo iteganya ko Abacamanza bakora umurimo wabo w'Ubucamanza mu bwigenge kandi batavugirwamo n'ubutegetsi cyangwa ubuyobozi ubwo ari bwo bwose. Bakomeza bavuga ko umucamanza akwiye kubaho akora inshingano ze, akurikiza amategeko mu kazi ke ariko nta rwego rwaba urwa Leta cyangwa urwigenga rumubuza ubwisanzure, niyo yaba ari Inteko Ishinga Amategeko.

[29] Bakomeza bavuga ko iyo urwego rushinga amategeko rushyizeho itegeko rizirika umucamanza ku buryo atabona umwanya n'ubwinyagamburiro bwo gushyira mu gaciro, ruba rumubujije umudendezo wo gutanga ubutabera buboneye buteganywa n'ingingo ya 29 y'itegeko Nshinga. Basoza bavuga ingingo ya 133, agace ka kane y'Itegeko rihana ibyaha, ibuza umucamanza gutanga ubutabera buboneye ashingira ku mpamvu nyoroshyacyaha, yavaho kuko ituma umucamanza atigenga mu kazi ke, kuko ategetswe gutanga igifungo cya burundu gusa, ibyo bikaba binyuranyije n'ingingo ya 151 y'Itegeko Nshinga.

[30] Intumwa ya Leta, Me Batsinda Aline avuga ko ingingo ya 151 y'itegeko Nshinga igaragaza amahame agenga ubucamanza, ariko ko urega atagaragaza rimwe muri ayo mahame cyangwa menshi muriyo anyuranije n'ingingo ya 133, akaba adasobanura uburyo iyo ngingo itubahiriza ihame ryo guca imanza mu izina ry'abaturage n'irvo kuba ntawe ushobora kwicira urubanza ubwe, irvo kuburanishiriza imanza mu ruhame no kuburanishiriza mu muhezo mu gihe no mu buryo biteganywa n'amategeko, iryo kugaragaza impamvu zashingiweho mu icibwa ry'urubanza no kurwandika mu ngingo zarwo zose no irvo gukurikiza mu ruhame, icyemezo kurusomera cy'ubucamanza bikozwe na buri wese, iryo kuba abacamanza bakurikiza itegeko kandi bakora umurimo wabo w'ubucamanza mu bwigenge nta kuvugirwamo n'ubutegetsi cyangwa ubuyobozi ubwo aribwo bwose.

[31] Akomeza avuga ko akurikije ibyo urega yasobanuye, asanga urega yagaragaje uburyo abona uburemere bw'ibihano itegeko riteganya ibyaha n'ibihano muri rusange ryateganyije mu ngingo yaryo ya 133. Avuga ko nta rwego na rumwe rwabujije umucamanza ubwisanzure ndetse n'ubwigenge kubera ko mu mirimo akurikiza itegeko kandi rikaba rihari. Asanga ingingo ya 133 ntaho inyuranyije n'Itegeko Nshinga, mu ngingo yaryo ya 151.

## UKO URUKIKO RUBIBONA

Ingingo ya 61 y'Itegeko Nshinga rya Repubulika y'u [32] Rwanda ryo muri 2003 ryavuguruwe muri 2015 iteganya ko: "Inzego z'Ubutegetsi bwa Leta [...] Ubutegetsi ni Nshingamategeko, Ubutegetsi Nyubahirizategeko, Ubutegetsi bw'Ubucamanza. Ubu butegetsi uko ari butatu buratandukanye butegetsi burigenga [...]". Ubwigenge kandi buri bw'Ubucamanza bukomoka ku ihame riteganywa n'iyi ngingo ryuko inzego z'Ubutegetsi bwa Leta uko ari butatu (Ubutegetsi

Nshingamategeko, Nyubahirizategeko n'Ubutegetsi bw'Ubucamanza) butandukanye kandi buri butegetsi bwigenga (separation of powers).

Ingingo ya 151, 5° y'Itegeko Nshinga rya Repubulika y'u [33] Rwanda ryo muri 2003 nkuko ryavuruwe muri 2015, iteganya ko: «[...] Abacamanza bakurikiza itegeko kandi bakora umurimo wabo w'ubucamanza mu bwigenge kandi batavugirwamo n'ubutegetsi cyangwa ubuyobozi ubwo ari bwo bwose ». Naho ingingo ya 4 n'iya 5 z'Itegeko nº 09/2004 ryo ku wa 29/04/2004 ryerekeye imyitwarire mu kazi k'ubucamanza zivuga ko: « Umucamanza arigenga mu kazi ke. Asuzuma, mu bwisanzure, ibirego yashyikirijwe kandi akabifataho ibyemezo, atitaye ku bamushyiraho igitugu. Mu manza yaregewe, umucamanza agomba kwirinda ikintu cyose cyatuma afata ibyemezo byaba binyuranyije n'imiburanishirize yagenwe n'amategeko. Ategetswe guca urubanza akurikije amategeko arugenga ». Ingingo zivugwa muri iki gika, zishyiraho ihame ry'uko umucamanza yigenga mu kazi ndetse zikanagaragaza ibigize ubwo bwigenge birimo kutavugirwamo, gusuzuma mu bwisanzure ibirego yashyikirijwe, kwirinda ibyatuma afata ibyemezo binyuranyije n'amategeko no gukurikiza amategeko arebana n'urubanza aca.

[34] Ihame ry'ubwigenge bw'umucamanza mu kazi ke, rijyana n'ihame ry'ubwigenge bw'urwego rw'Ubucamanza. Rifatwa nk'ubwisanzure umucamanza afite bwo kuburanisha no guca imanza mu nzira n'uburyo biteganywa n'amategeko, akabikora nta gitutu icyo aricyo cyose cyaba icy'inzego za Leta, n'icy'abandi. Urukiko rw'Ikirenga rwa Canada rwasobanuye mu rubanza R. v. Beauregard ubwigenge bw'umucamanza mu magambo akurikira : « The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider—be it Government, pressure group, individual or even another judge—should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision"<sup>9</sup>. Icyo aricyo cyose cyabuza umucamanza guca urubanza mu bwisanzure cyaba kinyuranyije n'ihame ry'ubwigenge bw'umucamanza. Ku birebana n'uru rubanza, ikibazo gihari ni ukumenya niba ibiteganywa n'itegeko ko igihano kidashobora kugabanywa kubera impamvu nyoroshyacyaha byaba byambura cyangwa bibangamiye ubwigenge bw'umucamanza.

Ingingo ya 133 iteganya igihano ntayegayezwa, ibuza [35] umucamanza gutanga igihano mu bushishozi bushingiye ku mpamvu nyoroshyacyaha yabonye. Ibi bikaba byambura umucamanza ubwigenge bwo gutanga igihano kigendanye n'icyaha cyakozwe, ashingiye ku mikorere yacyo, uko cyakozwe, imyitwarire y'uwagikoze, n'ingaruka zacyo kuwagikorewe no ku muryango nyarwanda muri rusange. Urukiko rw'Ikirenga rwo muri Afurika v'epfo rwabisobanuye neza mu rubanza S v. Toms; S v. Bruce alo rwavuze ko: "the first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which

<sup>&</sup>lt;sup>9</sup> Supreme Court of Canada, R. v. Beauregard, [1987] LRC (Const.)

requires proper consideration of the individual circumstances of each accused person"<sup>10</sup>.

[36] Nkuko byavuzwe n'Urukiko rw'lkirenga muri Leta Zunze Ubumwe z'Amerika mu rubanza Graham v. Florida<sup>11</sup>, guca urubanza mu bwigenge bijyana no guhuza icyaha n'uburemere bw'igihano kuri icyo cyaha kandi bikozwe n'umucamanza. Urukiko rwagize ruti: "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question". Urukiko rusanga mu gihe umucamanza nta mahitamo afite uretse gutanga igihano ntayegayezwa, akabuzwa gutanga igihano kijyanye n'uburemere bw'icyaha, bimwambura ubwigenge bwo guca urubanza ahuje uburemere bw'igihano n'icyaha.

[37] Mu gihugu cy'Ubuhinde, Urukiko rw'Ikirenga rwaho rwaciye urubanza Mithu v. State of Punjab ruvanaho ingingo ya 303 y'itegeko rihana ry'icyo gihugu yagenaga igihano ntayegayezwa kuko yatumaga umucamanza atisanzura mu gutanga agihano ashingiye ku mpamvu zitandukanye zijyanye

<sup>&</sup>lt;sup>10</sup> South Africa: Supreme Court of Appeal, S v Toms; S v Bruce (139/89,

<sup>289/89) [1990]</sup> ZAŠCA 38; 1990 (2) ŠA 802 (AD); [1990] 2 All SA 248 (A) (30 March 1990)

<sup>&</sup>lt;sup>11</sup> Supreme Court of the United States, Graham v. Florida, 560 U.S. 48 (2010), "holding that a life imprisonment without parole sentence on a juvenile offender convicted of armed burglary with assault, and attempted robbery, was offensive to the Eighth Amendment. [The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion]

n'urubanza. Urwo Rukiko rwagize ruti:"a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair<sup>12</sup>". Nta wavuga ko umucamanza yigenga mu gutanga igihano mu gihe agomba gutanga igihano ntayegayezwa kitajyanye n'uburemere bw'icyaha, uburyo cyakozwemo, n'igihe hari impamvu nyoroshyacyaha zikomeye zari gutuma agabanyirizwa igihano.

[38] Hashingiwe ku bisobanuro bitanzwe mu bika bibibanziriza iki, ibiteganywa n'ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranye n'ingingo ya 151,5° y'Itegeko Nshinga iteganya ko abacamanza bakora umurimo wabo w'ubucamanza mu bwigenge, kuko babujijwe gushingira ku mpamvu nyoroshyacyaha batanga igihano gikwiye.

[39] Hari izindi ngingo ziteganya ibihano bidashobora kugabanywa, Urukiko rukaba nta cyemezo rwazifataho kuko zitaregewe. Leta yazisuzuma ikareba niba zidakwiye guhindurwa kugirango zihuzwe n'ibivugwa muri uru rubanza.

[40] Mu gihe cyo gusuzuma iki kirego rwasanze hari n'ikindi kibazo mu itangwa ry'ibihano muri rusange kijyanye n'intera iri hagati y'igihano gito (minimum) n'ikinini (maximum) rukaba rukwiye kugira icyo rukivugaho kuko kiri mu murongo umwe n'ikibazo rwaregewe.

<sup>&</sup>lt;sup>12</sup> Supreme Court of India, Mithu v. State of Punjab [1983] 2 SCR 690

## Ibirebana n'ibihano biteganywa n'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange mu gihe hari impamvu nyoroshyacyaha.

[41] Ingingo ya 60 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "Iyo hari impamvu zigabanya ububi bw'icyaha, ibihano bishobora kugabanywa ku buryo bukurikira: 1° haseguriwe ibiteganywa mu ngingo ya 107 igihano cyo gufungwa burundu gishobora kugabanywa ariko ntikijye munsi y'imyaka makumyabiri n'itanu (25); 2° igihano cy'igifungo kimara igihe kizwi cyangwa ihazabu bishobora kugabanywa ariko ntibijye munsi y'igihano gito ntarengwa giteganyirijwe icyaha cyakozwe."

Mbere y'itegeko rivugwa mu gika kibanziriza iki, [42] hakoreshwaga Itegeko Ngenga N° 01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy'amategeko ahana. Uburyo ibihano bigabanywa iyo hari impamvu nyoroshyacyaha biteganywa n'ingingo ya 78 y'iryo Tegeko mu buryo bukurikira: "igihano cyo gufungwa burundu cyangwa cya burundu y'umwihariko gisimbuzwa igihano cy'igifungo kitari munsi y'imyaka icumi (10); 2° igihano cy'igifungo kuva ku myaka icumi (10) kugeza ku myaka makumyabiri n'itanu (25) gishobora kugabanywa kugeza ku gifungo cy'imyaka (5); 3° igihano cy'igifungo kirenze imyaka itanu (5) ariko kitageze ku myaka icumi (10) gishobora kugabanywa kugeza ku gifungo cy'umwaka umwe (1); 4° igihano cy'igifungo kuva ku mezi atandatu (6) kugeza ku myaka itanu (5) gishobora kugabanywa kugeza ku gifungo cy'amezi abiri (2); 5° igihano cy'igifungo kiri munsi y'amezi atandatu (6) gishobora gusubikwa".

[43] Itegeko Nº 68/2018 ryemera ko igihe hari impamvu nyoroshyacyaha, igihano cyagabanywa ariko ntikijye munsi y'igihano gito giteganywa n'Itegeko. Mu gihe Itegeko Ngenga N° 01/2012/OL, ryo ryemeraga ko igihe hari impamvu nyoroshyacyaha igihano kigabanywa kikajya munsi y'igihano gito mu buryo bwagenwe n'ingingo yaryo ya 78 ivugwa mu gika kibanziriza iki. Ku byaha byinshi, igihano gito ntarengwa (minimum) ntikigeze gihinduka ukurikije uko ayo mategeko yagiye akurikirana, ndetse hari naho cyazamuwe. Ibyo bituma n'impamvu nyoroshyacyaha, uwahamwe n'icyaha hari atagabanyirizwa igihano ku buryo bukwiye, ndetse rimwe na rimwe akaba yahanwa hafi kimwe y'uwakoze icyaha hatari impamvu nyoroshyacyaha.

[44] Kuba Umushingamategeko yarahisemo ko mu gihe hari nyoroshyacyaha, ibihano bitangwa bishobora impamvu kugabanywa ariko ntibijye munsi y'igihano gito ntarengwa giteganyirijwe icyaha cyakozwe, Urukiko rusanga byaba biri mu gaciro, mu gihe intera hagati y'igihano gito (minimum) n'igihano kinini (maximum) ibaye nini, hibandwa ku kugabanya igihano gito. Ibi nibyo byatuma ibiteganywa n'Ingingo ya 49, igika cya mbere y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 iteganya ko Umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo, bishyirwa mu bikorwa mu buryo nyabwo. Gushingira ku mpamvu nyoroshyacyaha hagatangwa igihano gito ntarengwa giteganyirijwe icyaha (minimum) kandi kiri hejuru, ntacyo bimarira uregwa, n'ubutabera muri rusange.

[45] Ubushakashatsi bwagaragaje ko iyo itegeko riteganya igihano umucamanza adashobora kugabanya, hari ubwo ahitamo

kudahamya umuntu icyaha kuko abona uburyo yagikoze ndetse n'imyitwarire ye muri rusange bihabanye n'uburemere bw'igihano ashobora guhabwa<sup>13</sup>. Iyo bigenze gutyo icyo itegeko ryagiriyeho ntikiba kigezweho.

rusange, gushyiraho [46] Muri gutanga igihano, no byagombye gushingira ku kamaro kacyo n'icyo kigamije. Hari uguhana uwakoze icyaha (denunciation), guca intege no gukanga n'abandi bashobora gukora icvaha uwahanwe nk'icyo, (deterrence), kugorora no kwigisha (rehabilitation), kurengera rubanda binyuze mu gufunga uwakoze icyaha kugirango adakomeza kugira nabi (protection of the public). Nkuko byavuzwe mu rubanza R v Smith<sup>14</sup> rwaciwe n'Urukiko rw'Ikirenga wa Canada. Rwabivuze muri aya magambo: "[T]he court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves". N'ingingo

<sup>&</sup>lt;sup>13</sup> Mandatory Sentencing & the Independence of the Judiciary, available at: https://www.ruleoflaw.org.au/wp

content/uploads/2015/11/MandatorySentencing.pdf, visited on November 30, 2019

<sup>&</sup>lt;sup>14</sup> Supreme Court of Canada, R v Smith, [1987] 1 S.C.R. 1045

z'amategeko ahana mu Rwanda, zagombye guteganya ibihano bifite intera nini hagati y'igihano gito (minimum) n'igihano kinini (maximum) ituma umucamanza atanga igihano akurikije akamaro kacyo nkuko kavuzwe hejuru.

[47] Kubw'ibyo, Urukiko rusanga byihutirwa ko hashyirwaho politiki yo guhana ishingiye ku bushakashatsi bwimbitse, ihuza amahame mpuzamahanga mu guhana n'ibibazo byihariye biri mu muryango nyarwanda, kandi umucamanza agahabwa ubwisanzure bwo gutanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo.

## III. ICYEMEZO CY'URUKIKO

[48] Rwemeje ko ikirego cyatanzwe na Kabasinga Florida gifite ishingiro.

[49] Rwemeje ko ingingo ya 133 y'itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, igika cyayo cya gatanu kivuga ko: "Iyo gusambanya umwana byakurikiwe no kubana nk'umugabo umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha" kinyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015. Icyo gika kikaba nta gaciro gifite nkuko biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

[50] Rutegetse ko uru rubanza rutangazwa mu igazeti ya Leta.

# IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA

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

## **BRALIRWA v. GISA**

## [Rwanda URUKIKO RW'IKIRENGA – RCOMAA00023/2017/SC (Hatangimbabazi, P.J., Ngagi na Kanyange, J.) 06 Ukwakira 2017]

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Ububasha bw'inkiko z'ubucuruzi – Inshingano zidashingiye ku masezerano – Inshingano zidashingiye ku masezerano zifatwa nk'iz 'ubucuruzi iyo zikomoka ku murimo w'ubucuruzi – Imanza zikomoka kuri izo nshingano zikaba ziri mu mu bubasha bw'inkiko z'ubucuruzi.

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Ububasha bw'inkiko – Ububasha bushingiye ku ndishyi zagenwe mu rubanza – Urugero rw'indishyi zagenwe n'umucamanza igihe habaye impaka nirwo rugomba gushingirwaho mu kwemeza niba ubujurire buri mu bubasha bw'Urukiko rw'Ikirenga, aho kuba gusa agaciro k'ikiburanwa katanzwe n'umuburanyi mu kirego cye – Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingigo ya 7.

**Incamake y'ikibazo:** Gisa Frediane yareze BRALIRWA Ltd mu mu Rukiko rw'Ubucuruzi rwa Nyarugenge avuga ko yarakoresheje amafoto ye mu itangazamakuru (TVR na You tube) mu gikorwa cyo kwamamaza igicuruzwa cyayo cya Heineken nta burenganzira ayihaye, ku byibyo akaba asaba Urukiko kumugenera indishyi zinyuranye zingana na 130.000.000Frw. BRALIRWA Ltd yatanze inzitizi y'iburabubasha bw'inkiko z'ubucuruzi ivuga ko ikirego kitagombaga kwakira, ahubwo ko yagombaga kuregera mu nkiko zisanzwe kuko icyo aregera ni "violation de la vie privée" biyo kikaba ari ikirego cy'imbonezamubano, kiri mu bubasha bw'inko zisazwe.

Kuri iyi nzitizi, Urukiko rwemeje ko ikirego kiri mu bubasha bwarwo kuko uregwa ari sosiyete y'ubucuruzi, kandi ko igikorwa iregwa cyo kuba yarakoreshejemo amashusho n'amafoto by'urega cyo kwamamaza igicuruzwa cyayo gifatwa nk'igikorwa cy'ubucuruzi.

Mu mizi y'urubanza, Urukiko rw'Ubucuruzi rwa nyarugenge rwemeje ko ikirego cy'urega nta shingiro gifite, bityo ko atagomba guhabwa indishyi asaba kuko urukiko rwasanze BRALIRWA Ltd itigeze yamamaza igicuruwa cyayo ikoresheje amashusho n'amajwi ye, ahubwo rumutegeka guha Bralirwa indishyi z'ikurikiranarubanza.

Gisa ntiyishimiye imikirize y'urubanza maze ajurira mu Rukiko Rukuru rw'Ubucuruzi avuga ko Urukiko rubanza rwirengagije uruhare rwa BRALIRWA Ltd mu bikorwa byo kwamamaza igicuruzwa cyayo cya Heineken hifashishijwe amashusho n'amafoto bye, kandi ko uwo baburana yiyemereye ko ayo mashusho n'amafoto yakoreshejwe mu kwamamaza inzoga zayo kandi nta masezerano bagiranye, avuga ko amafoto yayahawe na sosiyete EXP RWANDA, ariko akaba atarashoboye kugaragaza amasezerano yagiranye n'iyo sosiyete, ku bwibyo, Gisa akaba asaba urukiko guhabwa indishyi yari yatse atagenewe.

Muri uru rukiko, BRALIRWA Ltd yongeye gutanga inzitizi ishingiye ku kuba uru rubanza rutari mu bubasha bw'inkiko z'ubucuruzi, ivuga ko mu gihe amashusho cyangwa amafoto y'umuntu akoreshejwe mu bikorwa byo kwamamaza

36

atabitangiye uburenganzira byaba ari ikibazo cy'imbonezamubano kigomba kujyanwa mu nkiko zisanzwe. Uru rukiko rwemeje ko ubujurire bufite ishingiro kuko rwasanze Bralirwa yarakoresheje amshusho n'amafoto bya Gisa nta burenganzira ibifitiye, bityo ko imikirize y' urubanza ihindutse, ko ubujurire buri mu bubasha bwarwo, rutegeka Bralirwa kumuha indishyi zingana na 8.200.000Frw.

Bralirwa yajuririye mu Rukiko rw'Ikirenga isaba uru rukiko gusuzuma niba koko yaryozwa indishyi kubwo gukoresha amajwi n'amashusho ya Gisa mu kwamamaza igicuruzwa cyayo ivuga ko ntaho yigeze ihurira nayo. Gisa nawe atanga inzitizi avuga ko uru rukiko rudafite ububasha bwo kwakira ubujurire kuko indishyi zagenwe mu rubanza rujuririrwa zitageze kuri 50.000.000Frw. BRALIRWA Ltd ivuga ko uru rukiko rufite ububasha kuko indishyi zaregewe zirenze 50.000.000Frw kuko icyaregewe kw'ikubitiro ari indishyi zingana na 130.000.000Frw kandi ko ububasha bw'uru Rukiko bushingiye ku kuba uru rubanza rwaraciwe n'inkiko z'ubucuruzi kandi zitabifitiye ububasha kandi ko n'indishyi zaregewe zirenze 50.000.000Frw.

Gisa Frediane we, avuga ko ashingiye kw'Itegeko Ngenga rigena imiterere, imikorere n'ububasha by'inkiko z'ubucuruzi, asanga inkiko zibanza zaciye urubanza zibifitiye ububasha kuko ibikorwa bivugwa muri urubanza ari iby'ubucuruzi.

**Incamake y'icyemezo:** 1. Inshingano zidashingiye ku masezerano zifatwa nk'iz'ubucuruzi iyo zikomoka ku murimo w'ubucuruzi, bityo imanza zibishingiyeho zikaba ziri mu mu bubasha bw'inkiko z'ubucuruzi.

2.Urugero rw'indishyi zagenwe n'umucamanza igihe habaye impaka nirwo rugomba gushingirwaho mu kwemeza niba ubujurire buri mu bubasha bw'Urukiko rw'Ikirenga, aho kuba gusa agaciro k'ikiburanwa katanzwe n'umuburanyi mu kirego cye. Bityo inzitizi y'iburabubasha bw'urukiko rw'ikirenga ifite ishingiro.

## Inzitizi y'iburabubasha ishingiye ku kuba indishyi zagenwe mu rubanza rujurirwa zitageze nibura kuri 50.000.000 Frw ifite ishingiro; bujurire ntibwakiriwe; Ingwate y'igarama yatanzwe ihwanye n'ibyakozwe mu rubanza.

#### Amategeko yashingiweho:

Itegeko Ngenga N°06/2012/OL ryo ku wa 14/09/2012 rigena imiterere, imikorere n'ububasha by'inkiko z'ubucuruzi, ingingo ya 2.

#### Imanza zifashishijwe:

RCOMAA 00020/2016/SC–RCOMAA 0025/15/CS, Rural Development Solution Company Ltd v Akarere ka Nyabihu rwaciwe n'Urukiko rw'Ikirenga ku wa 21/04/2017

#### Ibitekerezo by'abahanga:

D. FASQUELLE, M.- A. FASQUELLE, Droit de l'entreprise 2010/2011, "Introduction au droit et au droit commercial", Paris, Lamy, 2010 p. 143.

# Urubanza

# I. IMITERERE Y'URUBANZA

[1] Gisa Frediane yatanze ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge, arega Bralirwa Ltd kuba yarakoresheje amashusho ye mu kwamamaza ubucuruzi bw'inzoga yayo yitwa Heineken nta burenganzira ayihaye, no kuba yarakoresheje amafoto ye mw'itangazamakuru rya televiziyo (RTV), "You tube", "Websites" itabiherewe uburenganzira, bityo ayisaba indishyi zinyuranye.

[2] Mu iburanisha ry'ibanze ryo ku wa 05/10/2016, uburanira Bralirwa Ltd yatanze inzitizi yo kutakira ikirego kubera kitari mu bubasha bw'Urukiko rw'Ubucuruzi, aho uyiburanira yavugaga ko icyo kirego gishingiye ku itegeko rigenga umutungo bwite mu by'ubwenge, mu gihe nyamara Gisa atabanje kwerekana ko ibyo aburana bigize koko umutungo bwite mu by'ubwenge, ko kandi nta masezerano y'ubucuruzi afitanye na Bralirwa Ltd. Ku wa 11/10/2016, Urukiko rw'Ubucuruzi rwa Nyarugenge rwemeje ko ikirego cyatanzwe na Gisa Frediane kiri mu bubasha bwarwo, nyuma yo gusanga Bralirwa Ltd ari sosiyete y'ubucuruzi, ko kandi igikorwa iregwa kuba yarakoreshejemo amashusho n'amafoto bya Gisa Frediane ari icyo kwamamaza igicuruzwa cyayo cya Heineken, kikaba gifatwa nk'igikorwa cy'ubucuruzi.

[3] Mu mizi y'urubanza RCOM 00965/2016/TC/NYGE rwaciwe ku wa 28/10/2016, Urukiko rw'Ubucuruzi rwa Nyarugenge rwemeje ko ikirego cya Gisa Frediane nta shingiro gifite, ko Bralirwa Ltd itigeze yamamaza igicuruzwa cyayo cyo mu bwoko bwa Heineken ikoreshesheje amashusho n'amajwi bye ku buryo yabimuhera indishyi. Rwamutegetse guha Bralirwa

Ltd indishyi z'ikurikiranarubanza n'igihembo cy'Avoka zingana na 600.000Frw.

[4] Gisa Frediane ntiyishimiye imikirize y'urubanza rwaciwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge, ajuririra Urukiko Rukuru rw'Ubucuruzi avuga ko Urukiko rubanza rwirengagije uruhare rwa BRALIRWA Ltd mu bikorwa byo kwamamaza Heineken hifashishijwe amashusho n'amafoto bye, akaba anenga ko indishyi yatse atazigenewe.

[5] BRALIRWA Ltd, nayo, yongeye gutanga inzitizi ishingiye ku kuba uru rubanza rutari mu bubasha bw'inkiko kuko gihe amashusho z'ubucuruzi. mu cyangwa amafotoy'umuntu akoreshejwe mu bikorwa byo kwamamaza uburenganzira, byaba atabitangiye ari ikibazo cy'imbonezamubano kigomba kujyanwa mu nkiko zisanzwe.

[6] Mu rubanza RCOMA 00645/2016/CHC/HCC rwaciwe ku wa 09/02/2017, Urukiko Rukuru rw'Ubucuruzi rwasanze uru rubanza ruri mu bubasha bw'inkiko z'ubucuruzi, rwemeza ko ubujurire bwa Gisa Frediane bufite ishingiro. Rwemeje kandi ko BRALIRWA Ltd yakoresheje amashusho n'amafoto bya Gisa Frediane nta burenganzira ibifitiye, ruyitegeka kumuha 8.200.000Frw no kumusubiza amagarama yose yishyuye atanga ikirego ku rwego rwa mbere no ku rwego rw'ubujurire.

[7] BRALIRWA Ltd yajuririye imikirize y'urubanza mu Rukiko rw'lkirenga, isaba ko rwasuzuma ibibazo bikurikira:

- Gusuzuma niba BRALIRWA Ltd yaryozwa indishyi kubera amashusho n'amafoto bya Gisa Frediane itigeze igira aho ihurira nayo;

- Gusuzuma ingaruka zigomba guhabwa urubanza rwaciwe nta tegeko na rimwe rishingiweho; - Gusuzuma niba Urukiko rwemerewe kugena indishyi mu bushishozi bwarwo mu gihe nyamara uzisaba azishingira ku rwunguko yemeza ko uziregwa yamukomoyeho;

- Gusuzuma niba Urukiko rutarivuguruje mu kugenera Gisa indishyi mu kirego cy'ubucuruzi, nyamara rugahindukira, rukemeza ko izo ndishyi zitanzwe gusa kubera ko amafoto n'amashusho byakoreshejwe nta burenganzira nyirabyo abitangiye.

[8] Urubanza rwaburanishijwe mu ruhame ku wa 12/09/2017, BRALIRWA Ltd ihagarariwe na Me Umurerwa Jeanne Marie Christine afatanyije na Me Mpayimana Isaïe, naho Gisa Frediane ahagarariwe na Me Ruton Ndasheja Sonia, uyu akaba yaratanze inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga kubera ko indishyi zagenwe mu rubanza rujuririrwa zitageze kuri 50.000.000Frw, ababuranira BRALIRWA Ltd nabo bavuga ko ububasha bw'uru Rukiko bushingiye ku kuba uru rubanza rwaraciwe n'inkiko z'ubucuruzi kandi zitabifitiye ububasha kandi ko n'indishyi zaregewe zirenze 50.000.000Frw.

# II. IKIBAZO KIGIZE URU RUBANZA N'ISESENGURWA RYACYO

# Kumenya niba uru rubanza ruri mu bubasha bw'Urukiko rw'Ikirenga

[9] Mu gusuzuma iki kibazo, Urukiko rurasanga ari ngombwa kubanza gusuzuma niba uru rubanza ruri mu bubasha bwarwo bushingiye ku kuba rwaraciwe n'inkiko zidafite ububasha, nyuma rwongere rusuzume niba rutari mu bubasha

bwarwo kubera ko urubanza rujuririrwa rutagenwemo indishyi zingana nibura na 50.000.000Frw.

## a. Ububasha bw'Urukiko rw'Ikirenga bushingiye ku kuba, mu rwego rwa mbere n'urwa kabiri, uru rubanza rwaraciwe n'inkiko zidafite ububasha

[10] Ababuranira BRALIRWA Ltd bavuga ko ububasha bw'Urukiko rw'Ikirenga bushingiye ku ngingo ya 28, igika cya kabiri, agace ka 2°, y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, kubera ko Urukiko Rukuru rw'Ubucuruzi rwakiriye ubujurire ku rubanza rutari mu bubasha bw'inkiko z'ubucuruzi, ko Gisa Frediane yatanze ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge kigamije gusaba indishyi za 130.000.000Frw zituruka ku gukoresha amashusho ye mu kwamamaza ubucuruzi bw'inzoga za BRALIRWA Ltd nta burenganzira ayihaye no gukoresha amafoto ye mu itangazamakuru rya Televiziyo, "You Tube", "websites" n'ibindi, akaba yarashingiye ku itegeko rigamije kurengera umutungo bwite mu by'ubwenge (loi sur la propriété intellectuelle), ndetse arondora n'ingingo z'iryo tegeko (*iva 1, 2, 3, 6, 7, 16, 177, 178, 179, 180, 181, 183 na 184*); ko mu myiregurire yayo, BRALIRWA Ltd yagaragaje ko icyo kirego atari ikibazo cy'ubucuruzi, ko rero kidashobora kwakirwa mu nkiko z'ubucuruzi (exception d'incompétence des juridictions de commerce) kubera ko:

> 1. Mu ngingo z'iryo tegeko rigamije kurengera umutungo bwite mu by'ubwenge, nta n'imwe muri zo igaragaramo ko amafoto n'amashusho by'umuntu ku giti cye, ari igihangano gishobora kurengerwa nk'umutungo bwite mu by'ubwenge;

42

2. Ingingo ya mbere y'iryo tegeko igaragaza urutonde rw'ibihangano bishobora kurengerwa nk'umutungo bwite mu by'ubwenge, kandi amafoto n'amashusho by'umuntu, bikaba bitarimo;

3. Gisa ubwe yiyemerera ko ntaho yigeze ahurira na BRALIRWA Ltd ku buryo bari kugirana ibikorwa by'ubucuruzi;

4. Nta kuntu iki kirego cyaba icy'ubucuruzi ngo kandi kinabeicy 'imbonezamubano, mu gihe Gisa aregera «violation de la vie privée», anashingiye ku ngingo ya 23 y'itegeko Nshinga, ndetse ko n'indishyi Urukiko Rukuru rw'Ubucuruzi rwaciye BRALIRWA Ltd usanga ariho honyine zishingiye, bityo iki kirego kikaba ari icy'imbonezamubano, kiri mu bubasha bw'Urukiko Rwisumbuye rwa Nyarugenge.

[11] Bavuga, na none, ko uretse no kuba inkiko zombi zibanza zitarashingiye ku mpamvu zimwe ku kibazo cy'ububasha bwazo kuri iki kirego cya Gisa, ingingo ya 178 y'Itegeko Ngenga rigena imiterere, imikorere n'ububasha by'Inkiko, ubwayo yihagije kugira ngo Urukiko rw'Ikirenga rwakire ubu bujurire, kuko mu manza z'imbonezamubano, amategeko yerekeye ububasha bwo kuziburanisha ari indemyagihugu.

[12] Me Ruton Ndasheja Sonia, uburanira Gisa Frediane, avuga ko ashingiye ku ngingo ya 2 y'Itegeko Ngenga N°06/2012/OL ryo ku wa 14/09/2012 rigena imiterere, imikorere n'ububasha by'inkiko z'ubucuruzi, inkiko zibanza zaciye urubanza zibifitiye ububasha kuko ibikorwa bivugwa muri urubanza ari iby'ubucuruzi.

## UKO URUKIKO RUBIBONA

[13] Ingingo ya 28, igika cya kabiri, agace ka 2, y'Itegeko Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya ko: "Urukiko rw'Ikirenga rufite kandi ububasha bwo kuburanisha mu rwego rw'ubujurire imanza zaciwe ku rwego rwa kabiri n'Urukiko Rukuru, Urukiko Rukuru rw'Ubucuruzi cyangwa Urukiko Rukuru rwa Gisirikare, iyo izo manza zashingiye kuitegeko ritariho cyangwa ingingo z'amategeko zitakiriho, cyangwa zaciwe n'urukiko rutabifitiye ububasha".

[14] Ingingo ya 2 y'Itegeko Ngenga N° 06/2012/OL ryo ku wa 14/09/2012 rigena imiterere, imikorere n'ububasha by'inkiko z'ubucuruzi, iteganya ko: "[...] ibibazo by'ubucuruzi bivuga imanza z'ubucuruzi, iz'imari, iz'imisoro n'amahoro n'ibindi bibazo bifitanye isano byerekeye: (10) impaka zivutse ku masezerano cyangwa ku bikorwa by'ubucuruzi hagati y'abantu cyangwa ibigo by'ubucuruzi. [...]". Ingingo ya 12, igika cya mbere, y'iryo Tegeko Ngenga, iteganya ko: "Inkiko z'Ubucuruzi ziburanisha mu rwego rwa mbere imanza zose z'ubucuruzi, iz'imari, iz'imisoro n'ibindi bibazo bifitanye isano, nk'uko bisobanurwa mu ngingo ya 2 y'iri tegeko ngenga"

[15] Abahanga mu mategeko, Daniel FASQUELLE na Marie-Alice FASQUELLE basobanura ko kubyerekeye inshingano zidashingiye ku masezerano, izi nshingano aba ari iz'ubucuruzi igihe cyose zakomotse ku gikorwa cy'ubucuruzi<sup>1</sup>.

<sup>&</sup>lt;sup>1</sup> Pour ce qui concerne les engagements extra-contractuels, ceux-ci sont commerciaux dès lors qu'ils sont nés à l'occasion de l'activité commerciale (D. FASQUELLE, M.- A. FASQUELLE, Droit de l'entreprise 2010/2011, "Introduction au droit et au droit commercial", Paris, Lamy, 2010 p. 143.

[16] Muri uru rubanza, dosiye igaragaza ko ikibazo Gisa Frediane afitanye na sosiyete y'ubucuruzi BRALIRWA Ltd, cyerekeranye n'amashusho n'amafoto ye yakoreshejwe (na BRALIRWA Ltd) mu kwamamaza ikinyobwa cyo mu bwoko bwa Heineken atabiyihereye uburenganzira, akaba asaba indishyi zikomoka kuri icyo gikorwa. Dosiye igaragaza na none ko uburanira BRALIRWA Ltd, mu Rukiko Rukuru rw'Ubucuruzi, yemeye ko koko ayo mashusho n'amafoto yakoreshejwe na BRALIRWA Ltd mu kwamamaza inzoga zayo kandi nta masezerano yagiranye na GISA Frediane, avuga ko BRALIRWA Ltd yayahawe na sosiyete EXP RWANDA, ariko akaba atarashoboye kugaragaza amasezerano yagiranye n'iyo sosiyete.

[17] Urukiko rurasanga kuba BRALIRWA Ltd ari sosiyete y'ubucuruzi, ibyo byerekana ko kwamamaza igicuruzwa cyayo cyo mu bwoko bwa Heineken hakoreshejwe amashusho n'amafoto bya Gisa Frediane, ari igikorwa gifitanye isano n'ubucuruzi, bityo, hakurikijwe ibiteganywa n'ingingo ya 2 n'iya 12 zavuzwe haruguru, impaka zigikomotseho zikaba zigomba gukemurwa n'inkiko z'ubucuruzi, cyane cyane ko, nk'uko n'abahanga mu mategeko bavuzwe haruguru babisobanura, inshingano zidashingiye ku masezerano zifatwa nk'iz'ubucuruzi iyo zikomoka ku murimo w'ubucuruzi, bityo imanza zibishingiyeho zikaba ziri mu mu bubasha bw'inkiko z'ubucuruzi.

[18] Urukiko rurasanga, hakurikijwe ibimaze gusobanurwa haruguru, urubanza rwajuririwe rwaraciwe n'inkiko zibifitiye ububasha, bityo imvugo y'uburanira BRALIRWA Ltd y'uko Urukiko rw'Ikirenga rufite ububasha bushingiye ku kuba inkiko zibanza zaraciye urubanza rutari mu babasha bwazo, ikaba nta shingiro ifite.

### b. Iburabubasha bw'Urukiko rw'Ikirenga rishingiye ku kuba indishyi zagenwe mu rubanza rujurirwa zitageze nibura kuri 50.000.000 Frw

[19] Me Ruton Ndasheja Sonia, uburanira Gisa Frediane, avuga ko, ashingiye ku ngingo ya 28, igika cya kabiri, agace ka 7, y'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/06/2012 rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, uru rubanza rutari mu bubasha bw'Urukiko rw'Ikirenga, kuko BRALIRWA Ltd yajuririye urubanza ku rwego rwa kabiri kandi haratanzwemo indishyi zingana na 8.200.000 Frw, mu gihe amafaranga make yemewe n'itegeko ari 50.000.000Frw nibura.

[20] Ababuranira BRALIRWA Ltd bavuga ko ingingo ya 28, igika cya kane, y'Itegeko Ngenga N° 03/2012/OL yerekana ko ubu bujurire bugomba kwakirwa mu Rukiko rw'Ikirenga, kubera ko indishyi zisabwa, haba mu kirego, haba no mu iburana rya GISA Frediane, ari 130.000.000Frw, bityo zikaba zirenga 50.000.000Frw ziteganyijwe n'itegeko ku bujurire bwa kabiri, ko kandi icyagombwa atari ukureba icyo urukiko rwatanze, ahubwo ko ari ukureba icyaregerwaga mbere.

# UKO URUKIKO RUBIBONA

[21] Ingingo ya 28, igika cya kabiri, agace ka 7, y'Itegeko Ngenga N° 03/2012/OL ryo kuwa 13/06/2012 rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya ko: "Urukiko rw'Ikirenga rufite kandi ububasha bwo kuburanisha mu rwego rw'ubujurire imanza zaciwe ku rwego rwa kabiri n'Urukiko Rukuru, Urukiko Rukuru rw'Ubucuruzi cyangwa Urukiko Rukuru rwa Gisirikare, iyo izo manza [...] zagenwemo n'urukiko indishyi zingana nibura na miliyoni mirongo itanu z'amafaranga y'u Rwanda (50.000.000 Frw) cyangwa se zifite agaciro kagenwe n'umucamanza igihe habaye impaka, kangana nibura n'amafaranga y'u Rwanda miliyoni mirongo itanu (50.000.000 Frw)".

Dosiye y'uru rubanza igaragaza ko, mu ntangiriro, GISA [22] Frediane yareze BRALIRWA Ltd kuba varakoresheje amashusho n'amafoto bye mu kwamamaza inzoga yayo yitwa atayibihereye uburenganzira, Heineken abisabira indishvi mbonezamusaruro zingana 100.000.000Frw, na indishvi z'akababaro zingana 20.000.000Frw, amafaranga na y'ikurikiranarubanza angana na 5.000.000Frw<sup>2</sup> n'igihembo cy'Avoka kingana na 10.000.000Frw, yose hamwe akaba 135.000.000Frw. Ku rwego rwa mbere nta ndishyi GISA Frediane yigeze agenerwa kuko yatsinzwe, naho ku rwego rwa rw'Ubucuruzi) (mu Rukuru kabiri Rukiko agenerwa 5.000.000Frw y'indishyi z'uko amashusho n'amafoto bye byashyizwe na BRALIRWA Ltd ku bicuruzwa byayo nta burenganzira abitangiye, 2.000.000Frw y'indishyi z'akababaro ko gushorwa mu manza ku maherere na 1.200.000Frw akubiyemo igihembo cy'Avoka n'indishyi z'ibyatanzwe mu gukurikirana urubanza, yose hamwe aba 8.200.000Frw.

[23] Urukiko rurasanga, n'ubwo, nk'uko bimaze gusobanurwa haruguru, icyaregewe ku kubitiro ari indishyi za 130.000.000Frw zari zirenze 50.000.000Frw, avugwa mu ngingo ya 28 y'Itegeko Ngenga N°03/2012/OL yavuzwe haruguru, ariko hashingiwe ku biteganywa mu gika cya 2, agace ka 7, cy'iyo ngingo, urugero rw'indishyi zagenwe n'umucamanza igihe habaye impaka nirwo

 $<sup>^2</sup>$  Mu Rukiko Rukuru rw'Ubucuruzi urega yavuze indishyi zo gukurikirana urubanza zingana na 3.000.000Frw

rugomba gushingirwaho mu kwemeza niba ubujurire bwa BRALIRWA Ltd buri mu bubasha bw'Urukiko rw'Ikirenga, aho kuba gusa agaciro k'ikiburanwa katanzwe n'umuburanyi mu kirego cye nk'uko uburanira BRALIRWA Ltd ashaka kubyumvikanisha. Kuba rero muri uru rubanza bigaragara ko indishyi zagenwe n'umucamanza zingana na 8.200.000Frw, zikaba zitageze ku mubare wa 50.000.000 Frw uteganywa n'ingingo ya 28, igika cya 2, agace ka 7°, y'Itegeko Ngenga N°03/2012/OL yavuzwe haruguru, ibyo byerekana nta shiti, ko ubujurire bwa BRALIRWA Ltd butari mu bubasha bw'Urukiko rw'Ikirenga. Uyu murongo ni nawo wafashwe n'uru Rukiko mu rubanza RCOMAA 00020/2016/SC–RCOMAA 0025/15/CS rwaciwe ku wa 21/04/2017 (RURAL DEVELOPMENT SOLUTION COMPANY LTD vs AKARERE KA NYABIHU).

[24] Urukiko rurasanga rero, hashingiwe ku bimaze gusobanurwa haruguru, inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga yatanzwe na Gisa Frediane, ishingiye ku kuba indishyi zagenwe mu rubanza rujurirwa zitageze nibura kuri 50.000.000Frw, ifite ishingiro.

## III. ICYEMEZO CY'URUKIKO

[25] Rwemeje ko inzitizi y'iburabusha bw'Urukiko rw'Ikirenga yatanzwe na Gisa Frediane ifite ishingiro;

[26] Rwemeje ko ubujurire bwa BRALIRWA Ltd butakiriwe kuko butari mu bubasha bw'Urukiko rw'Ikirenga;

[27] Rutegetse ko ingwate y'igarama yatanzwe na BRALIRWA Ltd ihwanye n'ibyakozwe mu rubanza

## ENTREPRISE TWAHIRWA FAUSTIN (ETF) Ltd v. BRALIRWA Ltd

#### [Rwanda URUKIKO RW'UBUJURIRE – RCOMA 00003/2018/CA (Karimunda, P.J., Ngagi na Munyangeri, J.) 25 Mutarama 2019]

Amategeko agenga imanza z'ubucuruzi – Isosiyete – Isosiyete idahamagarira rubanda kuyiguramo imigabane ifite umuyobozi umwe – Gusimbura umuyobozi wa Sosiyete –Icyemezo gitangwa n'Ikigo cy'Igihugu cy'Iterambere (RDB) n'icyo kigaragaza uwasimbuye umuyobozi wa sosiyete mu gihe bigaragara ko ariwe munyamigabane umwe rukumbi.

Amategeko agenga imiburanishirije y'imanza z'ubucuruzi – Iyakirwa ry'ikirego – Ububasha byo kurega – Kugira ngo ikirego cyakirwe urega n'uregwa bagomba kuba bafite ububasha (qualité) – Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 3.

**Incamake y'ikibazo**: Entreprise Twahirwa Faustin (ETF Ltd) ihagarariwe n'umuyobozi wayo Twahirwa Faustin, akaba n'umunyamigabane wayo umwe rukumbi, yakoranye amasezerano na Bralirwa Ltd yo kubaka amashuli. Igihe cyo kurangiza imirimo cyararenze, imirimo itararangira maze Bralirwa isesa amasezerano, ibyo bituma Entreprise Twahirwa itanga ikirego mu bunkemurampaka ivuga ko Bralirwa yasheshe amasezerano mu buryo bunyuranyije n'amategeko. Inteko y'abakemurampaka yemeje ko Bralirwa yishyura ETF Ltd 2.462.090Frw no guhita iyisubiza ibikoresho byose biri kuri « chantier » nk'uko byari bimeze ubwo byabarurwaga.

ETF ntiyishimiye iki cyemezo cy'ubukemurampaka maze iregera Urukiko Rukuru rw'Ubucuruzi, ariko Umuyobozi wa ETF yaze kwitaba Imana urubanza muri uru Rukiko rutararangira, urubanza rukomezwa kuburanwa n'uwari uhagaririye nyakwigendera mu mategeko, Urukiko rwasanze ikirego kitagomba kwakirwa kubera ko kinyuranye n'ibiteganywa n'ingingo ya 46 y'Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi.

Uhagarariye ETF mu izina ryayo yajuririye mu Rukiko rw'Ikirenga, nyuma y'ivugurura ry'inkiko, ubujurire bwayo bwimuriwe mu Rukiko rw'Ubujurire, asaba ko icyemezo cyafashwe n'Inteko y'Abakemurampaka cyahinduka avuga ko Inteko y'Abakemurampaka aho gusuzuma ikibazo cyo kuba BRALIRWA Ltd varasheshe amasezerano mu burvo budakurikije amategeko no gusuzuma igihombo cyatewe n'iryo seswa ry'amasezerano, yemeje ko ETF Ltd isubirana ibikoresho byayo byari kuri « chantier » BRALIRWA Ltd ikishyura 2.462.090Frw, kandi mu gihe agaciro k'ibyo bikoresho n'indishyi ETF Ltd isaba birenze miliyoni magana abiri.

Bralirwa yahitse izamura inzitizi, ivuga ko ubujurire bwa ETF Ltd butagomba kwakirwa kuko bwatanzwe n'umuntu udafite ububasha n'ubushobozi bwo kuyihagararira, kuko uwari umuyobozi n'umunyamigabane wayo umwe rukumbi yitabye Imana, akaba atarasimburwa muri izo nshingano ze kuko kugeza ubu ntawigeze amusimbura muri izo nshingano nk'umuyobozi mukuru kuko nta cyemezo cya Rwanda Development Board (RDB) kigaragaza uwasimbuye Twahirwa Faustin. Kuri iyi nzitizi, mu izina rya ETF Ltd, uyihagarariye avuga ko nta shingiro ifite kuko umugore wa nyakwigendera hamwe n'abana yasize aribo basigaranye ubuyobozi bwa sosiyete kuko babifite uburenganzira bahabwa n'amategeko yerekeye izungura, cyane cyane ko hajuriye ETF Ltd yari yanabaye umuburanyi ku rwego rwa mbere.

**Incamake y'icyemezo:** 1. Inyandikomvugo y'inama rusange y'abanyamuryango ba sosiyete si ikimenyetso kigaragaza ugomba gusimbura umuyobozi wa sosiyete mu gihe bigaragara ko ariwe munyamigabane umwe rukumbi, ahubwo bigaragazwa n'icyemezo cya RDB.

2. Ikirego cyakirwa mu Rukiko nuko urega n'uregwa bagomba kuba bafite ububasha (*qualité*), mu gihe batabufite, nticyakirwa.

#### Inzitizi yo kutakira ikirego yatanzwe ifite ishingiro; Amagarama y'urubanza ahwanye n'ibyakozwe mu rubanza.

#### Amategeko yashingiweho:

Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 3. Itegeko N° 17/2018 ryo ku wa 13/04/2018 ryerekeye amasosiyete y'ubucuruzi, ingingo ya 142.

#### Nta manza zifashishijwe.

#### Inyandiko z'abahanga:

Serge GUINCHARD, Droit et pratique de la procedure civile, 5e edition, Paris, Dalloz, 2006-2007.

## Urubanza

## I. IMITERERE Y'IKIBAZO

[1] Entreprise Twahirwa Faustin (ETF Ltd) yagiranye na BRALIRWA Ltd amasezerano yo kubaka ishuri rya Rambo mu Karere ka Rubavu, muri ayo masezerano impande zombi zumvikana ko nizigirana ikibazo gifitanye isano n'ayo masezerano kizakemurwa n'urwego rw'Ubukemurampaka.

[2] BRALIRWA Ltd yaje gusesa ayo masezerano ishingiye ku kuba igihe imirimo yari kumara cyarangiye, ETF Ltd iza kubibona nko gusesa amasezerano mu buryo bunyuranye n'amategeko, bituma itangiza urubanza imbere y'Umukemurampaka witwa Rusanganwa Jean Bosco washyizweho n'Urukiko rw'Ubucuruzi rwa Nyarugenge mu rubanza RCOM 01657/2016/TC/NYGE, rwaciwe ku wa 23/03/2017 bisabwe na ETF Ltd.

[3] Inteko y'Abakemurampaka yafashe icyemezo ku wa 26/09/2017, itegeka BRALIRWA Ltd kwishyura ETF Ltd 2.462.090 Frw no guhita iyisubiza ibikoresho byose biri kuri « chantier » nk'uko byari bimeze ubwo byabarurwaga ku wa 24/08/2017.

[4] ETF Ltd ntiyishimiye icyo cyemezo, iregera Urukiko Rukuru rw'Ubucuruzi, urwo Rukiko ruca urubanza RCOMA 00035/2017/CHC/HCC ku wa 27/04/2018, rusanga ubujurire bwa ETF Ltd busaba guhindura icyemezo cy'Inteko y'Abakemurampaka (réformation) bunyuranye n'ibiteganywa n'ingingo ya 46 y'Itegeko N°005/2008 ryo ku wa 14/02/2008 rverekeve ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi,igaragaza ko igisabwa urukiko rujuririrwa ari ivanwaho ry'icyemezo (annulation) aho kuba ihindurwa ryacyo nk'uko ETF Ltd yabisabye mu bujurire bwayo, rusanga kuba mu kujurira ETF Ltd nta mpamvu n'imwe ishingiraho mu ziteganywa n'ingingo ya 47 y'itegeko Nº005/2008 ryo ku wa 14/02/2008 ryavuzwe haruguru, bituma ubujurire bwayo butagomba kwakirwa, rwemeza ko ikirego cya ETF Ltd kitakiriwe, ko ntagihindutse ku cyemezo cyo ku wa 26/09/2017 cyafashwe n'Inteko y'Ubukemurampaka cyajuririwe, rutegeka ETF Ltd kwishyura BRALIRWA Ltd amafaranga ibihumbi y'indishyi z'ikurikiranarubanza habariwemo 600.000Frw n'igihembo cya Avoka.

Me BUHURU Pierre Célestin, mu izina rya ETF Ltd, [5] yajuririye mu Rukiko rw'Ikirenga, urubanza ruhabwa RCOMA 00004/2018/SC. Nyuma y'ivugurura ry'inkiko, ubujurire bwayo bwimuriwe mu Rukiko rw'Ubujurire, ruhabwa RCOMA asaba ko icyemezo cyafashwe n'Inteko 00003/2018/CA, y'Abakemurampaka cyahinduka hagashingirwa ku biteganywa n'ingingo ya 46 y'Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, avuga kandi ko mu cyemezo cyafashwe harimo kwivuguruza no kuvuguruza ibiteganywa n'amategeko, asaba Urukiko gusuzuma niba BRALIRWA Ltd yarasheshe amasezerano mu buryo bukurikije amategeko, no kumenya niba nta kindi gishya cyari kwiyongeraho kitareba ayo masezerano yasheshwe usibye ibijyanye n'igihombo yatejwe na BRALIRWA Ltd no kugena indishyi.

[6] Mu gusobanura izi mpamvu, Me Buhuru Pierre Célestin avuga ko Inteko y'Abakemurampaka aho gusuzuma ikibazo cyo kuba BRALIRWA Ltd yarasheshe amasezerano mu buryo budakurikije amategeko no gusuzuma igihombo cyatewe n'iryo seswa ry'amasezerano, yemeje ko ETF Ltd isubirana ibikoresho byayo byari kuri « chantier » BRALIRWA Ltd ikishyura 2.462.090Frw, mu gihe agaciro k'ibyo bikoresho n'indishyi ETF Ltd isaba birenze miliyoni magana abiri; aregeye Urukiko Rukuru rw'Ubucuruzi ntirwahindura icyemezo ahubwo rwemeza ko ikirego kitakiriwe, akaba asaba ko Urukiko rw'Ubujurire rwashingira ku biteganywa n'ingingo ya 46 y'Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurapaka n'ubwunzi mu manza z'ubucuruzi maze rugakuraho icyemezo cyafashwe n'Ubukemurampaka.

[7] Urubanza rwaburanishijwe mu ruhame ku wa 09/01/2019, Entreprise Twahirwa Faustin (ETF Ltd) iburanirwa na Me Buhuru Pierre Célestin, naho BRALIRWA Ltd iburanirwa na Me Abijuru Emmanuel, uyu akaba yaratanze inzitizi yo kutakira ubujurire bwa ETF Ltd kuko bwatanzwe n'umuntu udafite ububasha n'ubushobozi.

## II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

#### Kumenya niba ubujurire bwa ETF Ltd budakwiriye kwakirwa kubera ko bwatanzwe n'utabifitiye ububasha n'ubushobozi.

[8] Me Abijuru Emmanuel, uhagarariye BRALIRWA Ltd, avuga ko ubujurire bwa ETF Ltd budakwiriye kwakirwa kuko bwatanzwe n'umuntu udafite ububasha n'ubushobozi bwo kuyihagararira. Asobanura ko ETF Ltd yahoze iyoborwa n'uwitwa Twahirwa Faustin nk'umuyobozi mukuru wayo ari nawe munyamigabane umwe rukumbi yari ifite, aza gupfa nk'uko « attestation de décès » yo ku wa 09/01/2018 ibigaragaza, kandi icyo igihe urubanza rwari rukiburanishwa mu Rukiko Rukuru rw'Ubucuruzi, kugeza ubu hakaba ntawigeze amusimbura muri izo nshingano nk'umuyobozi mukuru kuko nta cyemezo cya Rwanda Development Board (RDB) kigaragaza uwasimbuye Twahirwa Faustin, bityo BRALIRWA Ltd ikaba itazi uwatumye Me Buhuru Pierre Célestin gutanga ubujurire bwa ETF Ltd, asaba ko hasuzumwa niba ingingo ya 142 y'Itegeko N° 17/2018 ryo ku wa 13/04/2018 ryerekeye amasosiyete y'ubucuruzi ivuga uburyo amasosiyete y'ubucuruzi ahagararirwa yarubahirijwe.

[9] Me Buhuru Pierre Célestin, uhagarariye ETF Ltd, nawe avuga ko Twahirwa Faustin yari umunyamigabane umwe rukumbi wa ETF Ltd akaba n'umuyobozi mukuru wayo, ubu iyo sosiyete ikaba ihagaririwe na Mukandekezi Antoinette, ari na we uyigize hamwe n'abana be batanu aribo Twagirayezu Félicien, Mupenzi Jean Damascène, Mugisha Fred, Uwera Séraphine na Kwizera Claudine. Akomeza avuga ko abagize sosiyete bashobora kuvaho ariko sosiyete igakomeza ku bafite uburenganzira bahabwa n'amategeko yerekeye izungura, bityo akaba asanga iyi nzitizi nta shingiro ifite kuko hajuriye ETF Ltd yari yanabaye umuburanyi ku rwego rwa mbere.

## UKO URUKIKO RUBIBONA

[10] Ingingo ya 3, igika cya mbere, y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko: "Ikirego cyakirwa mu rukiko iyo urega afite ububasha, inyungu n'ubushobozi byo kurega, keretse igihe itegeko ribiteganya ukundi". Ingingo ya 142, igika cya mbere, y'Itegeko N° 17/2018 ryo ku wa 13/04/2018 ryerekeye amasosiyete y'ubucuruzi iteganya ko "Imirimo n'ibikorwa by'isosiyete biyoborwa cyangwa bikarebererwa n'Inama y'Ubutegetsi ifite ububasha bwose muri ubwobuyobozi (....). Naho igika cya kabiri cy'iyi ngingo kigateganya ko: "Iyo isosiyete idahamagarira rubanda kuyiguramo imigabane ifite umuyobozi umwe, uwo muyoboziniwe ufite ububasha n'inshingano z'Inama y'Ubutegetsi ziteganywa n'iri tegeko".

[11] Isesengura ry'izi ngingo z'amategeko zavuzwe haruguru zisuzumiwe hamwe, ryumvikanisha ko ububasha bwo kugira igikorwa icyo ari cyo cyose cy'isosiyete kirimono gutanga ikirego mu rukiko kiyoborwa cyangwa kikarebererwa n'Inama y'Ubutegesi ifite ububasha bwose muri ubwo buyobozi, mu gihe sosiyete yaba ifite umuyobozi umwe akaba ari we ufite ububasha n'inshingano z'Inama y'Ubutegetsi.

[12] Ku byerekeranye n'uru rubanza, dosiye igaragaza ko Twahirwa Faustin yari umunyamigabane umwe rukumbi akaba n'umuyobozi mukuru wa sosiyete y'ubucuruzi yitwa Entreprise Twahirwa Faustin (ETF Ltd) akaba ari nawe wari uyihagaririye mu buryo bwemewe n'amategeko mu rubanza iyi sosiyete yarezemo BRALIRWA Ltd, kugeza aho apfiriye ku wa 04/01/2018, uru rubanza ruri mu Rukiko Rukuru rw'Ubucuruzi.

[13] Dosiye igaragaza na none ko nyuma y'aho Urukiko Rukuru rw'Ubucuruzi ruciriye urubanza RCOMA 00035/2017/CHC/HCC ku wa 27/04/2018, rukemeza ko ikirego cya ETF Ltd kitakiriwe, ku wa 25/05/2018, Me Buhuru Pierre Célestin yajuririye uru rubanza mu Rukiko rw'Ikirenga mu izina rya ETF Ltd, ariko akaba ntaho bigaragara ko yaba yarabiherewe ububasha n'umuyobozi mukuru wa ETF Ltd waba warasimbuye Twahirwa Faustin nyuma y'urupfu rwe, akaba ari cyo BRALIRWA Ltd ishingiraho ivuga ko uwajuriye nta bubasha n'ubushobozi bwo kurega mu bujuririre afite.

[14] Mu iburanisha ryo ku wa 09/01/2019, ubwo Urukiko rwabazaga Me Buhuru Pierre Célestin uwaba yarasimbuye Twahirwa Faustin nk'umuyobozi mukuru wa ETF Ltd nyuma y'urupfu rwe, yasubije ko sosiyete ihagaririwe na Mukandekezi Antoinette, akaba ari we uyigize hamwe n'abana be batanu aribo Twagirayezu Félicien, Mupenzi Jean Damascène, Mugisha Fred, Uwera Séraphine na Kwizera Claudine, abajijwe ikimenyetso kigaragaza ko koko ibyo avuga byababyaremejwe n'Umwanditsi Mukuru muri RDB, avuga ko yari yarasabye Mukandekezi Antoinette gushaka ibyangombwa muri RDB ariko ntiyabikora.

[15] Dosiye y'urubanza igaragaza kandi ko iyi nzitizi yazamuwe na BRALIRWA Ltd mu nama ntegurarubanza yo ku wa 30/10/2018, ndetse icyo gihe Me Buhuru Pierre Célestin asabwa kuzageza muri uru rukiko ibimenyetso bigaragaza ko Mukandekezi Antoinette ari we wasimbuye Twahirwa Faustin ku buyobozi bwa ETF Ltd.

[16] Urukiko rurasanga impande zombi zemeranya ko ETF Ltd iriho mu buryo bwemewe n'amategeko ndetse narwo akaba ariko rubibona, kuko urupfu rw'umunyamigabane wa sosiyete, n'ubwo yaba ari umwe, rutabuza sosiyete gukomeza kubaho, ikaba yakomezwa n'abazungura ari uko babyemeye.

[17] Urukiko rurasanga ariko, usibye ko mu iburanisha ryo ku wa 09/01/2019, Me Buhuru Pierre Célestin yivugiraga ko yahawe uburenganzira bwo kujurira na Mukandekezi Antoinette, nta kimenyetso na kimwe yaragaragaje cyemeza ko uyu

Mukandekezi Antoinette yaba yarasimbuye Twahirwa Faustin nk'umuyobozi mukuru wa ETF Ltd, ngo abe noneho yaramuhaye uburenganzira bwo gutanga ikirego mu bujurire mu izina rya sosiyete ETF Ltd, ibi bikaba bishimangirwa n'abahanga mu mategeko barimo Serge Guinchard uvuga ko kugira ngo ikirego cyakirwe ari uko urega n'uregwa bagomba kuba bafite ububasha (qualité), ko mu gihe batabufite, ikirego kitakirwa<sup>1</sup>.

byerekeranye n'inyandiko yiswe [18] Ku ~ INAMA RUSANGE Y'ABANYAMURYANGO BA ENTREPRISE TWAHIRWA Faustin (E.T.F LTD) » yagaragaye muri dosiye ku wa 17/01/2019, nyuma y'ipfundikirwa rw'iburanisha ryo kuwa 09/01/2019, Urukiko, rushingiye ku ngingo ya 75, igika cya mbere<sup>2</sup>, icya kabiri<sup>3</sup> n'icya gatatu<sup>4</sup>, y'Itegeko Nº 22/2018 ryo ku 29/04/2018 ryerekeye imiburanishirize wa v'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, rurasanga iyi nyandiko itakwakirwa ngo isuzumwe bitewe n'uko

<sup>&</sup>lt;sup>1</sup> "La qualité est une condition d'existence de l'action, exigée tant en demandant qu'en defense. Le défaut de qualité donne lieu à une fin de non-recevoir", Serge GUINCHARD, Droit et pratique de la procedure civile, 5e edition, Paris, Dalloz, 2006-2007, p.22.

<sup>&</sup>lt;sup>2</sup> Muri rusange nta nyandiko, imyanzuro y'urubanza cyangwa inyandiko ikubiyemo ingingo ziburanishwa bishobora kohererezwa urukiko nyuma y'inama ntegurarubanza.

<sup>&</sup>lt;sup>3</sup> Icyakora, igihe cyose urubanza rutaracibwa, iyo habonetse inyandiko cyangwa se ikindi kintu gishya cyafasha mu kugaragaza ukuri kivumbuwe n'umwe mu baburanyi, ashobora kugishyikiriza urukiko, rugasuzuma niba cyakwakirwa. Iyo iburanisha ryari ryarapfundikiwe, umuburanyi asaba ko ripfundurwa.

<sup>&</sup>lt;sup>4</sup> Urukiko ubwarwo ni rwo rusuzuma niba ari ngombwa gupfundura iburanisha, iyo rusanze ruzashingirakuri icyo kintu gishya mu guca urwo rubanza n'ikirego cy'iremezo. Gishobora kandi kwakirwa kikanaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe ».

ntacyo yarufasha mu gufata icyemezo, icyari gikenewe kitigeze kigaragazwa ku gihe, si inyandikomvugo y'inama y'abanyamuryango ahubwo ni icyemezo cya RDB kigaragaza uwasimbuye Twahirwa Faustin ku mwanya w'umuyobozi mukuru wa ETF Ltd.

[19] Hashingiwe ku ngingo z'amategeko no ku bisobanuro bimaze gutangwa, Urukiko rurasanga Me Buhuru Pierre Célestin nta bubasha yari afite bwo gutanga ikirego mu bujurire mu mwanya wa ETF Ltd, inzitizi yatanzwe na BRALIRWA Ltd ikaba ifite ishingiro, bityo ubujurire bwa ETF Ltd bukaba butakiriwe.

# 2. Kumenya niba indishyi zasabwe na BRALIRWA Ltd zifite ishingiro

[20] Mu nama ntegurarubanza yo ku wa 30/10/2018, Me Abijuru Emmanuel, uhagarariye BRALIRWA Ltd, yasabye indishyi z'ikurikiranarubanza n'igihembo cya Avoka zingana na 1.500.000 Frw kuko ETF Ltd yayishoye mu manza zidafite ishingiro, ageze mu iburanisha ryo ku wa 09/01/2019 asaba ko amafaranga yasabwe yakongerwaho 200.000 Frw y'igihembo cya Avoka.

[21] Me Buhuru Pierre Célestin, uburanira ETF Ltd, avuga ko indishyi BRALIRWA Ltd isaba nta shingiro zahabwa kuko iyo ababuranyi batumvikanye baba bafite uburenganzira bwo kugana inkiko, ETF Ltd ikaba nta kindi kintu yakoze kidateganyijwe n'amategeko cyatuma itanga indishyi.

# UKO URUKIKO RUBIBONA

[22] Ingingo ya 111 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko « Ikirego cy'amafaranga y'ikurikiranarubanza kiburanishirizwa rimwe n'ikirego cy'iremezo. Gishobora kandi kwakirwa kikanaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe ».

[23] Ku birebana n'amafaranga y'ikurikiranarubanza n'igihembo cya Avoka uburanira BRALIRWA Ltd asaba, Urukiko rurasanga akwiye kuyahabwa kuko ETF Ltd yayishoye mu rubanza bituma yiyambaza uyiburanira, ariko ikaba igomba kuyagenerwa mu bushishozi bw'Urukiko kuko atagaragaza uburyo 1.700.000Frw asaba yayabaze, bityo BRALIRWA Ltd ikaba igomba guhabwa 500.000Frw y'igihembo cya Avoka na 200.000Frw y'ikurikiranarubanza, yose hamwe akaba 700.000Frw.

## III. ICYEMEZO CY'URUKIKO

[24] Rwemeje kwakira inzitizi yo kutakira ikirego yatanzwe na BRALIRWA Ltd;

[25] Rwemeje ko iyo nzitizi ifite ishingiro;

[26] Rutegetse Entreprise Twahirwa Ltd (ETF Ltd) guha BRALIRWA Ltd 500.000Frw y'igihembo cya Avoka na 200.000Frw y'ikurikiranarubanza, yose hamwe akaba 700.000Frw;

[27] Ruvuze ko amagarama y'urubanza ahwanye n'ibyakozwe mu rubanza.

IMANZA ZACIWE MU MIZI

# IMANZA Z'IMBONEZAMUBANO

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## CANDARI v. MUKAMANA N'ABANDI

[Rwanda URUKIKO RW'IKIRENGA – RCAA0024/14/CS (Mukanyundo P.J., Kayitesi R. na Gatete J.) 10 Mata 2015]

Amategeko agenga umuryango – Umuryango – Izungura – Abana batabyawe na nyakwigendera ntabwo bamuzungura kuko ntaho baba bahuriye kereka bigaragara ko yabagize abe ku bw'amategeko. (adoption).

Amategeko agenga umuryango – Umuryango – Imicungire y'umutungo w'abashingiranywe – Iyo abantu basezeranye ivangamutungo rusange, umwe muri bo ntashyire "réserve" (umwihariko) muri ayo masezerano, ku bijyanye n'umutungo yita uw'abana yashakanye, imitungo yose ifatwa ko ari iyabashyingiranywe

Amategeko agenga imanza mbonezamubano – Agaciro k'inyandiko – Inenge – Inyandiko nubwo yakorerwa imbere ya noteri ariko igakorwa hirengagijwe ibyo amategeko ateganya, ntabwo iyo nyandiko yahabwa agaciro.

Incamake y'ikibazo: Havugimana yabyaranye na Mwamini abana babiri aribo Mukamana Mamique na Havugimana Celestin. Mwamini yaje gupfa maze Havugimana ashakana na Candali, babyarana Iradukunda Jean Luc. Havugimana nawe yaje gupfa maze abana basizwe na Mwamini barega Candari mu Rukiko Rwisumbuye rwa Gasabo basaba guhabwa uburenganzira ku mutungo wasizwe n'ababyeyi babo. Urwo rukiko rwemeje ko umutungo wasizwe na Havugimana uzungurwa n'abana be bose, ½ cy'umutungo usigaye kigahabwa Candari Verena nk'umugore bari barashakanye nyuma mu buryo bwemewe n'amategeko.

Candari yajuririye urwo rubanza mu Rukiko Rukuru, uwitwa Umuhoza nawe wemejwe n'Urukiko ko nawe ari umwana wa Havugimana arugobokamo asaba ko nawe yagira uburenganzira bwo kuzungura umubyeyi we. Urukiko Rukuru rushingiye kw'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryerekeye imicungire y'umutungo w'abashingiranywe, impano n'izungura ryakoreshwaga icyo gihe rwemeje ko imitungo ya Havugimana igomba kugabanwamo kabiri, ½ cya kabiri cyayo kigahabwa Candari nk'umugore we w'isezerano naho ½ kigahabwa abana ba Havugimana bose.

Candari yajuriye mu Rukiko rw'Ikirenga avuga ko imwe mu mitungo isabirwa kuzungurwa atayishakanye na Hvugimana kuko bashakanye ayifite indi ayibona nyuma yuko Havugimana yitabye Imana. Avuga kandi ko imwe muri iyo mitungo yamaze kuyigurisha. Bityo ko itajya mu mutungo rusange uzungurwa wa Havugimana.

Akomeza avuga ko nyuma yaje kugirana ubwumvikane n'abana ba Havugimana maze mu nyandiko yakorewe imbere ya Notaire yemera guhabwa 40% by'umutungo wa nyakwigendera, naho abana bemera gutwara 60%, bumvikana ko abana (Candari) yari afite mbere y'uko ashakana na Havugimana nabo bagomba kugira icyo babona, bityo asaba Urukiko guha agaciro ayo masezerano yo kwikiranura. Asobanura ko impamvu umwe mu bana ba nyakwigendera atagaragaye mu bagize inama y'umuryango nu kubera ko yari ataramenya ko ari umwana wa nyakwigendera.

Abaregwa muri uru Rukiko, biregura bavuga ko nta kigaragaza ko hari imitungo Candari yazanye kwa Havugimana kandi niba

66 \_\_\_\_

hari nuwo yazanye nta cyabuza ko izungurwa n'abazungura bose ba nyakwigendera kuko bari barasezeranye ivangamutungo rusange. Bavuga kandi ko imitungo avuga ko yayigurishije yabikoze imanza zaratangiye akaba yarabikoze mu rwego rwo kuyinyereza, kuba rero yaratinyutse kugurisha imitungo ikiburanwa, rikaba ari ikosa agomba guhanirwa, bakaba basaba Urukiko gutegeka ko iri gurisha nta gaciro rikwiye guhabwa ahubwo inzu ikagarurwa mu mutungo uzungurwa kuko yayigurishije agamije kunyereza imitungo izungurwa. Naho ku nyandiko yakorewe imbere ya Notaire, bavuga ko nta gaciro yagombye guhabwa kubera ko yakozwe urubanza rukiri mu rukiko, ndetse ikaba yarakozwe yirengagije umwe mu bana ba nyakwigendera kandi ko hongewemo abandi bana batazwi batigeze banavugwa mu manza zose zabaye.

**Incamake y'icyemezo:**1. Abana batabyawe na nyakwigendera ntabwo bamuzungura kuko ntaho baba bahuriye kereka bigaragara ko yabagize abe ku bw'amategeko. (adoption)

2. Iyo abantu basezeranye ivangamutungo rusange, umwe muri bo ntashyire "réserve" (umwihariko) muri ayo masezerano, ku bijyanye n'umutungo yita uw'abana yashatse afite, imitungo yose ifatwa ko ari iyabashyingiranywe.

3. Inyandiko nubwo yakorerwa imbere ya noteri ariko igakorwa hirengagijwe ibyo amategeko ateganya, ntabwo iyo nyandiko yahabwa agaciro.

Ubujurire bufite ishingiro kuri bimwe. Ubujurire bwuririye ku bundi bufite ishingiro.

#### Amategeko yishingiweho :

Itegeko n°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso n'itangwa ryabyo mu manza, ingingo ya 3.
Itegeko N° 22/99 ryo ku wa 12/11/1999 ryerekeye imicungire y'umutungo w'abashingiranywe, impano n'izungura, ingingo ya 3,49,50,51,66 niya 70.
Itegeko teka ryo ku wa 30/07/1888, rigenga amasezerano cyangwa imirimo nshinganwa, Igitabo cya III cy'Urwunge rw'amategeko mbonezamubano, ingingo ya 263, 590 (Ryakuweho n'itegeko n'Itegeko n° 020/2019 ryo kuwa 22/08/2019 rikuraho amategeko yose yashyizweho mbere y'itariki y'ubwigenge)

#### Nta manza zifashishijwe.

## Urubanza

# I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Gasabo, Mukamana Mamique na musaza we Havugmana Emmanuel, barega Candari Verena, umugore Se, Havugimana Céléstin yashatse nyina wababyaye amaze gupfa nawe nyuma akaza gupfa, mu kirego cyabo bakaba barasabaga ko bahabwa uburenganzira ku mutungo wasizwe n'ababyeyi babo.

[2] Urukiko rwaregewe rwemeje ko umutungo wasizwe na Havugimana Céléstin uzungurwa n'abana be bose, ½ cy'umutungo usigaye kigahabwa Candari Verena nk'umugore bari barashakanye mu buryo bwemewe n'amategeko. [3] Candari yajuririye urwo rubanza mu Rukiko Rukuru, uwitwa Umuhoza Aïsha wemewe mu rubanza RC0095/12/TB/Kma ko ari mwene Havugimana Céléstin arugobokamo asaba ko nawe yagira uburenganzira bwo kuzungura umubyeyi we.

[4] Urukiko rwajuririwe rwemeje kuwa 25/04/2014, ko imitungo igizwe n'igipangu cy'amazu Candari atuyemo, inzu iri ku Gisozi haruguru y'Agakinjiro, inzu iri mu Kiyovu cya Kagugu n'imodoka iri mu rugo rwa Candari Verena, ariyo mitungo igomba kugabanwamo kabiri, ½ cya kabiri cyayo kigahabwa Candari nk'umugore wa Havugimana Céléstin w'isezerano naho ½ kigahabwa abana ba Havugimana Céléstin bose aribo Mukamana Mamique, Havugimana Emmanuel, hakiyongeraho Umuhoza Aïsha na Shema Iradukunda Jean Luc, bakakigabana ku buryo bungana.

[5] Candari Verena yajuririye n'Urukiko rw'lkirenga avuga ko Urukiko Rukuru rwirengagije ko ajya gushakana na Havugimana Célestin hari imitungo yari asanganywe, ko rwemeje ko mu mitungo izungurwa hashyirwamo n'iyo yashatse nyuma y'uko uwo basezeranye apfuye, nyamara iyo mitungo itariho mu gihe izungura ryafungurwaga Habimana amaze gupfa no kuba Urukiko rwarirengagije ibiteganywa n'amategeko agenga umutungo w'abashakanye.

[6] Iburanisha ry'urubanza ryashyizwe ku wa 04/11/2014, ariko rugenda rwimurwa hategerejwe umwanzuro ku rubanza Umuhoza Aïsha yaburanaga na Candari Verena, bigeze ku itariki ya 03/03/2015, ruburanishirizwa mu ruhame Candari Verena yitabye, yunganiwe na Me Mbonyimpaye Elias, Havugimana Emmanuel na Mukamana Mamique nabo bahari bunganiwe na Me Nzabonimana John Peter, naho Umuhoza Aïsha yunganiwe na Me Umutesi Jeanne d'Arc.

## II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

#### Kumenya niba imitungo Candari Verena avuga yabonye nyuma y'urupfu rwa Havugimana Célestin ikwiye kuvamwa mu mitungo igomba kuzungurwa.

Me Mbonyimpaye Elias na Canadari Verena yunganira [7] bavuga ko uru rubanza rushingiye ku izungura ry'imitungo y'uwitwa Havugimana Céléstin wari warashakanye na Candari Verena mu buryo bwemewe n'amategeko, ko umutungo yashakanye na Havugimana Céléstin uhari, ari inzu imwe yubatse ku Gisozi haruguru y'urwibutso, ko indi mitungo igizwe n'inzu iherereye mu Kiyovu cya Kagugu n'indi iherereye ku Gisozi hejuru y'Agakinjiro ndetse n'imodoka abana ba Havugimana bavuga ko yayishakanye na Se atari byo kuko yayiguze umugabo we amaze gupfa, ko rero idakwiye gushyirwa mu mitungo izungurwa kubera ko mu gihe Havugimana yari maze gupfa, amasezerano y'ubushingiranywe na Candari Verena yahise arangira nk'uko biteganywa n'ingingo ya 236 y'Igitabo cya Mbere cy'urwunge rw'amategeko mbonezamubano, bivuga ko n'uburyo bw'imicungire y'umutungo bw'ivangamutungo risesuye bari barahisemo nabwo bwahise burangira nk'uko biteganywa n'ingingo ya 24 y'Itegeko rigenga imicungire y'umutungo w'abashakanye, impano n'izungura.

[8] Akomeza avuga ko mu myanzuro yabo bagiye bagaragaza uburyo Candari yabonye imitungo ye, batanga n'ibimenyetso byerekana ko ubu yayigurishije ikaba itakiri mu maboko ye : ko imodoka bavuga yayihugujwe na Dusabemengu Aloys (nawe wigeze kuba umugabo we) mu rubanza Nº RC0277/12/HC/KIG ikaba itagihari. Avuga ko nyuma Candari yaje kugirana ubwumvikane n'abana ba Havugimana maze mu nyandiko yakorewe imbere ya Notaire kuwa 02/09/2014 Candari vemera guhabwa 40% by'umutungo wa nyakwigendera, naho abana bemera gutwara 60%, ko kandi bumvikanye ko abana Candari yari afite mbere y'uko ashakana na Havugimana nabo bagomba kugira icyo babona, ko rero asaba Urukiko guha agaciro ayo masezerano yo kwikiranura rushingiye ku ngingo ya 155 Mbere cy'urwunge rw'amategeko y'Igitabo cya mbonezamubano Candari asobanura ko impamvu Umuhoza Aïsha atagaragaye mu bagize inama y'umuryango kubera ko Candari yari ataramenya ko ari umwana wa Havugimana Céléstin.

[9] Mu myanzuro ye y'ubujurire, Candari Verena avuga ko inzu y'i Kagugu ntaho ihuriye n'imitungo yashakanye na Havugimana Célestin kubera ko iyo nzu umuzungu witwa Jeff wari inshuti ye wabanje kuyimutiza, amugiriye impuhwe kubera umwana w'uruhinja yari afite, agezaho arayimwegurira amubwira ngo nayijyanire azayireremo uwo mwana yabyaye ku ruhande utari uwa Havugimana.

[10] Asobanura ko mu mitungo abana ba Havugimana bashaka kuzungura, harimo n'iyo Candari Verena yashatse Havugimana yarapfuye, ko hari inzu yubatse mu kibanza yaguriye abana yabyaranye na Bukuru Ananie atarabana na Havugimana nubwo nyuma baje kucyongera ku cyo Havugimana yari asanganywe, akaba yarabyemeye kubera ko yizeraga ko nta vangura rizaba hagati y'abana be n'abo yasanganye umugabo we, ko rero uwo mutungo ari uwe kandi ko umwanditseho.

[11] Me Ndacyayisenga mu myanzuro yakoreye Candari Verena, avuga ko Umucamanza wo mu Rukiko Rukuru yirengagije imitungo Candari Verena yazanye ajya gushakana na Havugimana, kandi ko ntacyo yavuze ku bana yatahanyeyo aribo Dufatanye Trésor na Uwimana David ahubwo imitungo yabo yemeza ko ifasha abana ba Havugimana kandi abe ntacyo basigaranye haba kwa Havugimana cyangwa kwa Se Bukuru Ananie, ko rero umucamanza yirengagije ibiteganywa n'Itegeko rigenga umutungo w'abashakanye impano n'izungura, izungura rikaba ryarabaye ari uko Havugimana Célestin amaze kwitaba imana bivuze ko imitungo Candari yashatse nyuma y'urupfu rwe itagomba kugabanywa hagati y'abazungura be.

[12] Asobanura ko impamvu Candari atihutiye guha abazungura ba Havugimana Céléstin imitungo yabo byatewe ni uko bari bakiri bato ko kandi icyo gihe yayishakagamo inyungu agura, yongera arayigurisha, avuga ko yafashe ahantu yakuye kwa Bukuru ahafatanya n'ahabo, arangije ahubaka amazu menshi mu mwaka wa 2000, akoresheje amafaranga yishakiye, ko rero abana batavuga ko ntacyo yabamariye kandi yarabishyuriye amashuri uretse ko nyuma baje kumwivumburaho bapfuye amafaranga ya "expropriation" y'inzu yo ku Kimicanga.

[13] Me Nzabonimana John Peter, uburanira Mukamana Mamique na Havugimana Emmanuel yunganira, bavuga ko impamvu z'ubujurire za Candari nta shingiro zifite, kuko nta kigaragaza ko hari imitungo Candari yazanye kwa Havugimana Céléstin ayivanye kwa Bukuru Ananie, ko kandi biramutse byarabayeho nabwo nta cyabuza ko izungurwa n'abazungura bose ba nyakwigendera kuko bari barasezeranye ivangamutungo rusange, cyane ko amategeko ateganya ko uwapfakaye asigarana inshingano zo gucunga umutungo wose ndetse no kurera abana

72 \_\_\_\_\_

yasigiwe na nyakwigendera ariko ko Candari Verena we atubahirije izo nshingano zo kurera abana kuko Se akimara gupfa, bahise bakwira imishwaro bakaba batarigeze baniga Kaminuza kandi Se yari afite amafaranga. Abana ba Havugimana nabo bemera ko izungura ryafumguwe Se akimara gupfa koko, ko ariko nk'abazungura, basabye Candari Verena kugabana imitungo Havugimana yasize akabyanga, bituma bitabaza Inkiko. Kuba rero atarabikoze kandi ariwe ucunga ibintu, ibyo ntibimuha uburenganzira bwo kwikubira umutungo wa Nyakwigendera kugira ngo awugumane, keretse agaragaje ko nyuma y'urupfu rwa Havugimana izungura ryabayeho.

[14] Bavuga ko Candari Verena atakwitwaza ko inzu y'i Kagugu itajya mu mutungo uzungurwa kubera ko ngo yayigurishije nyamara yarabikoze tariki 28/02/2014, iyo nzu ikiburanwa ndetse n'Urukiko rwarayishyize mu mitungo igomba kuzungurwa, ibi akaba ariko bimeze no ku nzu iri ku Gisozi hejuru y'Agakinjiro, kuba rero yaratinyutse kugurisha imitungo ikiburanwa, rikaba ari ikosa agomba guhanirwa, bakaba basaba Urukiko gutegeka ko iri gurisha nta gaciro rikwiye guhabwa ahubwo inzu ikagarurwa mu mutungo wa Havugimana uzungurwa kuko Candari Verena yayigurishije agamije kunyereza imitungo izungurwa.

[15] Me Nzabonimana akomeza avuga ko ibyo Candari Verena avuga ko amazu yita aye yayubakishije amafaranga yishakiye bitashoboka bitewe nuko nta wundi mwuga akora ku buryo yakwaka umwenda muri Banki kugira ngo abashe kugura inzu ko ahubwo iyi mitungo yayishakanye na Havugimana Céléstin akajya kwaka ibyangombwa nyuma y'uko apfuye. Naho ku bijyanye n'inzu y'i Kagugu yagurishijwe kandi ikiburanwa, asanga nta kitagaragaza ko yakorewe "Mutation", ko Urukiko rwanareba ibaruwa yo ku wa 20/08/2012 Candari yandikiye ubuyobozi bw'Umurenge wa Gisozi abumenyesha imitungo yasizwe na Havugimana Céléstin

[16] Ku kibazo cy'amasezerano yabereye kwa Notaire, Me Nzabonimana avuga ko nta gaciro ayaha kuko Candari Verena yihereranye abana abumvisha ko ikibanza cyabo Leta igiye kukibatwara, nuko bemera gusinya, ko ariko iyo urebye uburyo byakozwemo ataribwo, kuko inama y'umuryango itari yuzuye kuko Aïsha atari ayirimo kandi yari asanzwe agoboka mu rubanza. Avuga ko indi nenge abona muri iyo nyandiko, ari uko ivugamo abana Candari yabyaranye na Bukuru Ananie kandi batabarwa mu bazungura ba Havugimana Célestin. Avuga nanone ko iyi nyandiko yakozwe abana bazi ko bibaye ku mpamvu za "expropriation" kuko Candari yababwiraga ko ngo nibadasinya Leta izahatwarira ubusa. Basabye Urukiko kuzaha agaciro inyandiko Candari Verena yandikiye Ubuyobozi bw'Umurenge wa Gisozi kuwa 20/08/2012 awumenyesha imutungo ya Havugimana.

[17] Ku bijyanye n'imodoka Candari Verena avuga ko yatsindiwe mu rubanza yaburanye na Dusabemungu Aloys, avuga ko ari ikinamico ryakinywe kubera ko uyu Aloys wayitsindiye ari umugabo we banabyaranye umwana, ko ariko abana bemera ko yakurwa mu mutungo uzungurwa hagasigara amazu gusa.

[18] Me Umutesi Jeanne d'Arc na Umuhoza Aïsha yunganira bavuga ko kuba Havugimana Céléstin yarapfuye ariko ntihabe izungura (liquidation) kuko Candari atigeze yemerera abana b'umugabo we guhita bamuzungura akimara gupfa, ahubwo agakomeza gukoresha uwo mutungo, ibintu byose bigomba kugabanywa. [19] Bavuga ko ibyo Candari Verena aburanisha ko hari imitungo yavanye ku mugabo we akayivanga n'iya Havugimana nabyo nta shingiro bifite kuko yagombaga kuyitandukanya, kuba atarabikoze ibyo ntibyahabwa agaciro n'Urukiko rw'Ikirenga.

Naho kuba nta zungura ryabaye, Me Umutesi avuga ko [20] atarigeze agaragariza abana kuba Candari Verena ba Havugimana imitungo ye bagomba kuzungura ahubwo agakomeza kuyikoresha ayikuramo iyindi, yose igomba kugabanywa, ko ibyo yireguza y'uko hari imitungo yishakiye Havugimana amaze gupfa bikaba nta gaciro byahabwa kuva yarasezeranye ivangamutungo risesuye kandi nta zungura ryigeze rikorwa ko kuba Havugimana yarapfuye abana be bakiri bato, Candari Verena niwe wagombaga kubamenyera imitungo maze bakura akabagenera 50% by'umutungo wabo nawe agasigarana 50%.

[21] Me Umutesi akomeza avuga ko mu Rukiko Rukuru, umucamanza yasobanuye icyo ivangamutungo aricyo, avuga ko abashakanye bahisemo ubwo buryo baba basangiye imitungo, yaba iyo bashatse batarabana n'iyo baronse babana. Avuga ko mu gihe cyo gusezerana na Havugimana, Candari Verena atigeze avuga ko afite abandi bana cyangwa ngo avuge ko hari imitungo y'abo bana ashyize iruhande, ko abo bana abavugiye hano mu Rukiko.

[22] Ku nyandiko yakorewe imbere ya Notaire, Candari Verena aburanisha, Me Umutesi avuga ko nta gaciro yagombye guhabwa kubera ko yakozwe urubanza rukiri mu rukiko, ndetse ikaba yarakozwe yirengagije Aïsha kandi nawe ari umwana wa Havugimana Célestin, ko kandi n'ubwo Urukiko rwakongeramo Aïsha, nabwo nta gaciro yagira kuko hongewemo abandi bana batazwi batigeze banavugwa mu manza zose zabaye, bityo

hakaba hakwiye gushingirwa ku ngingo ya 70 y'Itegeko ryerekeye imicungire y'umutungo w'abashakanye, impano n'izungura.

[23] Ku bijyanye n'umutungo wagurishijwe, avuga ko ari amakosa yakozwe na Candari Verena, akaba akwiye kumuhereraho kuko igihe cyose nta gabana ryabayeho, Candari yagombaga gucunga umutungo wose akazawumurikira abana. Umuhoza Aïsha avuga we ko n'imodoka igomba kugaruka kuko yayitsindiwe ku makosa ye kubera ko umugabo we yamaze gupfa akazana undi mugabo, kandi ko hari amafaranga yagabanywe ya "expropriation" y'inzu yo ku Kimicanga akaba yarihereranye abandi bana we adahari.

## **UKO URUKIKO RUBIBONA**

[24] Ingingo ya 3 y'itegeko N° 22/99 ryo ku wa 12/11/1999 ryerekeye imicungire y'umutungo w'abashingiranywe, impano n'izungura iteganya ko "Ivangamutungo rusange ni amasezerano abashyingiranywe bagirana bumvikana gushyira hamwe umutungo wabo, wose, ibyimukanwa n'ibitimukanwa kimwe n'imyenda yabo yose".

[25] Ingingo ya 49 y'itegeko nº 22/99 ryo kuwa 12/11/1999 ivuga ko kuzungura ari uguhabwa ububasha n'inshingano ku mutungo n'imyenda bya nyakwigendera, igika cya kabiri kikavuga ko izungura ritangira iyo umuntu amaze gupfa, rikabera ahantu yari atuye cyangwa aho yabaga.

[26] Ingingo ya 50 yo iteganya ko abana amategeko mbomezamubano yemera ko ari aba nyakwigendera bazungura

76 \_\_\_\_

ku buryo bungana nta vangura hagati y'umwana w'umuhungu n'umukobwa.

[27] Ingingo ya 51 ivuga ko igihe cy'igabana ry'umutungo uzungurwa n'abana, inama y'umuryango igena umutungo wo kurera abana bakiri bato n'ugomba guhita ugabanwa abana bose ba nyakwigendera.

[28] Naho ingingo ya 70, agace kayo ka 1° igateganya ko iyo umwe mu bashyingiranywe bafitanye amasezerano y'ivangamutungo rusange apfuye, usigaye asigarana umutungo wose agakomeza inshingano yo kurera abana no gufasha ababyeyi ba nyakwigendera iyo babikeneye, mu gace ka 7, igateganya ko "iyo nta mwana wa nyakwigendera uwapfakaye akirera, akongera gushaka, atwara 1/2 cy'umutungo wose, ikindi 1/2 gihabwa abazungura ba nyakwigendera".

[29] Isesengura ry'izi ngingo zimaze kuvugwa mu bika bibanziriza iki ryumvikanisha ko iyo umwe mu basezeranye ivangamutungo risesuye apfuye usigaye, asigara acunga umutungo wose (acte d'administration) agakomeza inshingano ku bana no ku babyeyi ba nyakwigendera mu gihe ari ngombwa, bikaba byumvikana ko usigaye atazungura umutungo wa mugenzi we, ko ahubwo nyakwigendera azungurwa n'abana be ndetse n'abandi bavandimwe be nk'uko bigaragara mu rutonde ruteganyijwe mu ngingo ya 66 y'Itegeko Nº 22/99 ryo ku wa birebana n'umutungo 12/11/1999. Ku wasizwe na nyakwigendera umupfakazi afitemo 50%.

[30] Mu nyandiko zigize urubanza harimo icyemezo cy'ubushyingiranywe hagati ya Havugimana na Candari Verena cyatanzwe n'Ubuyobozi bw'Umurenge wa Kacyiru, icyo cyemezo kikaba kigaragaza ko basezeranye mu buryo bwemewe

n'amategeko, bakaba bari barahisemo uburyo bw'ivangamutungo risesuye mu micungire y'umutungo wabo.

Dosiye y'urubanza igaragaza ko Candari Verena na [31] Havugimana Céléstin babyaranye umwana umwe witwa Iradukunda Jean Luc, naho Havugimana Emmanuel na Mukamana Mamique, Havugimana Céléstin akaba yarabyaranye na Mwamini wapfuye mbere ye, hakiyongeraho Umuhoza Aïsha wemejwe n'Urukiko ko vabyawe na Havugimana Céléstin ku wundi mugore. Aba bana bose ababuranyi muri uru rubanza babemeranywaho ko ari aba Havugimana ndetse n'Urukiko Rukuru rukaba aruko rwabibonye mu rubanza Nº RCA0557/13/HC/KIG, ko n'imbere y'uru Rukiko nta muburanyi n'umwe wigeze ajurira avuga ko mu bana Urukiko Rukuru rwemeje ko bagomba kugabana umutungo wasizwe na Havugimana hari uwongewemo atabikwiye.

[32] Urukiko rurasanga ku bijyanye n'imitungo igomba kuzungurwa, hari Inzu iri ku Gisozi haruguru y'Urwibutso rwa Jenoside rwa Kigali, inzu iherereye mu Kiyovu cya Kagugu n'indi iherereye ku Gisozi hejuru y'Agakinjiro. Imodoka ivugwa mu rubanza yo bigaragara ko Candari Verena yaje kuyitsindirwa mu rubanza N° RCA0577/12/HC/KIG yaburanaga na Dusabemungu Aloys, rwemeje ko iriya modoka atari iye ahubwo ko ari iya Dusabemungu Aloys<sup>1</sup> ikaba igomba kuvanywa mu mitungo izungurwa ndetse n'abazungura ba Havugimana Célestin bakaba babyeranywaho<sup>2</sup> uretse Umuhoza Aïsha ariko nawe akaba atagaragaza ikindi cyakorwa.

<sup>&</sup>lt;sup>1</sup> Muri uru rubanza hemejwe ko Dusabemungu Aloys asubizwa imodoka ye Toyota Harrier ifite Plaque ya Congo n<sup>o</sup> 9880AA/19 ifitwe na Candari.

 $<sup>^2</sup>$ Reba inyandiko y'iburanisha ry'uru rubanza yo ku wa 03/03/2015 ku rupapuro rwa 5

[33] Ku birebana n'imitungo Candari Verena yagurishije kandi yari azi neza ko ayisangiye n'abana ba Havugimana, Urukiko rusanga ubwo bugure bwakozwe mu buryo bunyuranyije n'amategeko nta gaciro bufite hashingiwe ku ngingo ya 263 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano kuko yagurishije ibitari ibye, ibyo kandi akabikora yirengagije ko iyo mitungo yari ikiburanywa ndetse n'Inkiko zabanje zaramaze kuyifataho ibyemezo.

[34] Urukiko rurasanga nk'uko Urukiko Rukuru rwabyemeje, rwemeranya n'ibisobanuro byatanzwe n'urwo rukiko, ko rero rushingiye ku ngingo zimaze kuvugwa mu gika kibanziriza iki, imitungo igizwe n'igipangu cy'amazu ari ku Gisozi haruguru y'Urwibutso rwa Jenoside rwa Kigali iri mu kibanza n° 2710, inzu iri ku Gisozi haruguru y'Agakinjiro iri mu kibanza, inzu iri mu Kiyovu cya Kagugu, igomba kugabanywa n'abazungura ba Havugimana Célestin, ½ kigahabwa Candari Verena nk'umugore basezeranye mu buryo bwemewe n'amategeko, icya ½ gisigaye kigabanywa hagati ya Havugimana Emmanuel, Mukamana Mamique, Umuhoza Aïsha na Iradukunda Jean Luc hashingiwe ku biteganywa n'ingingo ya 70, agace ka 7°, y'Itegeko n° 22/99 ryo ku wa 12/11/1999 ryavuzwe haruguru.

[35] Urukiko rurasanga kandi ibyo Candari Verena aburanisha by'uko hari imitungo yashatse Havugimana Célestin yarapfuye nta shingiro byahabwa, kuko kuba izungura ryarafunguwe Havugimana Célestin akimara gupfa nk'uko biteganywa n'ingingo ya 49 y'Itegeko n° 22/99 ryo ku wa 12/11/1999 ryavuzwe haruguru, ariko ntihabe "liquidation" y'umutungo wasizwe na nyakwigendera, kandi Candari Verena yaragombaga gucunga umutungo wose awucungira abazungura ba Havugimana Célestin nk'uko biteganywa n'ingingo ya 70, agace

ka mbere<sup>3</sup>, y'Itegeko N<sup>o</sup> 22/99 ryo ku wa 12/11/1999, byumvikana ko ibyo yaguze nyuma niyo byaba bihari uretse ko nta bimenyetso abitangira, bigomba gufatwa ko byakomotse mu nyungu zabyawe n'umutungo yari asangiye na Havugimana Célestin. Kuba asaba ko yabigumana ngo kuko ari umutungo we bwite bikaba byaba ukwikungahaza mu buryo budakurikije amategeko ( enrichissement sans cause).

Urukiko rurasanga na none imiburanire ya Candari [36] Verena y'uko abana be Dufatanye Trésor na Uwimana David yabyaranye na Bukuru Ananie bagomba kugabana imitungo yashakanye na Havugimana Célestin nta gaciro byahabwa kubera ko ntaho aba bana bahuriye na Havugimana Célestin bitewe nuko batababyaranye cyangwa ngo habe hari icyemezo byerekana ko yabagize abe ku bw'amategeko (adoption). Byongeye kandi mu masezerano y'icungamutungo Candari Verena yagiranye na Havugimana Célestin basezerana imbere y'amategeko, nta "réserve" (umwihariko) bigeze bashyira ku bijyanye n'umutungo w'abana avuga ko yavanye ku mugabo we Bukuru Ananie, bityo ngo Urukiko rube rwabiheraho rwemeza ko uwo mutungo ariwo ugomba guherera kuri abo bana, ko rero hashingiwe ku biteganywa n'ingingo ya 3 y'Iitegeko nº15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso n'itangwa ryabyo mu manza<sup>4</sup>, Candari atahabwa ibyo asaba kuko nta bimenyetso abitangira.

[37] N'ubwo inyandiko yo ku wa 02/09/2014 yakorewe imbere ya Notaire, abayishyizeho umukono bakemeranywa uburyo bagabana umutungo wa Havugimana Célestin, Urukiko

80

<sup>&</sup>lt;sup>3</sup> iyo umwe apfuye, usigaye asigarana umutungo wose akubahiriza inshingano yo kurera abana no gufasha ababyeyi ba nyakwigendera iyo babikeneye.

<sup>&</sup>lt;sup>4</sup> Buri muburanyi agomba kugaragaza ukuri kw'ibyo aburana.

rusanga nta gaciro yahabwa kubera ko yakozwe hirengagijwe ibiteganywa n'ingingo ya 50 y'Itegeko y'itegeko n° 22/99 ryo kuwa 12/11/1999, kuko nkuko byasobanuwe mu gika kibanza, abana Dufatanye Trésor na Uwimana David, Candari Verena yabyaranye na Bukuru Ananie, bashyizwe mu mubare w'abagomba kuzungura Havugimana Céléstin kandi nta kigaragaza ko ari abe mu buryo buteganywa n'amategeko mbonezamubano. Ikindi ni uko muri iriya nyandiko, Umuhoza Aïsha wagobotse muri uru rubanza yibagiranye nk'umwe mu bana bemewe n'amategeko ba Havugimana Célestin, bityo n'abayikoze bakaba badashobora kuyitwaza nk'uko biteganywa n'ingingo ya 590<sup>5</sup> y'Igitabo cya gatatu cy'amategeko Mbonezamubano kuko yakozwe ku wa 02/09/2014 kandi Umuhoza Aïsha yaremejwe nk'umwana wa Havugimana Célestin ku wa 28/12/2012.

Urukiko rurasanga ku bijyanye n'amafaranga ya [38] "expropriation" y'umutungo wari ku Kimicanga, Umuhoza Aïsha avuga ko atahaweho uruhare rwe nta shingiro bifite, kubera ko mu Rukiko Rukuru hatanzwe inyandiko yakozwe ku wa 20/12/2013, ikorwa n'ababuranyi bose na Umuhoza Aïsha ahari, bemeranya amafaranga ababuranyi vavuve ko muri "expropriation" agabanwa hagati ya Candari Verena, Mukamana Mamique na Havugimana Emmanuel, icyo kibazo kikaba cyararangijwe n'ayo masezerano yo kwikiranura impande zose zagiranye, bityo akaba adashobora kugarukwaho muri uru rubanza nk'uko biteganywa n'ingingo ya 591 y'Igitabo cy'amategeko cyavuzwe haruguru.

<sup>&</sup>lt;sup>5</sup>Amasezerano yo kwikiranura akozwe n'umwe mu basangiye inyungu ntagomba kubahirizwa namba n'abandi basangiye nawe inyungu, kandi nabo ntabwo bashobora kuyitwaza.

#### Ku bijyanye n'ubujurire bwuririye ku bundi

[39] Me Nzabonimana John Peter mu bujurire bwuririye ku bundi, asabira Mukamana Mamique na Havugimana Emannuel, indishyi z'akababaro zingana na 5.000.000Frw kubera ko ari imfubyi ariko bakaba baravukijwe uburenganzira ku mutungo wabo kandi yarabasigiwe na nyakwigendera maze aho kubarera akabashora mu manza z'amaherere. Basaba kandi 1.000.000Frw y'igihembo cya Avoka na 500.000 Frw y'ikurikiranarubanza.

[40] Me Umutesi Jeanne d'Arc nawe ashingiye ku ngingo ya 167 y'Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryavuzwe haruguru, avuga ko Umuhoza Aïsha atanze ubujurire bwuririye ku bundi asaba Urukiko rw'Ikirenga gutegeka Candari Verena gutanga indishyi z'akababro n'iz'impozamarira zingana na 5.000.000 Frw kubera kumuvutsa uburenganzira ku mitungo ya Se no kumushora mu manza ku maherere, akamuha na 1.000.000Frw y'igihembo cya Avoka na 500.000Frw y'ikurikiranarubanza.

[41] Me Mbonyimpaye Elias mu mwanzuro we avuga ko Urukiko rukwiye kwemeza ko ubujurire bwa Candari Verena bufite ishingiro maze abarezwe akaba aribo bamuha indishyi z'akababaro zingana na 1.000.000Frw na 500.000Frw y'ikurikiranarubanza harimo n'igihembo cya Avoka.

# UKO URUKIKO RUBIBONA

[42] Urukiko rurasanga indishyi z'akababaro abaregwa muri uru rubanza basaba bazihabwa kubera ko Candari Verena yabaruhije bakaba bamaze igihe kirekire bafite ibibazo n'imibereho idakwiye kandi hari imitungo yasizwe n'umubyeyi wabo Havugimana Céléstin yashoboraga kubafasha gukemura ibibazo bimwe na bimwe. Mu bushibshozi bwarwo, Urukiko rugeneye Mukamana Mamique Havugimana Emannuel na 1.000.000Frw y'indishyi Umuhoza Aïsha, buri wese y'igihembo z'akababaro. 500.000Frw cva Avoka n'ikurikiranarubanza kuri Mukamana Mamique na Havugimana 500.000Frw y'igihembo Emannuel na cva Avoka n'ikurikiranarubanza kuri Umuhoza Aïsha.

## III. ICYEMEZO CY'URUKIKO

[43] Rwemeje ko ubujurire bwatanzwe na Candari Verena bufite ishingiro gusa ku birebana n'imodoka ikuwe mu mutungo ugomba kuzungurwa;

[44] Rwemeye kwakira ubujurire bwuririye ku bundi bwatanzwe na Mukamana Mamique, Havugimana Emmanuel na Umuhoza Aïsha kandi rwemeje ko bufite ishingiro;

[45] Rwemeje ko imikirize y'urubanza n° RCA 0557/13/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 25/04/2014 ruhindutse gusa ku bijyanye n'imodoka ifite "plaque" n° 9880AA/19 igomba gukurwa mu mitungo igabanywa hagati y'abazungura ba Havugimana Célestin.

[46] Rwemeje ko abagomba kuzungura umutungo Havugimana Céléstin yashakanye na Candari Verena ari: Mukamana Mamique, Havugimana Emmanuel, Umuhoza Aïsha na Iradukunda Jean Luc;

[47] Rutegetse Candari Verena guha Mukamana Mamique, Havugimana Emmanuel na Umuhoza Aïsha buri wese 1.000.000Frw y'indishyi z'akababaro, agaha Mukamana Mamique na Havugimana Emmanuel 500.000Frw y'ikurikiranarubanza n'igihembo cya Avoka, Umuhoza Aïsha nawe akamuha 500.000Frw y'ikurikiranarubanza n'igihembo cya Avoka, yose hamwe akaba 4.000.000Frw.

[48] Rutegetse Candari Verena kwishyura amagarama y'urubanza angana na 100.000Frw.

## NIYIGENA v. NYIRISHEMA

#### [Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RC 00010/2017/SC (Hatangimbabazi, P.J., Ngagi na Kanyange, J.) 12 Mutarama 2018]

Amategeko agenga ubutaka – Umutungo utimukanwa – Inkomoko y'umutungo utimukanwa – Amasezerano y'ubugure – Amasezerano y'ubugure ubwayo gusa ntahagije gushingirwaho hemezwa ko umuntu ari nyiri umutungo utimukanwa ahubwo hagomba n'ukugaragazwa ko uwo awukomoraho nawe yari nyirawo ntibihagije kuvuga ko umuntu ari nyir'umutungo utimukanwa hashingiwe ku masezerano y'ubugure, hagomba no kugaragazwa ibimenyetso by'uko uwo awukomoraho nawe yari nyirawo.

**Incamake y'ikibazo:** Niyigena yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge arega Nyirishema Hodari kuba yarabohoje inzu ya se Ahishakiye Musafiri, uyu nawe akavuga ko yayiguze na Maso Tharcisse. Urwo rukiko, rwaciye urubanza, rwemeza ko inzu ari iya Niyigena kuko ayikomora kuri Se Ahishakiye Musafiri, bityo Nyirishema akaba agomba kuyivamo, rumutegeka nukumuha indishyi zitandukanye,

Nyirishema ntiyishimiye imikirize y'urwo rubanza, arujuririra mu Rukiko Rukuru, urwo Rukiko rusanga nta bimenyetso Niyigena yagaragaje by'uko inzu iburanwa ari iya Se cyangwa ko Nyirishema yayibohoje, rwemeza ko urubanza rwajuririwe ruhindutse kuri byose, runategeka ko Niyigena amuha indishyi z'igihembo cy'Avoka Niyigena Marlène ntiyishimiye imikirize y'urubanza, yandikira Urwego rw'Umuvunyi asaba ko rwasubirwamo ku mpamvu z'akarengane, nyuma yo gusuzuma urwo rubanza, Urwego rw'Umuvunyi rwandikiye Perezida w'Urukiko rw'Ikirenga rusaba ko urwo rubanza rusubirwamo ku mpamvu z'akarengane. Ashingiye kuri raporo y'Ubugenzuzi Bukuru bw'Inkiko, Perezida w'Urukiko rw'Ikirenga, yemeje ko urwo rubanza rwongera kuburanishwa.

Mwiburanisha mu Rukiko rw'Ikirenga, Niyigena aburana avuga ko inzu ari iya Ahishakiye Musafiri ibohozwa na Maso Tharcisse akayisigira Nyirishema Hodari n'inyandiko zatanzwe n'ubuyobozi zigaragaza ko Nyirishema Hodari yasigiwe iyo nzu na Maso Tharcisse wari warayibohoje, asaba ko yahabwa indishyi zitandukanye.

Nyirishema avuga ko nta karengane Niyigena Marlène yakorewe kubera ko nta nkomoko yumvikana y'inzu iburanwa yagaragaje, asaba ko yagenerwa indishyi zo gushorwa mu manza ku maherere.

Mu rwego rwo kumenya ukuri ku nzu iburanwa, Urukiko rw'Ikirenga rwabajije abatangabuhamya banyuranye, harimo abasinye ku masezerano y'ubugure hagati ya Nyirishema Hodari na Maso Tharcisse, n'abandi bafite icyo bazi ku nzu iburanwa: Uwimana Philippe, yavuze ko ari we wubatse inzu iburanwa mu mwaka wa 1981, mu kibanza yahawe na Nkundabagenzi Abdallah wamufataga nk'umwana we, ko yabaye muri iyo nzu kugeza mu mwaka wa 1988 ubwo yayigurishaga Ahishakiye Musafiri. Murari François nawe yavuze ko inzu iburanwa yubatswe na Uwimana Philippe mu kibanza yahawe na Nkundabagenzi Abdallah, nyuma ayigurisha Ahishakiye Musafiri, ko Maso Tharcisse yayibohoje, nyuma asubira ku ivuko kubera uburwayi ayisigira Nyirishema Hodari wari inshuti ye akaba n'uw'iwabo. Mukanyindo Clotilde avuga ko yashakanye na Ngaboyayezu Tharcisse (bitaga Maso) mu mwaka wa 1995, babana mu nzu iburanwa ariko akamubwira ko atari iye, ko igihe cyose nyirayo ashobora kuza akayimwaka. Yasobanuye ko hageze igihe umugabo we ashaka gusubira iwabo, iyo nzu ayisigira Nyirishema Hodari wari inshuti ye kandi bakomoka mu Karere kamwe, ko kandi atahamya ko yasinyiye kuyigurisha kuko itari iyabo.

Naho witwa Dusengimana Perijine, avuga ko Nyirishema Hodari yamubwiye ko yabonye inzu yo kugura amusaba kumuherekeza, amubera umugabo, ko kandi bari bazi ko ari iya Maso Tharcisse kuko ari we wayibagamo. Uwamariya Immaculée, yasobanuye ko nyuma ya Jenoside yakorewe Abatutsi, Ngaboyayezu Tharcisse (Maso) yabaye iwe, ko umusaza witwa Rubagumya Georges yamurangiye inzu iburanwa, amubwira ko idafite inkurikizi za vuba, Ngaboyayezu Tharcisse arayitunganya anayishakiramo umugore, ariko nyuma aza kurwara yiyemeza gusubira iwabo ayisigira Nyirishema Hodari.

Kuri ubwo buhamya bwatanzwe, Niyigena Marlène avuga ko ubwa Uwimana Philippe, Murari François, Uwimana Immaculée na Mukanyindo Clotilde bushimangira ko inzu iburanwa yari yarabohojwe na Maso Tharcisse akaza kuyisigira Nyirishema Hodari. Asaba Urukiko ko rwakwemeza ko inzu ari iye bitewe n'uko ari we ugaragaza inkomoko yayo.

Naho Nyirishema avuga ko Mukanyindo wari umugore wa Maso Tharcisse, wanasinye ku masezerano y'ubugure, uyu munsi uvuga ko bari barabohoje icyo agamije nu gutesha agaciro ayo masezerano, kugira ngo ayisubirane abinyujije ku bandi avuga ko aribo ba nyirayo. Asoza avuga ko ibyo kuvuga ko Maso Tharcisse yavuze ko inzu itari iye, ari ibyo bamuvugira kuko atakiriho, akaba atari kujya asana inzu azi neza ko atari iye, ko rero Urukiko rutashingira ku magambo gusa mu gihe hari inyandiko y'amasezerano y'ubugure.

Incamake y'icyemezo: Amasezerano y'ubugure ubwayo gusa ntahagije gushingirwaho hemezwa ko umuntu ari nyiri umutungo utimukanwa ahubwo hagomba n'ukugaragazwa ko uwo awukomoraho nawe yari nyirawo. Bityo, kuba Nyirishema Hodari inkomoko y'inzu ayishingira ku bugure bwayo na Ngaboyayezu ariko ntagaragaze niba uwamugurishije yari iye, ubwo bugure nta gaciro bugomba guhabwa kuko uwagurishijeyaba yaragurishije ibitari ibye, inzu ikaba igomba kwegurirwa Niyigena kuko niwe ugaragaza ko ayikomora kuri se.

## Ikirego gisubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro.

#### Amategeko yashingiweho:

- Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 3, igika cya mbere, n'iya 65.
- Itegeko ryo ku wa 30 Nyakanga 1888 rishyiraho igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano: ibyerekeye imirimo nshinganwa cyangwa amasezerano (Ryakuweho n'itegeko n'Itegeko n° 020/2019 ryo kuwa 22/08/2019 rikuraho amategeko yose yashyizweho mbere y'itariki y'ubwigenge)

#### Nta manza zifashishijwe.

Inyandiko z'abahanga :

François Terré et Philippe Simler, Droit civil, Les Biens, Dalloz, 7<sup>ème</sup> éditional, p. 418.

### Urubanza

## I. IMITERERE Y'URUBANZA

[1] Niyigena Marlène yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge arega Nyirishema Hodari ko yabohoje inzu ya Se Ahishakiye Musafiri, iri mu Mudugudu wa Ramiro, Akagari ka Karambo, Umurenge wa Gatenga mu Mujyi wa Kigali, Nyirishema Hodari we akavuga ko yayiguze ku wa 15/06/1997 na Maso Tharcisse.

[2] Urwo Rukiko rwaciye urubanza n<sup>o</sup> RC 0025/12/TGI/NYGE ku wa 29/06/2012, rwemeza ko inzu ari iya Niyigena Marlène kuko ayikomora kuri Se Ahishakiye Musafiri, Nyirishema Hodari akaba agomba kuyivamo, runamutegeka kumuha 1.000.000 Frw y'indishyi mbonezamusaruro, ikurikiranarubanza n'igihembo cy'Avoka.

[3] Nyirishema Hodari yajuririye mu Rukiko Rukuru, ruca urubanza n° RCA 0433/12/HC ku wa 24/01/2014, rusanga nta bimenyetso Niyigena Marlène yagaragaje by'uko inzu iburanwa ari iya Se Ahishakiye Musafiri, bikaba bitanavugwa ko Nyirishema Hodari yayibohoje, rwemeza ko urubanza rwajuririwe ruhindutse kuri byose, inzu igasubira mu maboko ya Nyirishema Hodari. Rwategetse kandi NiyigenaMarlène kumuha 2.000.000 Frw akubiyemo indishyi n'igihembo cy'Avoka.

[4] Niyigena Marlène yatanze ikirego ku Rwego rw'Umuvunyi asaba ko urubanza n<sup>o</sup> RCA 0433/12/HC/KIG rwasubirwamo ku mpamvu z'akarengane, Umuvunyi Mukuru yandikira Perezida w'Urukiko rw'Ikirenga asaba ko urwo rubanza rusubirwamo ku mpamvu z'akarengane.

[5] Urubanza rwaburanishijwe mu ruhame ku wa 14/11/2017, Niyigena Marlène ahagarariwe na Me Gahutu Joseph, naho Nyirishema Hodari ahagarariwe na Me Bimenyimana Emmanuel, rwongera kuburanishwa ku wa 13/12/2017 humvwa abatangabuhamya nk'uko byari byemejwe n'Urukiko mu iburanisha rya mbere, uwo munsi ababuranyi baburana bahagarariwe nka mbere.

## II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO

## Kumenya niba inzu iburanwa ari iya Niyigena Marlène akomora kuri Se Ahishakiye Musafiri.

[6] Me Gahutu Joseph avuga ko mu kwemeza ko inzu iburanwa ari iya Niyigena Marlène, Urukiko Rwisumbuye rwa Nyarugenge rwabishingiye ku buhamya bwa Murari François wavuze ko yari iya Ahishakiye Musafiri kuva mbere ya 1994, ko yabohojwe na Maso Tharcisse waje kurwara akajya iwabo, akayisigira Nyirishema Hodari. Rwanashingiye ku nyandiko zatanzwe n'ubuyobozi zigaragaza ko Nyirishema Hodari yasigiwe iyo nzu na Maso Tharcisse wari warayibohoje.

[7] Avuga kandi ko ubwo buhamya bushimangirwa n'ubwa Uwimana Philippe uvuga ko ari we wiyubakiye inzu iburanwa, akayigurisha Ahishakiye Musafiri, ko no mu Rukiko Rukuru,

90

Mukanyindo Clotilde wari warashakanye na Maso Tharcisse, yasobanuye ko babaye muri iyo nzu bazi ko ari imbohozanyo. Akomeza avuga ko mu nyandiko zatanzwe n'Ubuyobozi bw'inzego z'ibanze, cyane cyane iyo ku wa 01/12/2009, Nyirishema Hodari yivugiye ko ku wa 30/12/2009 aribwo azatanga inzu iburanwa n'ibyangombwa byayo, bivuze ko nawe yemeraga ko atari iye.

[8] Na none kandi, ngo kuba uwo baburana avuga ko umutungo Niyigena Marlène yasabye kuzungura ari uwo mu Rugunga, ntibyabuza ko aburana inzu yo mu Gatenga kuko yemerewe kuzungura imitungo y'umubyeyi we aho yaba iri hose. Asanga rero Urukiko rugomba kwemeza ko inzu ari iye bitewe n'uko ari we ugaragaza inkomoko yayo kuko ari iya Se Ahishakiye Musafiri, nawe uyikomora kuri Uwimana Philippe, wayubatse mu kibanza yahawe na Nkundabagenzi Abdallah, ko rero amasezerano Nyirishema Hodari ashingiraho avuga ko yayiguze, nta gaciro agomba guhabwa kuko yayakoranye n'utari nyiri umutungo, akaba yateshwa agaciro hashingiwe ku biteganywa n'ingingo ya 276 CCLIII.

[9] Uburanira Nyirishema Hodari avuga ko nta karengane Niyigena Marlène yakorewe kubera ko nta nkomoko yumvikana y'inzu iburanwa yagaragaje, ko ahubwo ibimenyetso batanze bigaragaza ko Ahishakiye Musafiri atigeze atunga inzu mu Kagari ka Karambo.

[10] Akomeza avuga ko n'ubwo batagamije kuvuga ko habayeho ubuzime bwo gukurikirana iyo nzu (prescription acquisitive), ariko bibaza impamvu nyina wa Niyigena Marlène, utarigeze uva mu gihugu, yatanze ikirego kirebana n'imitungo yo mu Rugunga, naho inzu iburanwa ikaregerwa nyuma y'imyaka 16, ko nubwo haba hari impamvu zatumye adakurikirana iyo nzu, ntacyari kubuza mushiki wa Ahishakiye Musafiri witwa Ahishakiye M.Rose, kuyikurikirana, cyane cyane ko yatanze ubuhamya mu rubanza n° RC 0224/08/TB/NYMBO avuga ko Niyigena Marlène yabyawe na musaza we, ko ahubwo ibyo bishimangira ko imitungo ya Ahishakiye Musafiri ari iyo mu Biryogo aho yabanaga na nyina wa Niyigena Marlène, kuko no mu rubanza yaburanye asabira umwana we kuzungura imitungo ya Se, yavuze ko iyo mitungo iri mu Rugunga, akaba ataravuze ko hari imitungo iri mu Gatenga.

[11] Akomeza avuga ko Mukanyindo Clotilde wari umugore wa Maso Tharcisse, wanasinye ku masezerano y'ubugure yo ku wa 15/06/1997, uyu munsi avuga ko bari barabohoje iyo nzu mu rwego rwo gushaka gutesha agaciro ayo masezerano, agamije kuyisubirana abinyujije ku bandi avuga ko aribo ba nyirayo.

[12] Avuga kandi ko nubwo uwo baburana avuga ko inzu iburanwa yubatswe na Uwimana Philippe akayigurisha Ahishakiye Musafiri, nta muntu wo mu Karambo wemeza ko ahamuzi, ndetse na Murari François washingiweho n'Urukiko Rwisumbuye rwa Nyarugenge nk'umuntu wahatuye mbere ya 1994, ubuhamya bwe buvuguruzwa n'ikimenyetso batanze (kuri cote ya 15) kigaragaza ko yaje kuhatura nyuma ya 1994 avuye mu Bugesera. Byongeye kandi, mu buhamya yatanze muri urwo Rukiko, yavuze ko Ahishakiye Musafiri ari we wubatse inzu iburanwa, mu gihe Uwimana Philippe avuga ko ari we wayigurishije Ahishakiye Musafiri, hakaba hakwibazwa uwayubatse hagati y'abo bombi.

[13] Ku birebana n'uko Nyirishema Hodari yemeye ko azatanga inzu n'ibyangombwa byayo ku wa 30/12/2009, umuburanira avuga ko uwo baburana avugisha inyandiko yo ku wa 01/12/2009 ibyo itavuga, ko ahubwo icyo yemeye ari uko

92 \_

azatanga ibyangombwa cyangwa inzu, ariko ibimenyetso, akaba yarerekanye ibyo byangombwa bigizwe n'amasezerano y'ubugure hamwe n'icyangombwa cy'umutungo bimuhesha uburenganzira ku nzu yaguze na Maso Tharcisse wari uyituyemo, akaba kandi afatwa nka nyirayo kuko ari we uwaguze yayisanzemo, ko kandi ibivugwa n'uwo baburana by'uko Maso Tharcisse yasigiye iyo nzu Nyirishema Hodari mu rwego rw''ubukode, bitahabwa agaciro kuko nta masezerano y''ubwo bukode yagaragajwe.

[14] Nk'uko byavuzwe haruguru, mu rwego rwo kumenya ukuri ku nzu iburanwa, habajijwe abatangabuhamya banyuranye, harimo abasinye ku masezerano y'ubugure hagati ya Nyirishema Hodari na Maso Tharcisse, n'abandi bafite icyo bazi ku nzu iburanwa.

[15] Mu buhamya bwatanzwe na Uwimana Philippe, yavuze ko ari we wubatse inzu iburanwa mu mwaka wa 1981, mu kibanza yahawe na Nkundabagenzi Abdallah wamufataga nk'umwana we, ko yabaye muri iyo nzu kugeza mu mwaka wa 1988 ubwo yayigurishaga Ahishakiye Musafiri.

[16] Murari François nawe yavuze ko inzu iburanwa yubatswe na Uwimana Philippe mu kibanza yahawe na Nkundabagenzi Abdallah, nyuma ayigurisha Ahishakiye Musafiri, ko Maso Tharcisse yayibohoje, nyuma asubira ku ivuko kubera uburwayi ayisigira Nyirishema Hodari wari inshuti ye akaba n"uw"iwabo. Yasobanuye kandi ko yageze mu Karambo mu mwaka wa 1981 akodesha inzu ya Nkundabagenzi Abdallah, ko abavuga ko atahabaye bari bataraza kuhatura.

[17] Mukanyindo Clotilde nawe yabwiye Urukiko ko yashakanye na Ngaboyayezu Tharcisse (bitaga Maso) mu mwaka

wa 1995, babana mu nzu iburanwa ariko akamubwira ko atari iye, ko igihe cyose nyirayo ashobora kuza akayimwaka. Yasobanuye ko hageze igihe umugabo we ashaka gusubira iwabo, abanza gushaka gusigira iyo nzu abavandimwe be b'abasirikari kugira ngo nyirayo naza bazayimusubize, ariko bamubwira ko batabishobora kubera akazi bakoraga, ari nabwo yayisigiye Nyirishema Hodari wari inshuti ye kandi bakomoka mu Karere kamwe, amusaba 150.000 Frw yo kumufasha gusubira iwabo, undi amuha 60.000 Frw. Yakomeje asobanura ko nyuma y'igihe gito, umugabo we yitabye Imana, aza gusaba Nyirishema Hodari kumuha ku mafaranga yasigaye, amuhamo 10.000 Frw, agarutse aramwirukana amubwira ko ntacyo agomba kumwishyuza ngo kuko nabo inzu bari barayibohoje, ko kandi atahamya ko vasinyiye kuyigurisha kuko itari iyabo, cyane cyane ko ku masezerano handitseho Korotirida gusa, akibaza impamvu hatanditseho Mukanyindo, ko n'umukono uriho abona atari uwe.

[18] Umutangabuhamya witwa Dusengimana Perijine, nawe yabwiye Urukiko ko yakoranaga na Nyirishema Hodari akazi ko gutwara abantu (taximan), amubwira ko yabonye inzu yo kugura amusaba kumuherekeza, amubera umugabo, ko kandi bari bazi ko ari iya Maso Tharcisse kuko ari we wayibagamo.

[19] Hanabajijwe Uwamariya Immaculée, asobanura ko mu Karambo ahaba kuva mu mwaka wa 1991, ko nyuma ya Jenoside yakorewe Abatutsi, Ngaboyayezu Tharcisse (Maso) yabaye iwe kuko ava inda imwe n'umugabo we. Yakomeje asobanura ko umusaza witwa Rubagumya Georges yamurangiye inzu iburanwa, yakorerwagamo icyo gihe n'abantu babazaga, amubwira ko idafite inkurikizi za vuba, Ngaboyayezu Tharcisse arayitunganya anayishakiramo umugore, ariko nyuma aza kurwara yiyemeza gusubira iwabo. Avuga ko yamubwiye ko yasabye abavandimwe be kuyibasigira bakamwangira, ko ariko azayisigira Nyirishema Hodari, amubajije icyo bumvikanye kubyo yakoze kuri iyo nzu, amubwira ko azamuha 120.000 Frw cyangwa 150.000 Frw (ko atabyibuka neza), ariko aza kumubwira ko yamuhaye 60.000 Frw yonyine.

[20] Yakomeje asobanura ko Ngaboyayezu Tharcisse yaje kwitaba Imana, umugore we aza kwaka Nyirishema Hodari ku mafaranga yasigaye, amubwira ko yamuhaye 10.000 Frw, nyuma agarutse kumwaka andi aramwirukana amubwira ko inzu itari iyabo.

[21] Undi wagize icyo avuga ariko ntafatwe nk'umutangabuhamya kuko ari umugore wa Nyirishema Hodari, ni Umutesi Chantal, wavuze ko umugabo we yaguze inzu na Maso Tharcisse hari ubuyobozi, ko kandi iyo nzu yari iye kuko ari we wayibagamo akanayisana.

[22] Mujyambere Schadrack nawe yavuze ko Nyirishema Hodari yaguze inzu na Maso Tharcisse abibera umugabo, ko kandi bari bazi ko iyo nzu ari iye kuko bayimubonagamo.

[23] Kuri ubwo buhamya bwatanzwe, uburanira Niyigena Marlène avuga ko ubwa Uwimana Philippe, Murari François, Uwimana Immaculée na Mukanyindo Clotilde bushimangira ko inzu iburanwa yari yarabohojwe na Maso Tharcisse akaza kuyisigira Nyirishema Hodari wari inshuti ye, bivuze ko yari azi neza ko yari yarayibohoje, bikanashimangirwa n'ubuhamwa bwatanzwe<sup>1</sup> n<sup>c</sup>uwitwa Mutambuka Evariste, wavuze ko

<sup>&</sup>lt;sup>1</sup> Mu nama y'abaturage yakoreshejwe n'Umunyamabanga Nshingwabikorwa w'Umurenge wa Gatenga ku wa 07/09/2015.

Nyirishema Hodari yashatse kubaka urugo, uwari Responsable (witwa Gitenge) amubuza kubaka ku butaka butari ubwe.

[24] Uburanira Nyirishema Hodari avuga ko ubuhamya bwa Mukanyindo Clotilde bugaragaza ko afitiye urwango uwo aburanira, ariyo mpamvu ashaka gutesha agaciro amasezerano y'ubugure, ko kandi ibyo kuvuga ko Maso Tharcisse yavuze ko inzu itari iye, ari ibyo bamuvugira kuko atakiriho, akaba atari kujya asana inzu azi neza ko atari iye, ko rero Urukiko rutashingira ku magambo gusa mu gihe hari inyandiko y'amasezerano y'ubugure.

## **UKO URUKIKO RUBIBONA**

[25] Ingingo ya 3, igika cya mbere, 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". Ingingo ya 65 y'iryo Tegeko, iteganya ibikurikira: "Urukiko ni rwo rwonyine rupima ko imikirize y'abatangabuhamya ihuye n'ikiburanwa, ifite ingingo zikiranuye kandi ikaba ikwiye kwemerwa cyangwa guhakanwa. Ntirwitsitsa ku mubare w'abatangabuhamya. Rwita cyane cyane ku bumenyi bwabo bw'ibyabaye, no ku buryo babivuga uko byagenze nta cyo bihimbira".

[26] Nk'uko imiburanire y'impande ziburana ibigaragaza, ikimenyetso nyamukuru Nyirishema Hodari ashingiraho avuga ko inzu iburanwa ari iye, ni amasezerano y'ubugure yakoranye na Maso Tharcisse ku wa 15/06/1997, mu gihe NiyigenaMarlène avuga ko iyo nzu ari iya Se Ahishakiye Musafiri, Maso Tharcisse akaba yari yarayibohoje, nyuma yo gusubira iwabo akayisigira Nyirishema Hodari.

[27] Urukiko rurasanga ariko nubwo Nyirishema Hodari agaragaza ko yaguze inzu iburanwa na Maso Tharcisse (ari we Ngaboyayezu), ubwabyo bidahagije kwemeza ko ari nyiri umutungo, kuko hagombye kugaragazwa ibimenyetso by'inkomoko yawo nk'uko binemezwa n'abahanga mu mategeko François Terré et Philippe Simler, bavuga ko inyandiko zirimo n'ubugure, ubwazo zidahagije kugaragaza ko umuntu ari nyiri umutungo utimukanwa, ko agomba kugaragaza ko uwo awukomoraho nawe yari nyirawo<sup>2</sup>.

[28] birebana n'inkomoko Ku y'inzu iburanwa. abatangabuhamya Murari François, Mukanyindo Clotilde na Uwamariya Immaculée, bahuriza ku mvugo y'uko inzu iburanwa itari iya Ngaboyayezu Tharcisse (Maso), ko yari yarayibohoje nyuma ya Jenoside yakorewe Abatutsi mu mwaka wa 1994, kandi nta mpamvu yatuma ubwo buhamya budahabwa agaciro kuko ababutanze bagaragaza ko bazi iby'iyo nzu, cyane cyane ko Murari François avuga ko yari Umuyobozi mu gace iyo nzu yubatsemo (yari responsable), akaba rero atayoberwa iby'ayo, Uwamariya Immaculée nawe akaba atabiyoberwa kuko ahaturiye kandi akaba azi Ngaboyayezu Tharcisse (Maso) nk'uko

<sup>&</sup>lt;sup>2</sup> Lorsque le demandeur est en mesure de faire état de titre de propriété, c'està-dire d'actes juridiques d'acquisition (achat, échange, donation, testament...), ceux-ci ne sont pas invoqués en tant que conventions translatives du droit. Ils ne permettent pas, en effet, d'établir avec une absolue certitude la régularité du transfert. En prouvant par un titre que l'on a acquis tel immeuble, on ne prouve pas irréfutablement que l'on en est devenu propriétaire. On n'a pu le devenir que si le cédant ou disposant avait lui-même cette qualité. Et il ne suffit pas de fournir le titre en vertu duquel ce dernier est devenu propriétaire, car il faudra démontrer que son propre auteur l'était déjà, et ainsi de suite : François Terré et Philippe Simler, Droit civil, Les Biens, Dalloz, 7e edition, P.418

yabisobanuye, naho Mukanyindo Clotilde akaba yarayibanyemo n'umugabo we Ngaboyayezu Tharcisse (Maso).

[29] Usibye ibyemejwe n'abatangabuhamya bamaze kuvugwa by'uko inzu yari yarabohojwe na Ngaboyayezu Tharcisse (Maso), hari n'ubuhamya bwa Uwimana Philippe uvuga ko ari we wayubatse mu kibanza yahawe na Nkundabagenzi Abdallah, ibyo kandi bikaba byaranemejwe na Murari François. Iby'uko ari we wubatse iyo nzu, Uwimana Philippe yanabivugiye mu nama yakoreshejwe n'Umunyamabanga v'abaturage Nshingwabikorwa w'Umurenge wa Gatenga ku wa 07/09/2015, bikaba bigaragara ko nta muturage wabivuguruje, ahubwo byashimangiwe n'abandi bari muri iyo nama barimo Simbayobewe Elisé, wavuze ko atuye aho inzu iburanwa iherereye kuva mu mwaka wa 1975, ko azi ko Uwimana Philippe ari we wayubatse mu kibanza yahawe na Abdallah, ko kandi iyo nzu yayigurishije Ahishakiye Musafiri.

[30] Muri iyo nama kandi, uwitwa Minani Emmanuel yavuze ko mu mwaka wa 1995, yakoreye mu nzu iburanwa akazi ko kubaza, nyuma uwari "Responsible" witwa Ngarambe ayiha Ngaboyayezu Tharcisse, ibyo kandi akaba yarabihurijeho na Nyirababirigi Annonciata nawe wari muri iyo nama.

[31] Urukiko rurasanga, kuba kuri Nyirishema Hodari, inkomoko y'inzu iburanwa ayishingira ku bugure bwayo na Ngaboyayezu Tharcisse (Maso), ariko ntagaragaze niba uwamugurishije yari iye, mu gihe ku rundi ruhande ubuhamya bwatanzwe n'abantu batandukanye bavuzwe haruguru, bwumvikanisha ko iyo nzu itari iya Ngaboyayezu Tharcisse (Maso), ko ahubwo yari yarayitijwe, kandi ubwo buhamya bukaba bugomba guhabwa agaciro kuko ababutanze bafite ibyo bahurizaho byinshi, ndetse na Nyirishema Hodari akaba atagaragaza impamvu yatuma budashingirwaho usibye kuri Mukanyindo Clotilde avuga ko amufitiye urwango ariko ntavuge impamvu yarwo mu gihe ibyo yavuze abihurizaho n'abandi.

[32] Ku birebana n'ubuhamya bwa Mujyambere Schadrack n'ubwa Dusengimana Perijine, Urukiko rurasanga bigaragara ko batazi inkomoko y'inzu iburanwa, kuko kuvuga gusa ko bari bazi ko ari iya Maso Tharcisse kuko bayimubonagamo cyangwa kuko yayibagamo, bitamugira nyirayo nk'uko byasobanuwe haruguru.

[33] Urukiko rurasanga rero, ubugure Nyirishema Hodari ashingiraho avuga ko inzu iburanwa ari iye, nta gaciro bugomba guhabwa kuko Ngaboyayezu Tharcisse (Maso) yaba yaragurishije ibitari ibye kandi Nyirishema Hodari abizi neza nk'uko na none byemezwa n'abatangabuhamya Uwamariya Immaculée na Mukanyindo Clotilde bavuze ko yayimusigiye nk'umuntu wari inshuti ye, hakaniyongeraho ko Uwimana Philippe yivugiye ko ari we wubatse iyo nzu, akayigurisha Ahishakiye Musafiri, kandi hakaba hari abatangabuhamya babyemeje.

[34] Hashingiwe ku byasobanuwe haruguru no ku ngingo ya 276 y'Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano (CCLIII) ivuga ko "Kugurisha ikintu cy'undi ari impfabusa; rishobora gutangirwa indishyi iyo umuguzi atigeze amenya ko icyo kintu ari icy'undi", Urukiko rurasanga ubugure bwabaye hagati ya Nyirishema Hodari na Ngaboyayezu Tharcisse (Maso) nta gaciro bufite, hakaba hagomba kwemezwa ko inzu iburanwa ari iya NIYIGENA Marlène kuko ari we ugaragaza ko ayikomora ku mubyeyi we Ahishakiye Musafiri.

#### Kumenya niba indishyi zasabwe na buri ruhande zatangwa

[35] Mu myanzuro y'uburanira NiyigenaMarlène, avuga ko Nyirishema Hodari yanze kumuha inzu iburanwa kandi azi neza ko ayikomora kuri Se, akaba yaramushoye mu manza bitari ngombwa, ahubwo yagombye kuba abyaza umusaruro iyo nzu, ko kubera izo mpamvu yategekwa kumuha 5.000.000 Frw akubiyemo indishyi z'akababaro, ikurikiranarubanza no gukomeza gushorwa mu manza, hamwe na 1.000.000 Frw y'igihembo cy'Avoka.

[36] Uburanira Nyirishema Hodari avuga ko indishyi NiyigenaMarlène asaba nta shingiro zaryo, ko ahubwo yategekwa guha uregwa 5.000.000 Frw yo gushorwa mu manza ku maherere.

## UKO URUKIKO RUBIBONA

[37] Urukiko rurasanga, mu ndishyi zingana na 5.000.000 Frw zikubiyemo NivigenaMarlène asaba iz"akababaro, ikurikiranarubanza no gushorwa mu manza, yagenerwa gusa 300.000 Frw y'ikurikiranarubanza agenwe mu bushishozi bw'Urukiko, kuko byumvikana ko kuva imanza zatangira hari amafaranga yagiye atanga mu kuzikurikirana, naho indishyi z'akababaro no gushorwa mu manza akaba atazigenerwa kuko atagaragaza ishingiro ryazo, akaba kandi yagenerwa amafaranga v'igihembo cy'Avoka kuko bigaragara ko mu nkiko yaburaniyemo kugeza mu Rukiko rw'Ikirenga, yari afite Avoka umuburanira, bityo ku nzego zose yaburaniyemo akaba vagenerwa 1.000.000 Frw, vose hamwe akaba 1.300.000 Frw.

[38] Ku birebana n'indishyi zisabwa na Nyirishema Hodari, Urukiko rurasanga atazigenerwa kuko atsinzwe n'urubanza nk'uko byasobanuwe haruguru.

## III. ICYEMEZO CY'URUKIKO

[39] Rwemeje ko ikirego cya NiyigenaMarlène cyo gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro;

[40] Rwemeje ko urubanza nº RCA 0433/12/HC rwaciwe n'Urukiko Rukuru ku wa 24/01/2014 ruhindutse;

[41] Rwemeje ko inzu iburanwa iri mu Mudugudu wa Ramiro, Akagari ka Karambo, Umurenge wa Gatenga mu Mujyi wa Kigali, ari iya NiyigenaMarlène;

[42] Rutegetse Nyirishema Hodari kuva muri iyo nzu;

[43] Rutegetse Nyirishema Hodari guha NiyigenaMarlène 1.300.000 Frw y'igihembo cy'Avoka n'ikurikiranarubanza;

[44] Rumutegetse kandi gutanga amagarama y'urubanza.

## IMANZA NSHINJACYAHA

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## UBUSHINJACYAHA v. NIYOMURAGIJE

## [Rwanda URUKIKO RW'UBUJURIRE – RPAA 00475/2018/CA (Kaliwabo, P.J.,) 17 Gicurasi 2019]

Amategeko agenga ibimenyetso – Ibimenyetso mu manza nshinjabyaha – Ukwivuguruza k'umuburanyi – Amakimbirane hagati y'uregwa n'uwakorewe icyaha – Ukwivuguruza k'umuburanyi si ikimenyetso gihagije kimushinja icyaha mu gihe nta bindi bimenyetso simusiga bikimushinja kuko adafite inshingano yo gutanga ibimenyetso bimushinja – Amakimbirane hagati y'uregwa n'uwakorewe icyaha ubwabyo si ikimemyetso kigaragaza ko uregwa yakoze icyaha ashinjwa.

Amategeko agenga ibimenyetso – Ibimenyetso mu manza nshinjabyaha – Ibimenyetso biziguye (les preuves indirectes) – Ibimenyetso biziguye (les preuves indirectes) bigira agaciro iyo isesengura ryabyo ryerekana ko nta wundi mwanzuro byageraho uretse ibikorwa bigize icyaha ushinjwa akurikiranyweho.

**Incamake y'ikibazo:** Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Ngoma, Ubushinjacyaha burega Niyomuragije icyaha cyo kwica umubyeyi we Uzamukunda hashingiwe ku kuba yaremeraga ko ariwe wamuvanye mu rugo avuga ko agiye kumugurira inzoga nyuma uyu mubyeyi akaza kuboneka yishwe. Ubushinjacyaha bwashingiye kandi ku mvugo z'abavandimwe ba Niyomuragije bahamije ko bari basanganywe amakimbirane kubera ubujura bwa Niyomuragije, ndetse bunashingira ku kuba ngo hari amaraso yabonetse ku myenda no ku mubiri w'uregwa. Urwo Rukiko rwemeje ko uregwa ahamwa n'icyaha cyo kwica umubyeyi we maze rumuhanisha igifungo cya burundu.

Uregwa ntiyishimiye imikirize y'urwo rubanza maze ajuririra Urukiko Rukuru, Urugereko rwa Rwamagana avuga ko nta ruhare yagize mu rupfu rw'umubyeyi we, ko ntacyo bari basanzwe bapfa kuko n'uwo munsi bari bagiye gusangira inzoga, ko abavandimwe bamushinja ibinyoma kugira ngo bazasigare bigabanira imitungo y'umuryango.

Urukiko Rukuru rwahamishijeho imikirize y'urubanza rwajuririwe hashingiwe ngo ku kuba uregwa atarashoboye kuvuguruza ibimenyetso byashingiwe ho mu Rukiko Rwisumbuye ndetse no kuba yaritangiye umutangabuhamya akamushinja mu mwanya wo kumushinjura, ubuhamya bwe bwibanze mu kugaragaza ko hari hasanzwe amakimbirane hagati y'uregwa n'umubyeyi we.

Niyomuragije yarongeye ajuririra Urukiko Rw'Ikirenga, Ubujurire bwe bwoherezwa mu Rukiko Rw'Ubujurire nyuma y'ivugurura ry'ububasha bw'Inkiko. Akaba yaragaragazaga ko Urukiko Rukuru rwirengagije ko yatashye mbere y'umubyeyi we kubera uburwayi bw'igicuri yari asanganywe, kandi ko nta kibazo yari asanzwe afitanye n'umubyeyi we kuko n'uwo munsi bari basangiye, yongeyeho ko amaraso bivugwa ko yamubonetseho bayitiranyije n'amakashi y'ibitoki yari ku ikabutura ye, ko Ubugenzacyaha bwayifatiriye umurambo utarashyingurwa ku buryo aya maraso yagombaga gupimishwa muri "laboratoire" yabugenewe kugira ngo asanishwe n'urupfu rwa Uzamukunda.

Ubushinjacyaha bwo buvuga ko ubuhamya bwatanzwe n'abavandimwe b'uregwa bugaragaza amakimbirane yari afitanye n'umubyeyi wabo Uzamukunda, ubwo buhamywa ngo

bunagaragaza kandi uburyo yatashye imyenda ye iriho amaraso. Ubushinjacyaha bwongeraho ko umutangabuhamya yahamije ko yabonye Niyomuragije agegena igiti cyabonetse hafi y'umurambo kiriho amaraso, bunavuga kandi ko, kuba amaraso atarapimwe bitavanaho ireme ry'ibindi bimenyetso byatanzwe.

**Incamake y'icyemezo:** 1. Amakimbirane hagati y'uregwa n'uwakorewe icyaha ubwabyo si ikimemyetso kigaragaza ko uregwa yakoze icyaha ashinzwa. Bityo Urukiko Rukuru ntirwagombye kuba rwarahagarariye ku mvugo irebana n'imibanire ngo ruyifate nk'ubuhamya bushinja nyamara nta gikorwa cyirebana n'ubwicanyi kirimo.

2. Ukwivuguruza k'umuburanyi si ikimenyetso gihagije kimushinja icyaha mu gihe nta bindi bimenyetso simusiga bikimushinja kuko adafite inshingano yo gutanga ibimenyetso bimushinja. Bityo imvugo ya Niyomuragije waranzwe no kwivuguruza ku birebana n'amaraso bivugwa ko yaba yarabonetse ku myenda ye no ku mubiri we, ntizishobora kuba ikimenyetso kimushinja ubwicanyi.

3. Ibimenyetso biziguye (les preuves indirectes) bigira agaciro iyo isesengura ryabyo ryerekana ko nta wundi mwanzuro byageraho uretse ibikorwa bigize icyaha ushinjwa akurikiranyweho.

Ubujurire bufite ishingiro; Imikirize y'urubanza rwajuririwe irahindutse; Amagarama y'urubanza aherereye ku isanduku ya Leta.

#### Amategeko yashingiweho:

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

#### Imanza zifashishijwe:

Prosecutor vs Ntagerura, ICTR-99-46-A' Judgment, 7 July 2006, par.306.

### Urubanza

## I. IMITERERE Y'URUBANZA

[1] Kuwa 01/01/2016 Niyomuragije Xavier wo mu Murenge wa Rubona yajyanye umubyeyi we Uzamukunda Vestine kwa Musabimana Eliane aho yamuguriye inzoga. Mu ijoro ryo kuwa 01/01/2016, mu gihe cya saa ine z'ijoro umurambo wa Uzamukunda wabonetse mu nzira ufite ibikomere, Niyomuragije afatwa akekwa ho kuba ariwe wamwishe akoresheje igiti cy'ingereveriya.

[2] Mu Rukiko Rwisumbuye rwa Ngoma mu rubanza RP 0069/16/TGI/NGOMA, Ubushinjacyaha bwareze Niyomuragije Xavier bushingiye ku kuba yemera ko ariwe wamuvanye mu rugo avuga ko agiye kumugurira inzoga nyuma uyu akaza kuboneka yishwe. Ubushinjacyaha bwashingiye kandi ku mvugo z'abavandimwe ba Niyomuragije aribo Nzeyimana Samuel, Umwali Anitha na Niyibizi Kevin bahamije ko aba bari basanganywe amakimbirane kubera ubujura bwa Niyomuragije, ko igiti cy'ingeriveriya cyabonetse hafi y'umurambo wa Uzamukunda cyari cyaciwe na Niyomuragije, ko hari amaraso

108

yabonetse ku myenda no ku mubiri wa Niyomuragije. Ubushinjacyaha bwashingiye kandi ku mvugo ya Musabimana Eliane wavuze ko nyuma yuko Uzamukunda na Niyomuragije basohotse iwe, uyu yaje kugaruka yahinduye umupira yari yambariye.

[3] Urukiko Rwisumbuye rwa Ngoma, rumaze gusuzuma imyiregurire y'ababuranyi, rwasanze ibimenyetso by'Ubushinjabyaha byavuzwe haruguru bifite ishingiro, kuwa 12/05/2016 ruca urubanza ruhamya Niyomuragije Xavier icyaha cyo kwica umubyeyi we Uzamukunda Vestine, rumuhanisha igifungo cya burundu.

[4] Niyomuragije Xavier yajuririye Urukiko Rukuru, Urugereko rwa Rwamagana avuga ko nta ruhare yagize mu rupfu rw'umubyeyi we, ko ntacyo bari basanzwe bapfa kuko n'uwo munsi bari bagiye gusangira inzoga, ko yamusize akinywa inzoga we agataha kare kubera uburwayi bw'igicuri asanganywe, ko yatabaranye n'abavandimwe be bahurujwe ko umubyeyi wabo yapfuye. Uyu yajuriye avuga kandi ko nta maraso yamubonetseho, ko abavandimwe bamushinja ibinyoma kugira ngo bazasigare bigabanira imitungo y'umuryango.

[5] Mu rubanza RPA 00174/2017/HC/RWG rwaciwe kuwa 27/02/2018 Urukiko Rukuru rwagumishijeho imikirize y'urubanza rujuririrwa rubishingiye ku kuba Niyomuragije Xavier atarashoboye kuvuguruza ibimenyetso byashingiwe ho mu rubanza rwaciwe n'Urukiko Rwisumbuye, ko kandi umutangabuhamya Nzeyimana Samuel watanzwe na Niyomuragije ariko mu ibazwa rye akamushinja mu mwanya wo kumushinjura (ubuhamya bwe bwibanze mukugaragaza ko hari hasanzwe amakimbirane hagati ya Niyomuragije na Uzamukunda).

[6] Niyomuragije Xavier yajuririye urwo rubanza mu Rukiko rw'Ikirenga, nyuma y'ivugurura ry'ububasha bw'Inkiko ikirego cye cyohererezwa Urukiko rw'Ubujurire hakurikijwe ingingo ya 52 n'iya 105 z'Itegeko No 30/2018 ryo kuwa 02/06/2018 rigena ububasha bw'inkiko.

[7] Mu mwanzuro w'ubujurire, Niyomuragije Xavier yavuze ko Urukiko Rukuru rwirengagije ko yatashye mbere y'umubyeyi we kubera uburwayi bw'igicuri yari asanganywe, ko nta kibazo yari asanzwe afitanye n'umubyeyi we kuko n'uwo munsi bari bagiye gusangira inzoga, ko yitiriwe igiti cyakoreshejwe mu kwica Uzamukunda kandi nta muntu wakimubonanye. Mu miburanire ye, Niyomuragije Xavier yunganiwe na Me Nyirabasinga Helene yagarutse ku maraso bivugwa ko yamubonetseho avuga ko abeshyerwa kuko ngo bayitiranya n'amakashi y'ibitoki yari ku ikabutura ye, ko nta perereza ryakozwe ngo amaraso avugwa apimwe ndetse asanishwe n'aya Uzamukunda wishwe.

Ubushinjacyaha bwo buvuga ko ubuhamya bwatanzwe [8] Niyomuragije n'abavandimwe ba Xavier bugaragaza amakimbirane yari afitanye na Uzamukunda Vestine, n'uburyo yatashye imyenda ye iriho amaraso, ko kandi Musabimana Eliane yahamije ko Niyomuragije yatahanye na Uzamukunda akaza kugaruka yahinduye umupira, ko Niyibizi Kevin yabonye Niyomuragije agegena igiti cy'ingeriveriya ari nacyo cyabonetse hafi y'umurambo kiriho amaraso. Ubushinjacyaha buvuga kandi ko, kuba amaraso atarapimwe bitavanaho ireme ry'ibindi bimenyetso byatanzwe, ko kurwara igicuri bitagize impamvu ivanaho Niyomuragije icyaha ashinjwa.

[9] Urukiko rwifuje kumva abatangabuhamya muri uru rubanza, aribo Nzeyimana Samuel, Niyibizi Kevin, Umwali Anitha na Musabimana Eliane, bose ntibarwitaba.

[10] Muri uru rubanza harasesengurwa ireme ry'ikimenyetso gihamya amakimbirane yari hagati ya Niyomuragije na Uzamukunda, icy'amaraso yaba yarabonetse kuri Niyomuragije, inkomoko y'igiti cyakoreshejwe mu kwica Uzamukunda no kumenya iby'uburwayi bw'igicuri Niyomuragije avuga ko byatumye ataha mbere ya Uzamukunda.

## II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

#### A. Ku birebana n'amakimbirane hagati ya Niyomuragije Xavier na Uzamukunda Vestine

[11] Niyomuragije Xavier yunganiwe na Me Nyirabasinga Helene yaburanye avuga ko, kubera inyungu yo kumuheza muri gereza no kwikubira umutungo w'umuryango, abavandimwe be bagambanye kumushinja amakimbirane yaba yari hagati ye na Uzamukunda, nyamara ko nta kibazo yari afitanye n'umubyeyi we byatuma amwica, ko we n'umubyeyi we bakundaga gusangira inzoga kandi ko no ku munsi apfa bari basangiye inzoga kwa Musabimana Eliane, bityo ko iki kitagize ikimenyetso kimushinja urupfu rwa Uzamukunda.

[12] Ubushinjacyaha buhagarariwe na PN Niyonzima Vincent buvuga ko amakimbirane yari hagati ya Uzamukunda na Niyomuragije uyu ayashinjwa n'umuvandimwe we Nzeyimana Samuel yari yitangiye nk'umutangabuhamya umushinjura, ko umubyeyi we yamuzizaga ingeso yo kwiba kandi ibi ngo na raporo y'inzego z'ibanze ikaba yarabigaragaje.

### **UKO URUKIKO RUBIBONA**

[13] Urukiko rurasanga, ingingo ikomeye Urukiko Rukuru rwashingiyeho ruca urubanza RPA 00174/2017/HC/RWG ari imvugo ya Nzeyimana Samuel wagaragaje ko Uzamukunda yacyahaga Niyomuragije amuziza ubujura bwe, ko uvu vamwishe ashaka kumwikiza, ko we (Nzeyimana) nta makimbirane afitanye n'abavandimwe be ku buryo atahangara kubeshyera murumuna we, ngo n'isambu y'umuryango yagurishije yayiguzemo indi nayo akayandika ku muryango; Urukiko rukaba rwarabibonyemo ikimenyetso cy'umutangabuhamya ushinja Niyomuragije yari kandi yamutanze ho nk'umutangabuhamya umushinjura.

Urukiko rurasanga, Urukiko Rukuru, Urugereko rwa [14] Rwamagana rwarananiwe gusobanura ikibazo nyamukuru kirebana n'ibimenyetso bishinja Niyomuragije urupfu rwa Uzamukunda Vestine ahubwo ikibazo rukimurira mu makimbirane hagati ya Uzamukunda na Niyomuragije. Urukiko rurasanga, Nzeyimana Samuel, unavuga ko adatuye mu Murenge umwe na Uzamukunda kandi atari ahari ku munsi umubyeyi wabo yicwa, ubuhamya bwe bwibanda ku mibanire yari hagati ya Niyomuragije na Uzamukunda yerekana ko batari babanye neza, akavuga n'uburyo we nta kibazo afitanye n'umuryango. Iyi mvugo igaruka ku mibanire (nayo idafitiwe gihamya) ntabwo ubwayo yaba ikimenyetso gishinja Niyomuragije urupfu rwa Uzamukunda. Kuba inshuti cyangwa umwanzi w'umuntu byaba impamvu yo gukora cyangwa kudakora icyaha ariko si cyo kimenyetso gishinja umuntu icyaha. Urukiko Rukuru

ntirwagombye guhagararira kuri iyi mvugo irebana n'imibanire ngo ruyifate ho nk'umutangabuhamya watanzwe na NIYOMURAGIJE akaba amushinja, nyamara nta gikorwa na kimwe kirebana n'ubwicanyi Nzeyimana amushinja kuko ubwe yivugira ko adatuye mu murenge umwe n'ahabereye icyaha.

[15] Urukiko rurasanga kandi Urukiko Rukuru rwaraciye urubanza rudasobanuye impamvu rushingiyeho aho mu mvugo yarwo iri rusange iboneka mu gika cya 12 cya kopi y'urubanza RPA 00174/2017/HC/RWG, rugira ruti "Niyomuragije ntiyashoboye kuvuguruza ibimenyetso byashingiweho mu guca urubanza rujuririrwa", nyamara uyu anenga ubuhamya yatangiwe ndetse agahakana n'amaraso bivugwa ko yamubonetseho. Urukiko rwagombye kugaragaza ireme ruvuga ko riri mu bimenyetso ushinjwa anenga.

#### B. Ku birebana n'amaraso bivugwa ko yabonetse kuri Niyomuragije no ku giti cyabonetse hafi y'umurambo.

[16] Niyomuragije yunganiwe na Me Nyirabasinga yajuriye avuga ko amaraso yitirirwa ko yari ku myenda yari yambaye ari ukwitiranya amakashi y'ibitoki n'ibizinga bijyanye n'imirimo yakoraga harimo n'ibiraka yahabwaga ku ibagiro, ko ntamaraso yamubonetseho. Niyomuragije avuga ko yatashye asanga Umwali ahishije bagasangira ariko ko nta muntu wigeze amubaza amaraso yaba yari ku myenda ye, kandi ko nta n'imyenda yinitse mu mazi. Me Nyirabasinga umwunganira aburana avuga ko Ubugenzacyaha buvuga ko bwafatiriye ikabutura bivugwa ko yariho amaraso kandi ko bayifatiriye umurambo utarashyingurwa ku buryo aya maraso yagombaga gupimishwa muri "laboratoire" yabugenewe kugira ngo asanishwe n'urupfu rwa Uzamukunda. [17] Me Nyirabasinga akomeza avuga ko bitumvikana uburyo Musabimana wacuruzaga inzoga yaba yarakurikiranye kugira ngo amenye ko Niyomuragije agarutse mu kabare yahinduye imyenda, ko ikimenyetso kamarampaka cyari ugupima amaraso abonetse, kutabikora kukaba gutera ugushidikanya kurengera ushinjwa.

[18] Ubushinjcyaha bwaburanye buvuga ko kuba amaraso atarapimwe bidashobora gusimbura ibindi bimenyetso birimo n'imvugo za Niyomuragije ubwe wemeye ko amaraso yamubonetseho yatewe n'uko yabaye mu bambere batabaye ndetse ko n'ikabutura ye yayihanaguje amaguru, nyamara ngo ibi byose bikaba ari ibinyoma kuko yageze aho umurambo wari uri nta maraso akiva.

[19] Ubushinjacyaha buvuga kandi ko Niyomuragije wahakanye ko atigeze agaruka mu kabare hari ahandi yemeye ko yagarutse aje gufata inzoga bagombaga kunywera mu rugo, bityo ko ibyo Musabimana Eliane avuga bifite ishingiro kuko vamubonye koko. Bukomeza buvuga ko nta nyungu abavandimwe ba Niyomuragije bafite mu kumushinja. Ubushinjacyaha busobanura kandi ko imvugo ya Niyomuragije yuko amaraso bivugwa ko yabonetse ku ikabutura ye ari amavuta y'ingurube, iyi mvugo yavugurujwe na mushiki we Umwali Anitha wasobanuye ko amavuta y'ingurube Niyomuragije yayazanye muri "sachet" iri mu gafuka ku buryo atigeze ameneka ku myenda ye.

## UKO URUKIKO RUBIBONA

[20] Urukiko rurasanga ikimenyetso cy'amaraso avugwa ko yaba yarabonetse ku mubiri no ku myenda ya Niyomuragije

114

aricyo kimenyetso cyakabaye gihatse ibindi muri iyi dosiye nyamara uburyo cyateguwe ntibyemeza Urukiko ko ayo maraso ari ayatarukiye kuri Niyomuragije akora icyaha cyo kwica Uzamukunda. Niyomuragije wabajijwe ibijyanye n'amaraso yaba yaramubonetse ku itama no ku gutwi ndetse n'ayabonetse ku myenda ye yabitanzeho ibisobanuro binyuranye aho yavuze ko yabwiwe n'abandi bantu ko hari amaraso yumiye ku gutwi no ku itama, ko ayo yaba yarayavanye aho umurambo wa Uzamukunda wari uri kuko yawegereye awureba (ifoto iboneka kuri cote 35 iragaragaza amaraso menshi mu gisambu aho umutwe wa Uzamukunda wajanjaguriwe). Mu bindi bisobanuro, Niyomuragije yavuze ko ikabutura ye yandujwe n'amakashi y'ibitoki ndeste n'amavuta y'ingurube yamugiyeho, naho mushiki we Umwali Anitha akavuga ko amavuta y'ingurube Niyomuragije yayazanye mu isashi (sachet) iri mu gafuka ku buryo atigeze amumenekaho. Mu yindi mvugo Niyomuragije yavuze ko umwenda we wabonetseho amaraso yawuhanaguje amaguru amaze kwoga nyuma yo kuva aho umurambo wari uri bawuriza mu modoka.

[21] Urukiko rurasanga imvugo ya Niyomuragije, waranzwe no kwivuguruza ku birebana n'amaraso bivugwa ko yaba yarabonetse ku myenda ye no ku mubiri we, zidashobora kuba ikimenyetso kimushinja ubwicanyi hashingiwe gusa kuri iyo mpamvu yo kwivuguruza k'ushinjwa. Imvugo yemera icyaha iba ikimenyetso gishinja nyirayo iyo Urukiko ruyisesenguye rugasanga ihuza n'ibindi bimenyetso kandi ifite ireme rihuza n'uko ibintu byagenze; ntabwo ukuri kwayo gushakirwa mu ukwivuguruza kw'ushinjwa kuko adategetswe kwishinja.

[22] Urukiko rurasanga Ubushinjacyaha bwaranyuzwe n'ibimenyetso biziguye (preuves indirectes) nyamara bwari

bufite inzira yo kubona ibimenyetso bitaziguye (les preuves directes) byari kubonerwa mu gupimisha amaraso buvuga ko yabonetse ku myenda ya Niyomuragije no kuyasanisha n'umurambo. Mu gihe Ubushinjacyaha buburanisha imvugo yuko Niyomuragije yageze mu rugo abavandimwe be bakamubonaho amaraso, uyu ngo akaba yarahise yinika imyenda mu mazi mbere yo gusubira mu kabari (bivuze ko iyi myenda atariyo yari yambaye igihe yajyaga gutabara), mu gihe kandi Ubushinjacyaha bwerekana ko iyi myenda yafatiriwe ndetse n'umurambo utarashyingurwa, aha niho hari izingiro ry'ibimenyetso kuko ibipimo byari kuboneka byari kuba simusiga bikemura impaka z'amaraso yaba yaratarukiye Niyomuragije mu gihe cyo gutabara ndetse no kuyatandukanya n'amavuta y'ingurube cyangwa amakashi; kutabikora bikaba bituma ntawakwemeza nta shiti ko imyenda yafatiriwe yariho amaraso afitanye isano n'umurambo wa Uzamukunda. Ibimenyetso biziguye (les preuves indirectes) bigira agaciro iyo isesengura ryabyo ryerekana ko nta wundi mwanzuro byageraho uretse ibikorwa bigize icyaha ushinjwa akurikiranyweho. "It is settled jurisprudence that the conclusion of guilty can be inferred from circumstantial evidence if it is the only reasonable conclusion available on the evidence. If there is also reasonably open from that evidence and which is consistent with the nonexistence of that fact, the conclusion of guilty beyond reasonable doubt cannot be drawn"<sup>1</sup>

#### C. Kubirebana n'igiti cyakoreshejwe mu kwica Uzamukunda

[23] Niyomuragije yunganiwe na Me Nyirabasinga anenga ikimenyetso cy'igiti cy'ingereveriya ashinjwa kuba yaricishije Uzamukunda aho avuga ko nta muntu wamubonye aca icyo giti,

<sup>&</sup>lt;sup>1</sup> Prosecutor vs Ntagerura, ICTR-99-46-A' Judgment, 7 July 2006, par.306

ko kuba bivugwa ko cyavuye mu biti byari hafi y'urugo rwabo bitavuze ko ari we wagiciye, ko badasobanura uburyo yavuye mu kabare akaza guconga igiti bavuga ko cyari kigegennye.

[24] Ubushinjacyaha bwo busobanura ko Niyibizi Kevin (murumuna wa Niyomuragije) yamubonye mu gitondo agegena iki giti ngo akagihisha, ko Ubugenza cyaha bwageze aho iki giti cyavuye bugasanga cyaraciwe mu biti byari hafi y'urugo rwa Uzamukunda, kandi ko Umwali nawe yemeza ko yaherekeje Niyomuragije amusabye kumumurikira ngo ajye ku musarani uri hafi y'ibiti bivugwa muri iyi dosiye, ko kandi iki giti cyabonetse hafi y'umurambo wa Uzamukunda kiriho amaraso, bityo ko nta wundi muntu wakoresheje iki giti uretse Niyomuragije wari wagiteguye.

## UKO URUKIKO RUBIBONA

[25] Urukiko rurasanga ikidashidikanywaho aruko Uzamukunda yicishijwe igiti cy'ingereveriya nk'uko cyabonetse hafi y'umurambo kandi kiriho amaraso, ikibazo kikaba ari ukumenya uwakoresheje iki giti. Urukiko rurasanga mu kwemeza ko iki giti cyakoreshejwe na Niyomuragije, Urukiko rwashingiye ku mvugo ya Niyibizi Kevin, umwana uvuga ko yamubonye agegena igiti cy'ingeriveriya, yibwira ko ari kumukorera agakinisho (akamarimari) nyamara ngo akaza guhisha icyo giti cyasanishijwe n'ibiti by'ingeriveriya byari hafi y'urugo rwa Uzamukunda mu rutoki; aha kandi akaba ariho Umwali Anitha avuga ko yaherekeje Niyomuragije mu ijoro avuga ko agiye ku musarani.

[26] Urukiko rurasanga imvugo y'umwana Niyibizi Kevin itihagije mu gushinja Niyomuragije kuko, uretse no kuba ivugwa

n'umwana muto udafite ubushishozi buhagije, nta n'ubwo Urukiko rwemeranywa n'iyi mvugo yuko Kevin yabonye Niyomuragije ahisha iki giti kuko atari kumenya ko afite icyo ahishe atazi ko hari icyaha giteganijwe. Urukiko nanone rusanga imvugo ya Umwali ko waherekeje Niyomuragije ku musarane hafi y'ibiti idashinja uyu ko yari agiye gufata igiti cyakoreshejwe kwica Uzamukunda kuko isesengura rv'imvugo mu z'Ubushinjacyaha ryerekana ko Niyomuragije ashinjwa kuba yarishe umubyeyi we mu gihe bavaga kwa Kangoro (nk'uko biboneka mu nyandiko itanga ikirego) hanyuma uyu akaza mu rugo guhindura imyenda (ari nacyo gihe Umwali yamuherekeje ku musarane) akabona gusubira mu kabare nk'uko byahamijwe na Musabimana Eliane; ibi bikaba bivuze ko Niyomuragije atagiye ku musarane agamije gufata igiti yicishije Uzamukunda kuko ibisobanuro bivuzwe haruguru byaba byumvikanisha ko Uzamukunda yari yamaze kwicwa.

# D. Ku birebana n'uburwayi bw'igicuri Niyomuragije avuga ko abana nabwo

[27] Niyomuragije yajuriye avuga ko asanzwe agira uburwayi bw'igicuri kandi ko afata imiti ku buryo buzwi na gereza n'abavandimwe, ko ku munsi ashinjwa kwica Uzamukunda uyu yari yamusabye gutaha hakiri kare kugira ngo ataza gufatwa n'uburwayi ku buryo bubagora gutaha, bityo ko atabazwa urupfu rwe kuko batatahanye.

[28] Ubushinjacyaha bwo busobanura ko igicuri Niyomuragije arwara kitamubuza gukora icyaha, ko kandi kitagombera amasaha runaka, bityo ko adashobora kubyitwaza ahakana urupfu rwa Uzamukunda, ko nubwo avuga ko yatashye kare nyamara nawe yemera ko yasubiye mu kabare agiye gushaka inzoga ngo bagombaga kunywera mu rugo.

118 \_\_\_\_

## UKO URUKIKO RUBIBONA

[29] Urukiko rurasanga imvugo ya Niyomuragije yuko yatashye kare kubera indwara y'igicuri nta shingiro ifite kuko mu ibazwa rye yasobanuye uburyo yageze mu rugo iwabo agasubira kwa Musabimana Eliane agiye gushaka inzoga ajyana mu rugo, uyu akaba yarasobanuye n'icyatumye adatwara iyi nzoga (ko itariryoshye) iyi mvugo akayihurizaho na Musabimana Eliane. Urukiko rurasanga uburwayi bw'igicuri Niyomuragije avuga ko afite ataribyo bimushinjura ku cyaha ashinjwa, kuko nta sano na rito bifitanye, ahubwo ko ashinjurwa no gushidikanya kuboneka mu bimenyetso by'Ubushinjcyaha nk'uko byasobanuwe haruguru.

[30] Urukiko rurasanga Niyomuragije Xavier yarahamijwe icyaha cyo kwica umubyeyi we Uzamukunda Vestine nta kimenyetso gifatika Urukiko rushingiyeho bityo ugushidikanya kuri mu bimenyetso byatanzwe n'Ubushinjacyaha bikaba bigomba kungukira ushinjwa nk'uko biteganywa mu ngingo ya 165 y'Itegeko N°30/2013 ryo kuwa 24/05/2013<sup>2</sup> ryerekeye imiburanishirize y'imanza z'inshinjabyaha.

### III. ICYEMEZO CY'URUKIKO

[31] Rwemeje ko ubujurire bwa Niyomuragije Xavier (ubaruwe ku izina rya Xaverine) bufite ishingiro;

<sup>&</sup>lt;sup>2</sup> Iyi ngingo iteganya ko Iyo urubanza rwakurikiranywe mu buryo bwose, ntihagire ibimenyetso nyakuri biboneka byemeza nta shiti abacamanza ko ushinjwa yakoze icyaha koko, bagomba kwemeza ko atsinze.

#### 120 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

[32] Rwemeje ko Niyomuragije Xavier (Xaverine) agizwe umwere ku cyaha cyo kwica Uzamukunda Vestine;

[33] Rwemeje ko imikirize y'urubanza RPA 00174/2017/HC/RWG rwaciwe n'Urukiko Rukuru, Urugereko rwa Rwamagana kuwa 27/02/2018 ihindutse;

[34] Rutegetse ko Niyomuragije Xavier (Xaverine) ahita afungurwa uru rubanza rukimara gusomwa;

Rutegetse ko amagarama y'urubanza aherera ku isanduku [35] ya Leta.

### UBUSHINJACYAHA v. NZITAKUZE

## [Rwanda URUKIKO RW'UBUJURIRE – RPAA 00500/2018/CA (Muhumuza, P.J.,) 23 Gicurasi 2019]

Amategeko mpanabyaha – Ubwinjiracyaha bw'ubwicanyi – Kugira ngo habeho uburyozwacyaha ku cyaha cy'ubwiracyaha bw'ubwicanyi, ntibihagije gushingira gusa ku bikoresho cyangwa intwaro uregwa yafatanywe ahubwo hagomba kugaragazwa niba yari afite umugambi cyangwa ubushake bwo kwica – Itegeko N° 01/2012 ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko, ingingo ya 27.

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Ngoma, Nzitakuze akurikiranyweho icyaha cy'ubwinjiracyaha bw'ubwicanyi, Ubushinjacyaha buvuga ko ubwo yari kumwe nuwitwa Nsabimana mu kabari baje kugirana amakimbirane nuko uregwa aza kumutegera mu nzira ashaka kumwicisha umuhoro ariko ku bw'amahirwe Nsabimana ahita amubona, barwanira wa muhoro yaragiye kumutemesha, hanyuma abaturage baratabara basanga bakirwanira umuhoro barawubaka, baranabakiza. Urwo Rukiko rwahamije uregwa icyaha rumuhanisha igifungo cya burundu, rushingiye ku buhamya bw'abari mu batabaye ubwo Nsabimana na Nzitakuze barwanaga, no kuri raporo y'Inzego z'umutekano yemeje ko umuhoro uregwa yari afite yawukuye k'uwitwa Hakizimana.

Uregwa yajuriye mu Rukiko Rukuru, Urugereko rwa Rwamagana, avuga ko Urukiko Rwisumbuye rwamuhamije icyaha atakoze rwirengagije ibimenyetso yarushyikirije nuko urwo Rukiko rwemeza ko nta gihindutse ku rubanza rwajuririwe, rusobanura ko impamvu uregwa ahamwa n'icyaha akurikiranyweho ari uko atabashije kuvuguruza ibimenyetso byashingiweho n'Urukiko Rwisumbuye rwa Ngoma mu kumuhamya icyaha.

Uregwa na none yajuririye urwo rubanza mu Rukiko rw'Ikirenga urubanza rwimurirwa mu Rukiko Rw'Ubujurire nyuma y'ivugururwa ry'ububasha bw'inkiko. Mu bujurire bwe akaba avuga ko Urukiko Rukuru rwamuhamije icyaha rudasesenguye neza ibimenyetso byashingiweho mu ku muhamya icyaha, ko rwanirengagije ibisobanuro bye kandi rugaca urubanza rudakoze iperereza ryimbitse kandi yarabisabye guhera igihe cy'iperereza, yongeraho ko umuhoro yari afite yari awujyanye ku kazi ke k'izamu hanyuma ubwo yari mu nzira agahura na Nsabimana uyu akavuga ko agiye kumutema, bagafatana, bakaza gukizwa n'abaturage. Akomeza avuga ko anenga urubanza rwajuririwe kuberako ruvuga ko yateze igico Nzitakuze kandi atari byo, cyane cyane ko nta cyo bapfaga, ko Urukiko Rukuru rwafashe icyemezo ntaho rushingiye.

Ubushinjacyaha bwo buvuga ko Inkiko zombi zibanza zafashe ibyemezo zishingiye ku bimenyetso birimo raporo y'Inzego z'umutekano, umuhoro wari aho Nzitakuze na Nsabimana barimo kurwanira, kandi ko abahuruye bose bemeje ko basanze Nzitakuze ari hejuru ya Nsabimana barimo kurwanira umuhoro Nzitakuze yashakaga kumutemesha. Bwongeraho ko abari mu kabari babajijwe basobanuye ko Nzitakuze amaze gutongana na Nsabimana yahise ataha afata umuhoro ajya gutega Nsabimana, bwanavuze ko kuba nta gikomere Nsabimana yarafite bitaturutse ku bushake bw'uregwa ko ahubwo aruko yarushijwe imbaraga, busoza busaba Urukiko kwemeza ko uregwa ahamwa n'icyaha akurikiranyweho. **Incamake y'icyemezo:** 1. Ku cyaha cy'ubwinjiracyaha bw'ubwicanyi, ntibihagije gushingira ku bikoresho cyangwa intwaro uregwa yafatanywe ahubwo hagomba kugaragazwa niba yari afite umugambi cyangwa ubushake bwo guzikoresha mu gukora icyaha, bityo ntaho Urukiko rwahera rwemeza ko uregwa ahamwa n'icyaha.

#### Ubujurire bufite ishingiro; Imikirize y'urubanza rwajuririwe ihindutse kuri byose; Amagarama y'urubanza aherereye ku isanduku ya Leta.

#### Amategeko yashingiweho:

Itegeko N° 01/2012 ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko, ingingo ya 27. Itegeko N° 30/2013 ryo kuwa 24/05/2013 ryerekeye

imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 165.

#### Nta manza zifashishijwe.

#### Inyandiko z'abahanga:

Arshworth Andrew, Sentencing and Criminal Justice, sixth edition, Cambridge University Press p.127

#### Urubanza

#### I. IMITERERE Y'URUBANZA

[1] Ubushinjacyaha bwareze Nzitakuze Théoneste mu Rukiko Rwisumbuye rwa Ngoma bumukurikiranyeho icyaha cy'ubwinjiracyaha bw'ubwicanyi buvuga ko yakoreye uwitwa Nsabimana Blaise, ubwo bari kumwe mu kabari bakaza kugirana amakimbirane. Ubushinjacyaha buvuga ko Nsabimana Blaise yasohotse atashye, Nzitakuze Théoneste nawe arasohoka ajya kuzana umuhoro, amutegera mu nzira ashaka kumwica ariko ku bw'amahirwe Nsabimana Blaise ahita amubona, barwanira wa muhoro yaragiye kumutemesha, Nsabimana Blaise avuza induru abaturage baratabara basanga bakirwanira umuhoro barawubaka, baranabakiza.

[2] Urukiko Rwisumbuye rwa Ngoma, mu rubanza RP 0402/15/TGI/NGOMA, rwaciwe ku wa 05/11/2015, rwamuhamije icyaha, rumuhanisha igifungo cya burundu, rushingiye ku buhamya bwa Mukarukundo Languida n'ubwa Nyirahabimana Juliette bari mu batabaye ubwo Nsabimana Blaise na Nzitakuze Théoneste barwanaga, no kuri raporo y'Inzego z'umutekano yemeje ko umuhoro Nzitakuze Théoneste yari afite yawukuye kwa Hakizimana Valens.

[3] Nzitakuze Théoneste yajuriye mu Rukiko Rukuru, Urugereko rwa Rwamagana, avuga ko Urukiko Rwisumbuye rwamuhamije icyaha atakoze rwirengagije ibimenyetso yarushyikirije.

[4] Urukiko Rukuru, Urugereko rwa Rwamagana mu rubanza RPA 0480/15/HC/RWG, rwaciwe ku wa 12/05/2016, rwemeje ko nta gihindutse ku rubanza rujuririrwa, rusobanura ko impamvu Nzitakuze Théoneste ahamwa n'icyaha akurikiranweho ari uko atabashije kuvuguruza ibimenyetso byashingiweho n'Urukiko Rwisumbuye rwa Ngoma mu kumuhamya icyaha.

[5] Nzitakuze Théoneste na none yajuririye urwo rubanza mu Rukiko rw'Ikirenga, avuga ko Urukiko Rukuru rwamuhamije icyaha rudasesenguye neza ibimenyetso byashigiweho mu ku muhamya icyaha, ko rwanirengagije ibisobanuro bye kandi rugaca urubanza rudakoze iperereza ryimbitse

[6] Mbere yuko uru rubanza ruburanishwa habayeho ivugururwa ry'Inkiko, hashyirwaho Urukiko rw'Ubujurire, uru rubanza rwimurirwa muri urwo Rukiko hakurikijwe ibiteganywa n'Ingingo ya 52 n'iya 105, z'Itegeko N° 30/2018 ryo kuwa 02/06/2018, rigena ububasha bw'Inkiko.

[7] Iburanisha ry'urubanza ryabereye mu ruhame ku wa 09/04/2019, Nzitakuze Théoneste yunganiwe na Me Hategekimana Gratien, Ubushinjacyaha buhagarariwe na Rudatinya Gaspard, Umushinjacyaha ku rwego rw'Igihugu.

### II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

# Kumenya niba Nzitakuze Theoneste yarahamijwe icyaha atakoze.

[8] Nzitakuze Théoneste avuga ko yajuriye kubera ko Urukiko Rukuru rwaciye urubanza rudasesenguye ibimenyetso yarushyikirije, ko nta perereza rwakoze kandi yararisabye guhera mu Bugenzacyaha aho yasabaga ko habazwa nyirakabari banyweragamo, na Hakizimana Valens bivugwa ko ariwe wamuhaye umuhoro, yemera ko ubwo yajyaga mu kabari yahahuriye na Nsabimana Blaise akamusaba kumugurira inzoga, undi akamusubiza ko nta mafaranga afite, ko yahise ataha mu rugo akajya kuzana umuhoro yagombaga kujyana ku kazi k'izamu, hanyuma mu kuzamuka agiye ku kazi ko ari bwo yahuye na Nsabimana Blaise, uyu akavuga ko agiye kumutema, bagafatana, Nsabimana Blaise agatabaza abaturage bakaza bakabakiza, bakabaka n'umuhoro barwaniraga. Avuga ko ibyo bavuga ko yemeye icyaha atari byo kuko atigeze yemera ko yaragiye kwica Nsabimana Blaise, ko ahubwo yemeye ko yafashe umuhoro awukuye iwe awujyanye ku izamu.

[9] Me Hategekimana Gracien umwunganira, avuga ko icyo we n'uwo yunganira banenga urubanza rwajuririwe ari uko bivugwa ko Nzitakuze Théoneste yateze igico Nsabimana Blaise kandi atari byo, ko yasabye iperereza kugirango hamenyekane ko Nsabimana yahuye na Nzitakuze Théoneste agiye ku izamu bityo bivaneho iyo mvugo yuko yari yamuteze igico, cyane cyane ko nta cyo bapfaga, ko Urukiko Rukuru rwafashe icyemezo ntaho rushingiye. Asoza avuga ko nubwo Nzitakuze Théoneste nta cyaha yakoze ariko Urukiko ruramutse rubibonye ukundi kikamuhama, akwiye guhanwa hashingiwe ku Itegeko N° 68/2018 ku wa 30/08/2018 riteganya ibyaha muri rusange kuko ari ryo riteganya ibihano byoroheje.

[10] Uhagarariye Ubushinjacyaha avuga ko Inkiko zombi zibanza zafashe ibyemezo zishingiye ku bimenyetso birimo raporo y'Inzego z'umutekano, umuhoro wari aho Nzitakuze Théoneste na Nsabimana Blaise barimo kurwanira, abahuruye bose bemeje ko basanze Nzitakuze Théoneste ari hejuru ya Nsabimana Blaise barimo kurwanira umuhoro Nzitakuze yashakaga kumutemesha. Avuga ko mu Rukiko Rwisumbuye Nzitakuze Théoneste yasobanuye ukuntu yagiye mu kabari akahasanga Nsabimana Blaise wamusabye kumusengerera, asobanura ukuntu bateranye amagambo, ukuntu yatashye akahamusiga, akagaruka ku izamu afite umuhoro.

[11] Akomeza avuga ko abari mu kabari babajijwe basobanuye ko Nzitakuze Théoneste amaze gutongana na

126 \_\_\_\_\_

Nsabimana Blaise yahise ataha afata umuhoro ajya gutega Nsabimana Blaise, ko kuvuga ko nta gikomere Nsabimana Blaise yarafite nta gaciro byahabwa kuko kuba ataramwishe bitaturutse ku bushake bwe, ko ahubwo byaturutse ku kuba Nsabimana Blaise yaramurushije imbaraga, ko asanga impamvu z'ubujurire za Nzitakuze Théoneste ntashingiro zifite, asaba uru Rukiko kwemeza ko Nzitakuze Théoneste ahamwa n'icyaha akurikiranweho cy'ubwinjiracyaha bw'ubwicanyi ariko mu kugena ibihano ko hazakurikizwa ingingo ya 21, igika cya 3 y'Itegeko N° 68/2018 ku wa 30/08/2018 riteganya ibyaha muri rusange.

#### UKO URUKIKO RUBIBONA

[12] Ingingo ya 27 y'Itegeko N° 01/2012 ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana ryariho Nzitakuze akurikiranwa iteganya ko ubwinjiracyaha buhanirwa iyo umugambi wo gukora icyaha wagaragajwe n'ibikorwa biboneka bidashidikanywa by'intangiriro y'icyaha, bigamije gushyigikira ko gikorwa, nyuma bigahagarikwa, bikabuzwa kugera ku cyifuzo cyangwa bikazitirwa n'impamvu zidakomoka ku bushake bwa nyir'ugukora icyaha.

[13] Urukiko Rwisumbuye rwa Ngoma rwahamije Nzitakuze Théoneste icyaha cy'ubwinjiracyaha bw'ubwicanyi rushingiye ku mvugo y'umutangabuhamya Mukarukundo Languida umushinja kuba ubwo yatabaraga yaramusanze hejuru ya Nsabimana Blaise, bigashimangirwa na raporo y'Inzego z'umutekano yemeza ko umuhoro Nzitakuze Théoneste yarafite yawukuye kwa Hakizimana Valens. [14] Mu Rukiko Rukuru, Urugereko rwa Rwamagana Nzitakuze Théoneste yahamijwe icyaha hashingiwe ku kuba atarabashije kuvuguruza ibimenyetso byatanzwe n'Ubushinjacyaha byanashingiweho n'Urukiko Rwisumbuye mu kumuhamya icyaha, birimo imvugo z'abatangabuhamya babajijwe, raporo y'ubuyobozi no kuba ubwo yabazwaga mu Bugenzacyaha yaremeye ko we na Nsabimana Blaise barwaniye umuhoro.

[15] Dosiye y'urubanza igaragaza ko ubwo Mukarukundo Languida yabazwaga mu Bugenzacyaha ku wa 16/07/2015 ko yaba azi uburyo Nzitakuze Théoneste yashatse gutema Nsabimana Blaise, yasubije ko yumvise induru zivuga aryamye, arabyuka agenda agiye gutabara ahageze asanga Nsabimana Blaise aryamye hasi Nzitakuze Théoneste amuri hejuru barwanira umuhoro, ko we n'abandi bahahuriye bahise babambura uwo muhoro, ahita ahamagara ushinzwe umutekano kandi ko nta kintu azi Nzitakuze Théoneste apfa na Nsabimana Blaise.

[16] Dosiye y'urubanza igaragaza kandi ko ku wa 11/07/2015 Ubuyobozi bw'Umudugudu icyaha cyakorewemo bwakoze raporo bugaragaza uko ibintu byagenze, busobanura ko mu ijoro ryo ku wa 11/07/2015 saa 22h Nsabimana Blaise yarikumwe na Nzitakuze Théoneste na Hakizimana Valens mu kabari ka Nyirabungeri Alphonsine, ariko Nsabimana Blaise aza gusiga abo bagenzi be muri ako kabari arataha, ko aribwo Nzitakuze Théoneste yahise azenguruka ako kabari ajya kwihisha mu miyenzi yo ku rugo rwo kwa Nsabimana Blaise afite n'umuhoro ashaka kuwumutemesha, kandi ko ubwo bari muri ako kabari bari babanje kugirana amakimbirane.

128 \_\_\_\_\_

[17] Ku wa 12/07/2015 Ubuyobozi bw'Akagari ka Ntebe nabwo bwakoze raporo bugaragaza ko Umusore witwa Nzitakuze Théoneste yategeye umuturanyi we Nsabimana Blaise ku rugo rwe ashaka kumutema dore ko yaranafite umuhoro, ariko Nsabimana Blaise akigera ku irembo yahise abona Nzitakuze Théoneste yihishe mu miyenzi aza amusanga afite umuhoro, abanguye umuhoro kumutema Nsabimana Blaise arasimbuka barwanira uriya muhoro ari nako avuza induru abaturage baratabara basanga bombi bafashe uwo muhoro barawubaka.

[18] Ubwo Nzitakuze Theoneste yabazwaga mu Bugenzacyaha ku wa 12/07/2015, yavuze ko ubwo bari mu kabari we na Nsabimana Blaise bateranye amagambo, birangiye arataha ajya iwe kuzana umuhoro ngo ajye ku kazi k'izamu, ko yageze haruguru yo kwa Nsabimana Blaise asanga yamutegeye mu agiye kwiruka yumva yamufashe, barafatana miyenzi, Nsabimana Blaise aramutega yikubita hasi ariko bakomeza kurwanira umuhoro, Nsabimana Blaise avuza induru, hatabara Hakizimana Valens wahise abaka uwo muhoro, aribwo hahitaga haza abantu batabaye barimo ushinzwe umutekano bakamushinja ko varagiye kwica Nsabimana Blaise, ariko ko uwo muhoro atari uwo yaragiye kumwicisha ahubwo ari uwo yarajyanye mu kazi ke k'izamu.

[19] Mw'ibazwa rya Nsabimana Blaise mu Bugenzacyaha ku wa 15/07/2015, yavuze ko Nzitakuze Théoneste yamutegeye ku irembo atashye abona ahubutse mu miyenzi afite umuhoro awubanguye ashaka kumutema aramuhusha aribwo yamufataga barawurwanira, atabaza abaturanyi, habanza kuza uwitwa Hakizimana Valens ari nawe wari watije Nzitakuze Théoneste umuhoro, arabakiza abaka n'umuhoro, haza n'abandi barimo Mukarukundo, kandi ko ntacyo bapfa usibye kumugirira ishyari ryuko atunze we adatunze.

[20] Isesengura ry'ingingo ya 27 y'Itegeko N° 01/2012 ryo ku wa 02/05/2012 ryagarutsweho haruguru ryumvikanisha ko kugirango habeho ubwinjiracyaha kandi buhanwe, ari ngombwa ko haba habayeho ibikorwa biboneka kandi bidashidikanywaho mu rwego rwo gutangira gushyira mu bikorwa umugambi wo gukora icyaha, hanyuma ibyo bikorwa bigakomwa mu nkokora n'impamvu zitaturutse kuri nyir'ukubikora.

[21] Ibi by'umugambi mu bwinjiracyaha ni nako abahanga mu mategeko babisobanura, aho bavuga ko"the culpability required for an attempted murder is an intent to kill"<sup>1</sup> tugenekereje mu Kinyarwanda bisobanura ko kugirango habeho uburyozwacyaha ku cyaha cy'ubwiracyaha bw'ubwicanyi, ni ngombwa ko habaho umugambi cyangwa ubushake bwo kwica.

[22] Ku birebana n'uru rubanza, Urukiko rurasanga hashingiwe ku bikubiye muri dosiye nkuko byibukijwe haruguru, nubwo uregwa n'uwakorewe icyaha batabivugaho rumwe, ibyabaye hagati ya Nsabimana Blaise na Nzitakuze Théoneste ari imirwano ishingiye ku makimbirane bari bagiranye ubwo bari mu kabari, kuko Ubushinjacyaha butashoboye kugaragariza Urukiko ko Nzitakuze Théoneste yateze Nsabimana Blaise afite umugambi wo kumwica.

[23] Urukiko rurasanga abatangabuhamya babajijwe bose bemeza ko basanze Nzitakuze Théoneste na Nsabimana Blaise barwanira umuhoro, ariko ntawamenye uko byatangiye (niba

<sup>&</sup>lt;sup>1</sup> Arshworth Andrew, Sentencing and Criminal Justice, sixth edition, Cambridge University Press p.127.

barahuye buri wese akikanga undi, cyangwa harabaye ko umwe atega undi kubera amakimbirane bari bagiranye) kuko bose bavuga ko baje bahuruye bagakiza abarwanaga, bakaba batagaragaza ko hari ubushake ku ruhande rwa Nzitakuze Theoneste bwo kwica Nsabimana Blaise, akabibuzwa gusa nuko uyu yatabawe.

[24] Urukiko rurasanga hashingiwe ku biteganywa n'ingingo ya 165 y'Itegeko Nº 30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize v'imanza z'inshinjabyaha ivuga ko gushidikanya birengera ushinjwa, ko iyo urubanza rwakurikiranywe mu buryo bwose, ntihagire ibimenyetso nyakuri biboneka byemeza nta shiti abacamanza ko ushinjwa yakoze icyaha koko, bagomba kwemeza ko atsinze.

[25] Rurasanga hari ugushidikanya ku bimenyetso ku cyaha cy'ubwinjiracyaha mu cyaha cy'ubwicanyi Nzitakuze Théoneste akurikiranyweho kuko nta cyarugaragariye ko yagize umugambi wo gushaka kwambura Nsabimana Blaise ubuzima, bityo Urukiko rukaba ntaho rwahera rwemeza ko icyaha akurikiranyweho kimuhama.

#### III. ICYEMEZO CY'URUKIKO

[26] Rwemeje ko Ubujurire bwa Nzitakuze Théoneste bufite ishingiro;

[27] Rwemeje ko imikirize y'urubanza RPA 0480/15/HC/RWG rwaciwe ku wa 12/05/2016 n'Urukiko Rukuru, Urugereko rwa Rwamagana ihindutse muri byose;

#### 132 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

[28] Rwemeje ko Nzitakuze Théoneste adahamwa n'icyaha cy'ubwinjiracyaha bw'ubwicanyi yarakurikiranweho;

[29] Rutegetse ko Nzitakuze Théoneste waburanaga afunzwe ahita arekurwa uru rubanza rukimara gusomwa;

[30] Rutegetse ko amagarama y'urubanza aherera ku Isanduku ya Leta.

## RWANDA LAW REPORTS

## **ENGLISH VERSION**

#### **TABLE OF CONTENTS**

TEAM OF EDITORS	iii
MULTI-INSTITUTIONAL COMMITTEE	iv
PREFACE	vii
SCOPE OF THE REPORTS	viii
CITATION	viii
LIST OF STATUTES AND STATUTORY INSTR CONSIDERED	
LIST OF CASES CONSIDERED	xi
SUBJECT INDEX	xiii
Re. KABASINGA	1
BRALIRWA v. GISA	
CANDARI V. MUKAMANA ET AL	53
NIYIGENAv. NYIRISHEMA	73
ENTREPRISE TWAHIRWA FAUSTIN (ETF) BRALIRWA Ltd	
PROSECUTION v. NIYOMURAGIJE	107
PROSECUTION v. NZITAKUZE	123

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<b>BAGABO Faustin</b>	:	Advocate at Rwanda Bar Association

#### PREFACE

Dear Readers,

We are pleased to present to you the Law Reports Volume 2 [2020]. As usual, we select cases that can be useful in solving some of the legal issues you encounter, either in your career or in your daily life.

This volume contains seven (7) cases, which includes; five (5) cases in merit; two (2) civil cases, two (2) penal cases and one (1) petition seeking to declare a law unconstitutional, while the remaining two (2) are procedural cases.

These cases can be accessed on the website of the judiciary: <u>http://decisia.lexum.com/rlr/en/nav.do</u>.

Dr NTEZILYAYO Faustin President of the Supreme Court and President of the High Council of Judiciary

#### **SCOPE OF THE REPORTS**

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

#### CITATION

The Reports in this volume are cited thus: [2020] 2 RLR

#### LIST OF STATUTES AND STATUTORY INSTRUMENTS CONSIDERED

<i>The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 29, 61</i>
International Covenant on Civil and Political Rights, (ICCPR), article 14
Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, article 49, 58, 60 and 1515
Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 3
Law N° 17/2018 of 13/04/2018 governing companies, article 142
Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3
Law N° 09/2004 of 29/04/2004 relating to the code of ethics for the Judiciary, article 4 and 55
Organic Law N° 01/2012/OL of 02/05/2012 establishing the penal code (repealed), article 785 article 27125
Organic Law N°06/2012/OL of 14/09/2012 determining the organisation, functioning and jurisdiction of commercial courts,

Organic Law N $^{\circ}$ 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28	
Law N° 30/2013 of 24/05/2013 relating to the code of criminal procedure, article 165	
Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, article 355	
Decree Law of 30/07/1888, relating to contracts or obligations, civil code book III (abrogated by the law N° 020/2019 of 22/08/2019 abrogating all laws established before the independence), article 263 and 590	

X \_\_\_\_\_

#### LIST OF CASES CONSIDERED

*Prosecution v Barakagwira Gilbert, RP 00062/2019/TGI/HYE, rendered by the Intermediate Court of Huye on 18/02/2019......5* 

Prosecution		and B		menya	Venant		
RP00357/201	8/TGI/NG	GOMA,	rendered	by the	Intermediate		
Court	of	Ngor	na	on	14/06/2019 5		
					018/TGI/MUS, 5		
Prosecutor vs par.306	0		R-99-46-A'	0	nt, 7 July 2006, 109		
RCOMAA 00	020/2016/	SC - R	COMÁA 0	025/15/0	ere ka Nyabihu, CS rendered by 38		
(139/89, 289	/89) [199	0] ZAS	SCA 38; 1	990 (2)	ms; S v Bruce SA 802(A D); 6		
-	-			-	[1987] LRC		
Supreme Cou	rt of Cana	da, R v	Smith, [19	87] 1 S.C	C.R. 10456		
-				, ,	[1983] 2 SCR 6		
Supreme Cou 48 (2010)					orida, 560 U.S. 6		
Supreme Cou 586 (1978)					<i>Ohio, 438 U.S.</i>		

United States Supreme Court, Jurek v. Texas, 42	28	U.S.	262
(1976), July 2, 1976	•••••	••••	5
United States Supreme Court, Roberts v. Louisiana	(19	977),	No.
76-5206, June 6, 1977			6

#### SUBJECT INDEX

**Commercial law** – Company – Private Company which have one dorector – Replacement of the director –The document issued by Rwanda Development Board (RDB) is the only proof to confirm the successor of the Director of a company in which s/he was the sole shareholder.

#### ENTREPRISE TWAHIRWA FAUSTIN (ETF) Ltd v. BRALIRWA Ltd......93

**Commercial procedure** – Jurisdiction of commercial courts – Non-contractual obligations – Non-contractual obligations are treated as commercial obligations when they arise from commercial activity – The cases which results from such obligations are within the jurisdiction of the commercial courts

#### BRALIRWA v. GISA......35

Jurisdiction of courts – Pecunial jurisdiction – Damages awarded in the case – The amount of damages awarded by a judge in the event of a dispute shall be the basis for determining whether the appeal is within the jurisdiction of the Supreme Court – Organic Law N° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, article 28, paragraph 2, section 7

#### BRALIRWA v. GISA......35

Admissibility of the claim – Standing of the plaintif – The claim is only admissible to court when the plaintif and the defendants have the standing – Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 3.

#### ENTREPRISE TWAHIRWA FAUSTIN (ETF) Ltd v. BRALIRWA Ltd......93

**Constitution** – Due process of law – Due process of law consists of a series of requirements to be followed in the course of the proceedings based on procedural due process and fair justice that prevents the enactment of laws or other irrational measures that infringe on rights of the population (substantive due process) – The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 29

Re. KABASINGA.....1

Due process of law – Madatory sentencing –The mandatory sentencing is contrary to the principle of due process of law because the convict cannot appeal the sentence because the appellate judge cannot change it because it is mandatory – In criminal cases, while sentencing the convict, the judge is obliged to consider the manner in which it was committed, the conduct and welfare of the offender, on the society in which it was committed and on the victim.

Re. KABASINGA.....1

Freedom and Independence of the judge – Mandatory sentencing –In exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority – The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the manner in which it was committed, and mitigating circumstances that would have reduced his sentence in case there are any – The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 151.

#### Re. KABASINGA.....1

Criminal Law – An attempt of murder – To hold liability for an attempt of murder, it is not sufficient to rely on weapons or tools found with the accused, instead, the culpability required for an attempted murder is an intent of committing an offence – Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 27.

PROSECUTION v. NZITAKUZE.....123

**Evidence law** – Value of a document – Defectivness – A document even concluded before the notary, but disregarding the provision of the Law, is void.

CANDARI V. MUKAMANA ET AL.....53

Evidence in criminal matters – Contradiction of the party to the case – Conflicts between the accused and the victim – Contradiction of the party to the case is not a sufficient incriminating evidence when it is not corroborating with other reliable elements of evidence because he/she is not required to accuse himself/herself – Conflicts between the accused and the victim cannot be solely considered as an incriminating evidence.

PROSECUTION v. NIYOMURAGIJE.....107

Evidence law – Evidence in criminal matters – Circumstantial evidence – Conclusion of guilty can be inferred from circumstantial evidence if it is the only reasonable conclusion available on the evidence.

PROSECUTION v. NIYOMURAGIJE.....107

Family law – Family – The children who are not for the decujus, can not inherit him because they have no relation unless is proven that, he adopted them.

CANDARI V. MUKAMANA ET AL.....53

**Family** – Matriomonial regime – When spouses are married under community property regim, and one of them does not put a particularity in that agreement regarding the property he/she pretend to belong to the children he/she had before that marriage, all properties are considered as for the spouses.

#### CANDARI V. MUKAMANA ET AL.....53

Land law – Immovable properties – Origin of immovable property – Contract of sale – The contract of sale alone cannot be a basis to prove the legitimate ownership of the land without proving whether the one who transferred it was the legitimate owner

NIYIGENAV. NYIRISHEMA.....107

### PETITION SEEKING TO DECLARE A LAW UNCONSTITUTIONAL

#### **Re. KABASINGA**

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00003/2019/SC (Rugege, P.J., Nyirinkwaya, Cyanzayire Rukundakuvuga and Hitiyaremye, J.) December 04, 2019]

Constitution – Due process of law – Due process of law consists of a series of requirements to be followed in the course of the proceedings based on procedural due process and fair justice that prevents the enactment of laws or other irrational measures that infringe on rights of the population (substantive due process) – The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 29.

Constitution – Due process of law – Mandatory sentencing –The mandatory sentencing is contrary to the principle of due process of law because the convict cannot appeal the sentence because the appellate judge cannot change it because it is mandatory – In criminal cases, while sentencing the convict, the judge is obliged to consider how it was committed, the conduct and welfare of the offender, on the society in which it was committed and on the victim.

Constitution – Freedom and Independence of the judge – Mandatory sentencing – In exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority – The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the manner in which it was committed, and mitigating circumstances that would have reduced his sentence in case there are any – The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 151. **Fact:** Kabasinga Florida petitioned the Supreme Court seeking to declare unconstitutional article 133, paragraph five of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general which provides that: "[....] If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances. It infringes on article 29 and 151 of the Constitution of the Republic of Rwanda because it violates the right to a fair trial and undermines the independence of the judge in sentencing.

She argues that if there is a provision of the law prohibiting the consideration of a mitigating circumstance, which benefits the defendant and have his sentence reduced, implies that he is deprived of the right to a fair trial because while sentencing, a Judge must take into account the mitigating circumstance if there is any because it is part of the right to fair justice is provided for in the Constitution. she explains that the context of the subsection of that article which relates to child defilement followed by cohabitation as husband and wife poses a problem because the penalty of life imprisonment that cannot be mitigated, some are given severe sentence than others while if the way the offence was committed is considered it wouldn't be the case.

Regarding the issue that the impugned article infringes on the provisions of article 151;5 of the Constitution which provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority, he states that when the legislature enacts a law which does not give the judge the independence and liberty to exercise reasonable judgment, it precludes him or her from rendering the right to a fair trial provided for in Article 29 of the Constitution. Therefore, prays that article 133, paragraph five of the Penal Code, which prohibits a judge to base on mitigating

circumstances to render fair justice, be declared null and void, because it violates the independence of the judge in his work, as he is only required to give a life sentence, which is contrary to article 151 of the Constitution.

The Government of Rwanda argues that article 133 of Law N° 68/2018 of 30/08/2018 determining offences and penalties, in general, does not violate the Constitution, that it does not infringe on the right to a fair trial and that it does not prejudice the independence of the judge because nothing indicates that people are deprived of the right to fair justice, that the allegations of the plaintiff are based on emotion. It further argues that article 29 of the Constitution demonstrates a person's rights which must be respected to get fair justice, but the petitioner does not demonstrate how the provisions of the impugned article violate any of those rights.

On the issue of that article being contrary to article 151 of the Constitution, it states that no State organ deprived the judge of his/her freedom and independence because in executing his duties he abides by the law and which law exists, therefore it finds that the mentioned article is not inconsistent with article 151 of the Constitution.

**Held:** 1. Due process of law consists of a series of requirements to be followed in the course of the proceedings based on procedural due process and fair justice that prevents the enactment of laws or other irrational measures that infringe on the rights of the population (substantive due process).

2. The mandatory sentencing is inconsistent with the principle of due process of law because the convict cannot appeal the sentence

because the appellate judge cannot change it because it is mandatory.

3. In criminal cases, while sentencing the convict, the judge is obliged to consider how it was committed, the conduct and welfare of the offender, on the society in which it was committed and on the victim. Therefore, the fact that a judge is unable to examine and consider the mitigating circumstances when they are available, to reduce the sentence of a person convicted of child defilement followed by cohabitation as husband and wife, is inconsistent with the provisions of article 29 of the Constitution which provides that everyone has the right to a fair trial because the convict is given un proportional sentence.

4. In exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority.

5. The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the manner in which it was committed, and mitigating circumstances that would have reduced his sentence in case there are any. Therefore, article 133 of paragraph five of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general which provides that: "[....] If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances is inconsistent with article 151 paragraph 5 of the Constitution which provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority, as they are prohibited from relying on mitigating circumstances to impose proportional sentence.

## Article 133, paragraph five of the Law N° 68/2018 of 30/08/2018 determining offences and penalties, in general, is inconsistent with article 29 and 151 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015. That paragraph is without effect as provided by article 3 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015.

## Statutes and statutory instruments referred to:

- The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 29 and 61
- Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, article 49, 58, 60 and 151
- Organic Law N° 01/2012/OL of 02/05/2012 establishing the penal code, article 78 (repealed)
- Law N° 09/2004 of 29/04/2004 relating to the code of ethics for the Judiciary, article 4 and 5
- International Covenant on Civil and Political Rights, (ICCPR), article 14

## Case referred to:

- RP 00062/2019/TGI/HYE, Prosecution v Barakagwira Gilbert rendered by the Intermediate Court of Huye on 18/02/2019
- RP00357/2018/TGI/NGOMA, Prosecution and Barimenya Venant rendered by the Intermediate Court of Ngoma on 14/06/2019
- RP 00499/2018/TGI/MUS, Prosecution v Ntahorutaba Wellars rendered by the Intermediate Court of Musanze

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- United States Supreme Court, Jurek v. Texas, 428 U.S. 262 (1976), July 2, 1976
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- South Africa: Supreme Court of Appeal, S v Toms; S v Bruce
  - (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802(A
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Mandatory Sentencing & the Independence of the Judiciary, available at: https://www.ruleoflaw.org.au/wpcontent/uploads/2015/11/MandatorySentencing.pdf, visited on November 30, 2019

# Judgment

# I. BACKGROUND OF THE CASE

[1] KABASINGA Florida petitioned the Supreme Court seeking to declare article 133 par.5 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general unconstitutional because it is inconsistent with article 29 and 151 of the Constitution of the Republic of Rwanda in so far as they infringe on the right to due process of law and the independence of the judge to determine penalties.

[2] Article 133 par.5 of the Law N°68/2018 of 30/08/2018 mentioned above states that "[...] If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances. [...]".

[3] The Government of Rwanda submits that article 133 of the Law N°68/2018 of 30/08/2018 determining offences and penalties, in general, is not unconstitutional, and does not infringe on the right to due process of law nor does it infringe on the independence of the judge.

[4] The hearing was heard in public tried by the Supreme Court on 06/11/2019, the petitioner was represented by Counsel Rwagitare Fred Fiston and Counsel Mugabonabandi Jean Maurice, whereas the Government of Rwanda represented by Counsel Batsinda Aline.

# **II. ANALYSIS OF LEGAL ISSUES**

Whether paragraph five of article 133 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general, is inconsistent with article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[5] Kabasinga Florida and her counsels aver that article 133 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general contravenes article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 which provides that everyone has the right to due process of law. They further contend that the paragraph of article 133 which is inconsistent with the Constitution is the one that provides that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances.

[6] The petitioner and her counsel submit that when a case is adjudicated whereby the sentence was determined in

8

consideration of the available mitigating circumstances, that also constitutes the due process of law which is guaranteed by the Constitution. Thus, in case there is a provision that obstructs the examination of mitigating circumstances which would have led to a reduced sentence for the defendant, the right to due process of law is deprived. They further argue that the construct of article 133, specifically the paragraph concerning "child defilement followed by cohabitation as husband and wife..." is unconstitutional given that the penalty of life imprisonment cannot be reduced and thus detrimental to some, when depending on the circumstances under which the crime was committed, leading to some being severely punished than others which would not have been the case in some instances.

[7] They give an example of a person who may be convicted of defiling a child of the age bracket of 14 to 18 years, and the convict is above 50 years of age, such a person may be given a reduced sentence of up to 25 years of imprisonment. Yet a person of 19 years of age convicted of child defilement followed by cohabitation as husband and wife is sentenced to a penalty of life imprisonment which cannot be mitigated. They find this inconsistent with article 29 of the Constitution of Rwanda, consequently, they pray that article 133 which provides that be repealed.

[8] State Attorney Batsinda Aline representing the government of Rwanda argues that the provision of article 133 of the determining offences and penalties in general is not inconsistent with the Constitution because it does not obstruct the right to due process of law, and that the petitioner's submissions are based on sentiments

[9] She further submits that article 29 of the Constitution of the Republic of Rwanda lays down the rights vested in a person, which must be respected so as to access due process of law, nevertheless, the petitioner does not prove how article 133 of the law determining offences and penalties in general infringes on some of those rights. She does not demonstrate whether the impugned article infringes on the rights provided under article 29 which are the right to be informed of the nature and cause of charges, the right to defence and legal representation, the right to be presumed innocent until proved guilty by a competent Court, the right to appear before a competent Court, the right not to be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute an offence under national or international law at the time it was committed.

[10] She concludes by submitting that the Legislator was attentive of the matters regarding the right to due process of law, that article 133 does not in any way contravene article 29 of the Constitution, that on the contrary, that both articles are harmonious based on the provisions of paragraph 4 of article 29 where it provides that offences and their penalties are determined by law, it is in her view that based on the petitioner's arguments, she finds that the petitioner is confusing the social majority age with the legal majority age. She concludes by praying to this Court to declare that article 133 is not inconsistent with article 29 of the Constitution.

## **DETERMINATION OF THE COURT**

[11] Article 29 of the Constitution of the Republic of Rwanda states that "Everyone has the right to due process of law, [...]".

The same article furthermore numerates some of what constitutes this right.

[12] Article 29 of the Constitution provides some of the elements constituting the right to due process of law. As viewed through the construct of that article, it is obvious that all elements that constitute the right to due process of law were not listed. The legislator used the term "includes". This implies that apart from those elements listed in article 29, other elements constitute the right to due process of law.

[13] The due process of law is defined in different ways, there is procedural due process: a course of formal proceedings (such as legal proceedings) carried out regularly and in accordance with established rules and principles<sup>1</sup>. There is also substantive due process: protection against the enactment of arbitrary and unreasonable legislation or other measures that would violate peoples'rights.<sup>2</sup>

[14] The remaining issue before this court is whether the court considering the mitigating circumstances and to give an appropriate penalty are among the elements that constitute the right to due process of law. On this issue, the court finds that in criminal matters, the right to due process of law starts with the investigation phase, proceeds to the prosecution phase, to the trial and sentencing for the offences provided by criminal laws. This implies that even the examination of the mitigating circumstances and sentencing is in the trial phase, and they should also respect

<sup>&</sup>lt;sup>1</sup> Definition of due process, available at; https://dictionary.findlaw.com/legal-terms/d.html accessed on 2nd December 2019

<sup>&</sup>lt;sup>2</sup> John N. Ferdico. Criminal Procedure for the Criminal Justice Professional. Thomson, Wadsworth 9th Edition, P.22

the principles that constitute the right to due process of law on those aspects.

[15] Article 49 paragraph one of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general provides the grounds upon which a judge bases to give a sentence. That article provides that a judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence. [...]". The Court finds that the provisions of this article form the ground upon which a judge determines a penalty, and acting contrary to it, tantamounts to acting contrary to the right to due process of law in the determination of the penalty.

Article 133 of the law Nº 68/2018 provides for life [16] imprisonment for a person convicted of child defilement if it was followed by cohabitation as husband and wife. That article does not allow that penalty to be mitigated. This contradicts the fact that a judge determines the penalty based on the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence as provided under article 49 mentioned in the preceding paragraph. Based on the construct of article 133, par.5 which relates to a person convicted of the crime of child defilement followed by cohabitation as husband and wife, it seems that the discretion of a judge over the convict of such a crime is limited only to convicting that person of that offence, and thus has no discretion or powers to consider the factors taken into account by a judge in determining a penalty, since the life imprisonment penalty provided by the article is mandatory. This is contrary to what is

provided under article 49 which provides for the factors taken into account by a judge in determining a penalty.

The mandatory sentence that is also contrary to the [17] principle of fair trial provided under article 14 (5) of the International Covenant on Civil and Political Rights,<sup>3</sup> (ICCPR), which states that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal and according to the law" Regarding the mandatory penalty provided for a given offence, a person convicted of such an offence cannot appeal against the penalty handed since the appellate judge cannot change it given that it is mandatory. The same is emphasised by the United Nations Special Rapporteur on the Independence of the Judiciary where he stated that : ...[..] the right of appeal contained in Article 14(5) : [...] is negated when the trial judge imposes the prescribed minimum sentence since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards"<sup>4</sup>. in a similar manner, a person convicted of the crime of child offence followed by cohabitation as husband and wife benefit nothing from appealing against the penalty of life imprisonment given that that punishment is mandatory and as such is inconsistent with article 14 (5) mentioned in this paragraph.

<sup>&</sup>lt;sup>3</sup> International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. Ratified by Rwanda on 12/02/1975 (See decree law No 8/75 of 12/02/1975, Official gazette n° 5 of 01/03/1975).

<sup>&</sup>lt;sup>4</sup> Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) Australian Journal of Human Rights at http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#H eading140.

Article 49 par.2 of this law provides for the possibility of [18] concurrence of both aggravating and mitigating the circumstances in the same case and it goes further to demonstrate how such circumstances are considered in deciding a case in the following way: In the event of the concurrence of grounds for judgment, the judge must consider the following while imposing 1° aggravating circumstances; 2° mitigating a penalty: circumstances. The fact that the law allows a judge to consider both aggravating and mitigating circumstances at the same time, the Court finds that is an element that constitutes due process of law. The fact that the law construes cohabitation as husband and wife as an aggravating circumstance and it prohibits a judge to base on mitigating circumstances available to reduce penalties, is inconsistent with the principle of the right to due process of law as far as sentencing is concerned.

The provisions of article 49 that a judge considers both [19] aggravating and mitigating circumstances simultaneously is a principle acceptable even in other jurisdictions and to that effect, any law which is inconsistent with it has to be repealed. A case in a point is the case of Jurek v. Texas that was tried by the Supreme Court of the United States of America based on other cases it had decided and it held that in sentencing, mitigating circumstances should be considered, and therefore any law providing otherwise contravenes the Constitution. The court held that : "But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in Woodson v. North Carolina, [428 U.S.,] at 303-305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in Woodson and Roberts

v. Louisiana [ 428 U.S. 325 (1976)]. A jury must be allowed to consider based on all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. "Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."<sup>5</sup>

Article 58 of the Law Nº68/2018 du 30/08/2018 [20] determining offences and penalties in general provides that: "the judge assesses whether mitigating circumstances decided by a judge are admissible. The reasons for the acceptance of mitigating circumstances must be stated in the judgment. Article 59 lays down some of the mitigating circumstances that may be considered by a judge. The provisions of these articles are based on the obligation vested in a judge in criminal matters of giving a penalty based on the circumstances surrounding the commission of the crime, on the offender's prior record and personal situation, on the family upon which the offence was perpetrated and the victim of the crime. These, also constitute the right to due process of law and any law or one of its articles providing otherwise is deemed inconsistent with the Constitution. As held by the Supreme Court of the United States of America in the case of Roberts v. Louisiana, that a judge should consider mitigating circumstances relevant to the offender or the offence, and any law hampering the consideration thereof, is construed contradictory to the Constitution. The court pronounced itself in these words: "As we emphasized [...], the capital sentencing decision must allow for consideration of whatever mitigating

<sup>&</sup>lt;sup>5</sup> U 6 United States Supreme Court, ROBERTS v. LOUISIANA (1977), No. 76-5206, June 6, 1977.United States Supreme Court, Jurek v. Texas, 428 U.S. 262 (1976), July 2, 1976

circumstances may be relevant to either the particular offender or the particular offense. Because the [Louisiana] statute does not allow for consideration of particularized mitigating factors, it is unconstitutional<sup>6</sup>".

[21] The Law N°68/2018 of 30/08/2018 determining offences and penalties in general qualifies different acts as child defilement if it is committed on a child under eighteen (18) years of age. The penalty thereof ranges between twenty (20) to twenty five years of imprisonment. If child defilement is followed by cohabitation as husband and wife, it is construed to be an aggravating circumstance, and thus the penalty is life imprisonment that cannot be mitigated by any circumstances since the law prohibits it such mitigation. On the contrary, the law does not consider child defilement that was done for a long period as an aggravating circumstance as long as it does not result in cohabitation as husband and wife. This also is not conceivable.

[22] In consideration of what could be based on as mitigating circumstances, the Court finds that there are reasonable grounds that may lead to a convict of child defilement followed by cohabitation as husband and wife to be given a lesser sentence than a person convicted of the same crime without cohabiting as husband and wife. It is inconceivable how a person convicted of defiling a child he is much older than in age, committed it forcefully hence damaging her, maybe given a reduced sentence based on mitigating circumstances, yet a person of 19 years old who cohabited with a 17 years old victim of the same offence as husband and wife on their mutual consent, with a possibility that they two might be having children together, mutually cohabiting

16

<sup>&</sup>lt;sup>6</sup> United States Supreme Court, ROBERTS v. LOUISIANA (1977), No. 76-5206, June 6, 1977.

with the intent of establishing a family, is sentenced to life imprisonment that cannot be mitigated. Some times, some cohabit as the only convenient way to survive, like in the event where both or one of them is an orphan without any other support.

This is not just a possibility, but rather, these were the [23] rulings in some decided cases. For instance, the judgment RP 00062/2019/TGI/HYE that was rendered on 18/02/2019 by the Intermediate Court of Huye, whereby the Prosecution accused Barakagwira Gilbert of 19 years of age of the offence of defiling a child of 16 years old and impregnated her, and they mutually decided to cohabit as husband and wife, nevertheless, the girl's parents went and brought her back after spending there one night. In that particular case, the accused pleaded guilty and revealed that he is in a relationship with the impregnated girl, in the same way, the girl confessed that she was in love with the person who impregnated her and that they consented to cohabit after impregnating her. The court convicted Barakagwira Gilbert of the offence of child defilement and sentenced him to life imprisonment as provided by the law, given that after defiling her, they cohabited as husband and wife for one day as the defendant admitted. The defendant in that particular case is 19 years old, and as per the Rwandan laws, he also lacks the capacity to contract a civil marriage.

In another judgment rendered by the Intermediate Court [24] of Ngoma, Barimenya Venant 66 years old, who knew he was HIV positive, was found guilty of defiling two girls one 10 years and the other 5 years of age respectively. He was sentenced to life imprisonment. judgment Whereas in the RP 00499/2018/TGI/MUS that was decided bv Musanze Intermediate court, Ntahorutaba Wellars between 18-19 years old, was convicted of defiling a 16 years old girl following their mutual consent to do so, he impregnated her and they subsequently cohabited as husband and wife. The Prosecution had prayed to the Court to sentence the defendant to 20 years of imprisonment, but the Court, based on article 133 par.5, sentenced him to life imprisonment. It is obvious the circumstance surrounding the commission of the crime between these people is different and the effects on the victims are also different. Had it not been for the mandatory penalty, the judge might have sentenced them to different penalties considering each and everyone's distinctive circumstances. One would wonder whether justice was served in both Barakagwira Gilbert and Ntahorutaba Wellars case

[25] The nature of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general specifically on the issue relating to punishing those convicted of child defilement, it seems that it intended to severely punish offenders of such offence given its effects. The Court undoubtedly concurs that child defilement is both unacceptable and should be punishable. However, punishing such an offence does not preclude the right to due process of law which the accused has, which includes being given a mitigated penalty in case there are mitigating circumstances.

[26] In general, the fact that a judge cannot examine and base on mitigating circumstances if there any, to sentence the convict of child defilement followed by cohabitation as husband and wife to a mitigated penalty, the Court finds it inconsistent with the provisions of article 29 of the Constitution, which provides that everyone has the right to due process of law because it subjects a convict of such a crime to a disproportionate sentence. A provision of the law that provides such should be repealed as it was held in the case Lockett v. Ohio "A statute that prevents the sentencer in capital cases from giving independent mitigating weight to aspects of the defendant's character and record and the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed despite factors that may call for a less severe penalty, and, when the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments<sup>7</sup>". Even though this case was about the death penalty which is not provided for in the Rwandan laws but its contents can be applied to life imprisonment which is the heaviest penalty in Rwanda.

[27] It should also be noted that even scholars have divided opinions on the sentence of life imprisonment, as some argue that "mandatory sentence of life imprisonment arguably undermines several established common law and internationally recognised sentencing principles, including proportionality, equality before the law and respect for human dignity."<sup>8</sup>

[28] Pursuant to the motivations in the preceding paragraphs, the Court finds that the provisions of article 133 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general which provides that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances,

<sup>&</sup>lt;sup>7</sup> Supreme Court of the United States, Lockett v. Ohio, 438 U.S. 586 (1978)

<sup>&</sup>lt;sup>8</sup> The label of life imprisonment in Australia: A principled or Populist approach to an ultimate sentence. John L Andeson. P. 748 available at http://www.austlii.edu.au/au/journals/UNSWLJ/2012/30.html, accessed on 27 November 2019

inconsistent with one of the principles that constitute the right to due process of law, which states that a judge determines a penalty putting into consideration the gravity of the offence, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence. Therefore, it is inconsistent with article 29 of the Constitution.

# Whether paragraph 5 of article 133 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 151 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[29] Kabasinga Florida and her counsel state that article 133 of the law mentioned hereinabove is inconsistent with article 151 50 of the Constitution which provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority. They furthermore submit that a judge should execute his/her duties in accordance with the laws, without government or private institutions prejudicing his/her independence, be it the legislature.

[30] They furthermore argue that when the legislature enacts a law that confines a judge to the degree that he/she is deprived of the discretion to exercise equity, it for that matter dispossess him/her of the independence of serving due process of law that is guaranteed under article 29 of the Constitution. They conclude by submitting that article 133, par 40 of the law determining offences and penalties in general, which prohibits a judge from rendering due process of law based on mitigating circumstances should be repealed because it encroaches on the independence of the judge since he/she is obliged to impose the sentence of life

imprisonment only, which is inconsistent with article 151 of the Constitution.

[31] The State attorney, Batsinda Aline contends that article 151 of the Constitution lays down principles governing the judicial system, nonetheless, the petitioner does not point out exactly which principle(s) which article 133 infringes on, and he does not explain how the impugned article violates the principle that justice is rendered in the name of the people and nobody may be a judge in his or her cause, court proceedings are conducted in public unless or the proceedings are held in camera in circumstances provided for by law; every judgment must indicate its basis, be written in its entirety, and delivered in public together with the grounds and the decision taken; respect of the Court rulings by all and that which states that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority.

[32] She further submits that considering the explanations of the petitioner, she finds that the petitioner demonstrated her point of view on the severity of the penalties provided by the law determining offences and penalties in general in its article 133. She contends that no organ encroached on the liberty and independence of a judge since he/she executes his/her duties in accordance with the law and which law is in place. She finds that article 133 is not inconsistent with article 151 of the Constitution.

# **DETERMINATION OF THE COURT**

[33] Article 61 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 states that Branches of Government are the following [...] the Legislature, the Executive, and the

Judiciary. The three branches are separate and independent from each other [..]" the independence of the judiciary derives from this article which stipulates the three branches of the government (the Legislature, the Executive, and the Judiciary) are separate and independent (Separation of powers).

Article 151, 50 of the Constitution of the Republic of [34] Rwanda of 2003 revised in 2015 states that «[...] in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority ». whereas article 4 and 5 of the Law N° 09/2004 of 29/04/2004 relating to the code of ethics for the Judiciary provides that: a judge shall be independent in the exercise of his or her judicial functions. A judge shall independently examine matters before him/her and take decisions without any external pressure. In cases before him, a judge shall guard against any attempt to influence his or her decisions other than those made through the ordinary procedure provided for by the law. A judge is bound to decide cases in accordance with the law. The articles cited in this paragraph establish the principle of independence of a judge in exercising his/he judicial functions and they go further to demonstrate what constitutes that independence which includes not being influenced by any power or authority, independently examine matters before him/her, desist from anything which might influence him/her to make illegal decisions and to follow the laws relating to the case in hand.

[35] The principle of the independence of the judge in exercising judicial functions goes hand in hand with the principle of the independence of the judiciary. In the case of R. v. Beauregard, on the issue of the independence of the judiciary, the Supreme Court of Canada held that " the core of the principle

of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider—be it Government, pressure group, individual or even another judge — should interfere, or attempt to interfere, with how a judge conducts a case and makes a decision"<sup>9</sup>. Any obstacle obstructing a judge to decide a case with complete liberty would automatically contravene the principle of the independence of the judiciary. As regards to the case at hand, the issue is whether the provisions of the law that a penalty cannot be mitigated by any circumstances would be infringing on the independence of the judiciary.

Article 133 provides for a mandatory sentence; it [36] prohibits a judge to impose a penalty based on his/her discretion and in the assessment of the mitigating circumstances he/she noticed. This deprives a judge of the independence to determine a penalty based on the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence, the offender's behaviour and its effects on the victim and the Rwandan society in general. On the same issue, in the case of S v. Toms; S v. Bruce, the Supreme Court of South Africa held that "the first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. That courts should, as far as possible, have unfettered discretion in relation to the sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of

<sup>&</sup>lt;sup>9</sup> Supreme Court of Canada, R. v. Beauregard, [1987] LRC (Const.)

punishment, which requires proper consideration of the individual circumstances of each accused person"<sup>10</sup>.

[37] As it was held by the Supreme Court of the United States of America in the case of Graham v. Florida<sup>11</sup> that: "the judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question". This Court finds that in case a judge has no other option other than imposing a mandatory sentence, and is prohibited from imposing a penalty that is proportionate to the offence, this deprives the judge of liberty and independence to render judgment putting into consideration the severity of the penalty in relation to the offence.

[38] In India, in the case of Mithu v. State of Punjab, the Supreme Court repealed article 303 of the penal code which provided for a mandatory penalty on the basis that it infringes on the independence of a judge of imposing a sentence in consideration of diverse circumstances surrounding the case.

<sup>&</sup>lt;sup>10</sup> South Africa: Supreme Court of Appeal, S v Toms; S v Bruce (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802 (AD); [1990] 2 All SA 248 (A) (30 March 1990)

<sup>&</sup>lt;sup>11</sup> 11Supreme Court of the United States, Graham v. Florida, 560 U.S. 48 (2010), "holding that a life imprisonment without parole sentence on a juvenile offender convicted of armed burglary with assault, and attempted robbery, was offensive to the Eighth Amendment. [The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion]

That Court held that "a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair"<sup>12</sup> No one would advance that there is independence of a judge of imposing penalties when he/she is obliged to only impose a mandatory sentence that is unproportionate to the severity of the offence, the circumstances surrounding the commission of the crime, and the mitigating circumstances that would have led to a reduced sentence if there are any.

[39] Basing on the motivations in the preceding paragraphs, the provisions of article 133 of the Law N° 68/2018 of 30/08/2018 which states that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances are inconsistent with article 151,50 of the Constitution which provides that in exercising their judicial functions, judges at all times do it in independence, given that they are prohibited to consider extenuating circumstances in inflicting a fair penalty.

[40] The Court notes that there are other articles that also provides for mandatory penalties, however, the court can not pronounce itself on those provisions given that they were not petitioned before this Court. The Government should examine them so that they conform with this judgment.

[41] In the course of examining this petition, the Court found out that there is another issue in sentencing which concerns the range between the minimum and maximum penalty, which the

<sup>&</sup>lt;sup>12</sup> Supreme Court of India, Mithu v. State of Punjab [1983] 2 SCR 690

Court finds it necessary to give its opinion upon it as it is in the same line with the issue on which it was moved.

# The issue concerning the penalties provided by the Law $N^{\circ}68/2018$ of 30/08/2018 determining offences and penalties in general in case there are mitigating circumstances.

[42] Article 60 of the Law N°68/2018 du 30/08/2018 determining offences and penalties in general states that if there are mitigating circumstances, penalties may be reduced as follows : 1° subject to the provisions of Article 107 life imprisonment may be reduced but it cannot be less than twenty-five (25) years ; 2° a fixed-term imprisonment or a fine may be reduced but it cannot be less than the minimum sentence provided for the offence committed.

Before comming into force of the Law cited in the [43] preceeding paragraph, the Organic Law N° 01/2012/OL of 02/05/2012 establishing the penal code which was in force by then in its article 78 provided on the modality in which penalties are reduced in case of mitgating circumstances as follows: If there are mitigating circumstances, the reduction of penalties shall be as follows: 1° life imprisonment or life imprisonment with special provisions is replaced by a penalty of imprisonment of not less than ten (10) years;  $2^{\circ}$  a penalty of imprisonment of ten (10) years to twenty five (25) years may be reduced up to a term of imprisonment of five (5) years;  $3^{\circ}$  a penalty of imprisonment of more than five (5) years, but less than ten (10) years may be reduced up to a 4° a penalty of imprisonment of six (6) months to five (5) years may be reduced up to a term of imprisonment of two (2) months;  $5^{\circ}$  a penalty of imprisonment of less than six (6) months may be suspended."

26

[44] Law N° 68/2018 establishes that if there are mitigating circumstances, a penalty may be reduced but shall not be less than the minimum penalty provided by the law. Whereas Organic Law N° 01/2012/OL of 02/05/2012 provided that if there are mitigating circumstances, a penalty can be reduced to less than the minimum penalty in the modality provided under article 78 mentioned in the preceding paragraph. In comparison with those two laws, for many offences the minimum penalty did not change and for some offences the minimum penalty was raised. This makes it impossible for the convict to be sentenced to an appropriate mitigated sentence even if there are mitigating circumstances and in some instances is given the same penalty as the one with no mitigating circumstance.

Given the fact that the legislator decided that if there is a [45] mitigating circumstance, the penalties may be reduced but shall not be less than the minimum penalty provided for the offence committed. It is the opinion of this Court that it would be reasonable if the range between the minimum and the maximum penalty is large, putting more emphasis on reducing the minimum penalty. This would enable the provisions of article 49 par.1 of the Law N° 68/2018 of 30/08/2018 which provides that a judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence to be correctly applied. Basing on the mitigating circumstances and impose minimum penalty provided for an offense which itself is heavy, does not benefit the defendant nor does it serve justice in general.

[46] Research has established that when the law provides for the penalties that a judge cannot reduce, he/she may choose to acquit the suspect because the judge finds that the circumstances surrounding the defendant's commission of the crime and his/her behaviors in general are disproportionate with the severity of the penalty likely to be imposed<sup>13</sup>. In such a case, the purpose of the law is not realized.

[47] Generally, the enacting and imposition of the penalty should be based on its purpose and objective. In that case, there is a denunciation of the offender, deterrence, rehabilitation and protection of the public through incarcerating the offender. As held by the Supreme Court of Canada in the case of R v Smith<sup>14</sup> that: "[T]he court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves". Likewise, the penal provisions in Rwanda ought to provide for penalties with a large range between minimum and maximum penalty which

<sup>&</sup>lt;sup>13</sup> Mandatory Sentencing & the Independence of the Judiciary, available at: <u>https://www.ruleoflaw.org.au/wp</u>

content/uploads/2015/11/MandatorySentencing.pdf, visited on November 30, 2019.

<sup>&</sup>lt;sup>14</sup> Supreme Court of Canada, R v Smith, [1987] 1 S.C.R. 1045

permits a judge to determine a sentence in consideration of its purposed as mentioned hereinabove.

[48] Given the above, the Court finds it an urgent matter to adopt a punitive policy that is based on thorough research that harmonizes international sentencing principles with special issues in the Rwandan society and also a judge be accorded the liberty of imposing a sentence in consideration of the severity of the offence, its effects, the reasons that occasioned the commission of the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence.

# **III. DECISION OF THE COURT**

[49] The Court holds that the petition filed by Kabasinga Florida has merit;

[50] Declares that article 133 particularly paragraph five of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general, which states that : "if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances" is inconsistent with article 29 and 151 of the Constitution of the Republic of Rwanda of 2003 revised in 2015. That paragraph is therefore without effect as provided for by article 3 of the Constitution ;

[51] Orders that this judgment is published in the Official Gazette of the Government.

# **PROCEDURAL CASES**

# CASE RELATING TO CIVIL, COMMERCIAL, LABOUR AND ADMINISTRATIVE PROCEDURE

# **BRALIRWA v. GISA**

## [Rwanda SUPREME COURT – RCOMAA00023/2017/SC (Hatangimbabazi, P.J., Ngagi and Kanyange, J.) October 06, 2017]

Commercial procedure – Jurisdiction of Commercial Courts – Non-contractual obligations – Non-contractual obligations are treated as commercial obligations when they arise from commercial activity – The cases which results from such obligations are within the jurisdiction of the commercial courts.

Commercial procedure – Jurisdiction of courts – Pecunial jurisdiction – Damages awarded in the case – The amount of damages awarded by a judge in the event of a dispute shall be the basis for determining whether the appeal is within the jurisdiction of the Supreme Court – Organic Law N° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, article 28, paragraph 2, section 7.

**Facts**: Gisa Frediane sued BRALIRWA Ltd in the Commercial Court of Nyarugenge alleging that it used her images in the media (TVR and You tube) in the advertisement of its Heineken product without her permission and for that she prays to Court to award her various damages amounting to 130,000,000Frw.

BRALIRWA Ltd raised a prelinary objection of lack of jurisdiction of the commercial courts stating that the claim should not be admitted, rather that it should have been lodged in ordinary courts because the issue is violation of privacy which is a civil case, within the jurisdiction of the ordinary courts. On the contrary, the court held that the case was within its jurisdiction because the defendant is a commercial company, and that the defendant's alleged use of images and photographs of the plaintiff to advertise its business is treated as a commercial activity.

In the ruling of the case on its merits, the Commercial Court of Nyarugenge found the plaintiff's claim was unfounded, thus no damages awarded to her because the court found that BRALIRWA Ltd did not her images and audio to advertise its products and ordered the plaintiff to pay BRALIRWA procedural fees.

Gisa was dissatisfied with the outcome of the case and appealed to the Commercial High Court arguing that theprevious court disregarded BRALIRWA Ltd's role in advertising its Heineken product using her images and photographs while the defendant admitted that the images and photographs were used. in advertising its beer without having a contract with her, therefore Gisa prays to the court to award her damages which the previous court denied her.

In this Court, BRALIRWA Ltd raised again its objection of lack of jurisdiction of the commercial courts, stating that in the event where images or photographs of a person are used in advertising without the permission of the owner, is a civil matter which has to be settled by the ordinary courts. The court overlured the objection and on the merit of the case, it ruled that the appeal was well-founded because it found that BRALIRWA had used the images and photographs of Gisa without permission, overturned the rulings of the case and ordered BRALIRWA to pay her 8,200,000Frw in damages. BRALIRWA appealed to the Supreme Court requesting the court to re-examine whether it is liable for damages for using Gisa's audio and images in advertising of its product, because it never meet her. In her defence, Gisa raised an objection of lack of jurisdiction of the appellant court because the damages awarded in the appealed judgment is less than 50,000,000Frw. On the side of BRALIRWA Ltd, it argues that this court has jurisdiction on the ground that the damages requested are more than 50,000,000Frw because the damages which were initially claimed are 130,000,000Frw and also that the jurisdiction of this is Court is again based on the ground that this case was heard by the commercial courts, which had no jurisdiction.

Gisa Frediane, on the other hand, argues that based on the Organic Law on the organisation, functioning and jurisdiction of commercial courts, she finds that the previous courts had jurisdiction because the contested activities referred to in this case are commercial in nature.

**Held:** 1. Non-contractual obligations are treated as commercial obligations when they arise from business activity, therefore the cases which results from those obligations are within the jurisdiction of the commercial courts.

2. The amount of damages awarded by a judge in the event of a dispute shall be the basis for determining whether the appeal is within the jurisdiction of the Supreme Court, rather than merely basing on the value of the subjectmatter as submitted by the party in his or her claim.

## The objection of lack of jurisdiction on the ground that the damages awarded in the appealed judgment is less than 50,000,000Frw is sustained;

## Appeal rejected; Court fees deposit covers the expenses of the case.

## Statutes and statutory instruments referred to:

- Organic Law N ° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28.
- Organic Law N°06/2012/OL of 14/09/2012 determining the organisation, functioning and jurisdiction of commercial courts, article 2.

## **Cases referred to:**

RCOMAA 00020/2016/SC – RCOMAA 0025/15/CS, Rural Development Solution Company Ltd v District of Nyabihu rendered by the Supreme Court on 21/04/2017

## **Authors cited:**

D. FASQUELLE, M.- A. FASQUELLE, Droit de l'entreprise 2010/2011, "Introduction au droit et au droit commercial", Paris, Lamy, 2010 p. 143.

## Judgment

## I. BACKGROUND OF THE CASE

[1] Gisa Frediane filed a lawsuit in the Nyarugenge Commercial Court, accusing Bralirwa Ltd of using her images to advertise its Heineken brand without her permission, and of using her photos on television (RTV), "You tube", "Websites " with her consent and therefore claim for various damages. [2] At the preliminary hearing on 05/10/2016, Bralirwa Ltd's counsel raised an objection of inadmissibility of the claim because it was not within the jurisdiction of the Commercial Court, whereby its counsel argued that the claim is based on the law of intellectual property, while yet Gisa did not first demonstrate that her claims are indeed part of intellectual property, and that he has no business contract with Bralirwa Ltd. On 11/10/2016, the Commercial Court of Nyarugenge ruled that the claim filed by Gisa Frediane was within its jurisdiction, after finding that Bralirwa Ltd is a commercial company, and that the action in which its also alleged to have involved the use of images and photographs of Gisa Frediane. which is to advertise its Heineken product, is considered as a commercial activity.

[3] The case was heard in merit and in the Judgment RCOM 00965/2016/TC/NYGE rendered on 28/10/2016, the Commercial Court of Nyarugenge found Gisa Frediane's claim without merit and held that Bralirwa Ltd had not advertised its Heineken product using her images and sounds to the extent that it could compensate her. It ordered her to pay Bralirwa Ltd 600,000Frw for procedural and counsel fee.

[4] Gisa Frediane was dissatisfied with the outcome of the case at Commercial Court of Nyarugenge, and she appealed to the Commercial High Court stating that the trial court disregarded BRALIRWA Ltd's role in advertising its Heineken products using her images and photographs and the damages she requested were not awarded.

[5] BRALIRWA Ltd, also, reiterated its objections of inadmissibility on the ground that the case was not within the jurisdiction of the commercial courts, because in the event that images or photographs of a person are used in advertisement

without her permission, it is a civil matter which has to be taken in ordinary courts

[6] In the Judgment RCOMA 00645/2016 / CHC / HCC rendered on 09/02/2017, the High Court of Commerce found that the case was within the jurisdiction of the Commercial Courts and held that Gisa Frediane's appeal was well-founded. It also held that BRALIRWA Ltd had used the photographs and photographs of Gisa Frediane without her permission, ordering it to pay her 8,200,000Frw and to reimburse her all the costs of the case at the first and appeal levels.

[7] BRALIRWA Ltd appealed the judgment to the Supreme Court, requesting that it consider the following issues:

- To determine whether BRALIRWA Ltd was liable for damages for images and photographs of Gisa Frediane that had nothing to do with it;

- Assessing the effects of the judgment rendered without any legal basis; - Assessing whether the Court is authorized to award damages at its discretion while yet the applicant is relying on the profit which the defendant accrued from her;

- To determine whether the Court did not contradict itself in awarding damages to Gisa in a commercial claim and again held that such damages was only awrded because the photographs and images were used without the owner's consent.

[8] The case was heard in public on 12/09/2017, BRALIRWA Ltd represented by Counsel Umurerwa Jeanne Marie Christine together with Counsel Mpayimana Isaïe, and

Gisa Frediane represented by Counsel Ruton Ndasheja Sonia, who challenged the jurisdiction of the Court of the Supreme Court because the damages awarded in the appealed case were less than 50,000,000Frw, the lawyers of BRALIRWA Ltd also argued that the jurisdiction of this Court was based on the fact that the case was decided by the commercial courts which had no jurisdiction and that the damages claimed were more than 50,000 .000Frw.

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

# Determine whether the case is within the jurisdiction of the Supreme Court.

[9] In considering of this issue, the Court finds it necessary to first consider whether the case is within its jurisdiction based on the fact that it was decided by the courts without jurisdiction, and then re-examine whether it is not within its jurisdiction because no damages of at least 50,000. 000Frw was awarded in the judgment under appeal.

#### a. The jurisdiction of the Supreme Court based on the fact that in the first and second instance, the case was decided by the courts without jurisdiction.

[10] Counsels for BRALIRWA Ltd argue that the jurisdiction of the Supreme Court is based on article 28, paragraph two, section 2 °, of Organic Law N ° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, since the Commercial High Court admitted an appeal against a case that is not within the jurisdiction of the commercial courts, that Gisa Frediane filed a case at the Commercial Court of Nyarugenge seeking damages of

130,000,000Frw due to the use of her images in advertising BRALIRWA Ltd products without her permission and the use of her photos on Television, You Tube, websites etc., and her case was based on the law on the protection ot the intellectual property (loi sur la propriété intellectuelle), and even cited the provisions of that law (paras 1, 2, 3, 6, 7, 16, 177, 178, 179, 180, 181, 183 and 184); that in its defense, BRALIRWA Ltd elaborated that the claim was not a commercial matter, and therefore should not have been admitted in commercial courts (exception d 'incompetence des juridictions de commerce) because:

1. None in the provisions of the law on the protection of intellectual property expressly states that photographs and images of an individual, are inovation that should be protected as an intellectual property;

2. The first article of the law sets out a list of novations that can be protected as intellectual property but photographs and images of a person are not included,

3. Gisa herself admits that she never met with BRALIRWA Ltd for them to carry out commercial activities together;

4. There is no way this claim can be commercial and civil, while Gisa is suing for violation of privacy moreover basing on article 23 of the Constitution, and even that was the only basis for the damages which the Commercial High Court charged BRALIRWA Ltd, therefore the claim is a civil one, within the jurisdiction of the Intermediate Court of Nyarugenge.

[11] They also argue that, eventhough the two previous courts did not rely on the same grounds in ruling on the issue of their respectrive jurisdiction over Gisa's claim, but article 178 of the

Organic Law on the organization, functioning and jurisdiction of Courts is a basis for the Supreme Court to admit this appeal, because in civil cases, laws concerning jurisdiction are of public order.

[12] Counsel Ruton Ndasheja Sonia assisting Gisa Frediane argues that based on article 2 of Organic Law N°06/2012/OL of 14/09/2012 determining the organization, functioning and jurisdiction of commercial courts, the case which the previous courts ruled on the case which was within their jurisdiction as the activities referred to in the case are commercial in nature.

# **DETERMINATION OF THE COURT**

[13] Article 28, paragraph 2, part 2, of Organic Law N  $^{\circ}$  03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, provides that: the Supreme Court also has jurisdiction to hear appeals of cases decided in the second instance by the High Court, the Commercial High Court or the Military High Court are based on non-existing law, repealed legal provisions or decided by a court that does not have jurisdiction".

[14] Article 2 of Organic Law N ° 06/2012 / OL of 14/09/2012 determining the organisation, functioning and jurisdiction of commercial courts, provides that : [...] "commercial matters" shall mean commercial, financial, fiscal and other related matters in connection with : disputes related to intellectual property, including trade marks and names;. [...]". Article 12, paragraph 1, of this Organic Law, provides that: " Commercial Courts shall hear in the first instance, all commercial, financial and fiscal cases and other correlated matters as described in Article 2 of this Organic Law."

[15] Legal Scholars, Daniel FASQUELLE and Marie-Alice FASQUELLE explain that in terms of non-contractual obligations, these obligations are deemed to be commercial in nature as long as they are derived from commercial activity<sup>1</sup>.

[16] In the present case, the case file indicates that the despute between Gisa Frediane and BRALIRWA Ltd a commercial company, originates from her images and photographs used (by BRALIRWA Ltd) in the advertising of Heineken product without her permission, for which she seeks damages. As a redress. The case file also demonstrates that the counsel for BRALIRWA Ltd, in the Commercial High Court, admitted that the images and photos were indeed used by BRALIRWA Ltd in advertising its products and it had no contract with GISA Frediane, that those images and photos were given to BRALIRWA Ltd by EXP RWANDA, but he was not able to produce the contract it had with that company.

[17] The Court finds that BRALIRWA Ltd is a commercial company, which implies that advertising its Heineken brand using images and photographs of Gisa Frediane, is a commercial related activity, and therefore, therefore, in accordance with the provisions of article 2 and 12 mentioned above, the disputes arising from that activity are to be settled by the commercial courts, as the aforementioned legal scholars explained that non-

<sup>&</sup>lt;sup>1</sup> Pour ce qui concerne les engagements extra-contractuels, ceux-ci sont commerciaux dès lors qu'ils sont nés à l'occasion de l'activité commerciale (D. FASQUELLE, M.- A. FASQUELLE, Droit de l'entreprise 2010/2011, "Introduction au droit et au droit commercial", Paris, Lamy, 2010 p. 143.

contractual obligations are treated as commercial when they arise from commercial activity, thus the cases resulting from those activities are within the jurisdiction of the commercial courts

[18] The Court finds that, in the light of the foregoing motivations, the judgment under appeal was rendered by competent courts, therefore the argument of BRALIRWA Ltd that the jurisdiction of the Supreme Court is based on the ground that the lower courts ruled on the case which is not in their jurisdiction, lacks merit.

#### b. Supreme Court's lack of jurisdiction to hear this case on the basis that the damages awarded in the appealed case does not reach at least 50,000,000 Frw.

[19] Counsel Ruton Ndasheja Sonia, counsel for Gisa Frediane, states that, pursuant to article 28, paragraph two, section 7, of Organic Law N  $^{\circ}$  03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, the case is not within the jurisdiction of the Supreme Court, on the ground that BRALIRWA Ltd appealed the judgment on the second instance while the damages awarded are 8,200,000 Frw, while the minimum amount allowed by the law is atleast 50,000,000Frw.

[20] The counsel for BRALIRWA Ltd argue that pursuant to article 28, paragraph four, of the Organic Law N  $^{\circ}$  03/2012 / OL, this appeal must be admitted to the Supreme Court, because the damages that are claimed, either in the written submissions, or in the pleadings of GISA Frediane, is 130,000,000 Frw, which is therefore more than 50,000,000Frw provided by law on the second appeal and that it is not necessary to consider the amount

awarded by the court, but to consider what was previously sued for.

### **DETERMINATION OF THE COURT**

[21] Article 28, paragraph 2, section 7, of Organic Law N  $^{\circ}$  03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, provides that: "The Supreme Court shall also have appellate jurisdiction over cases heard and decided in the second instance by the High Court, the Commercial High Court or by the Military High Court if such cases: [...] involve a judgment in respect of which there was an award of damages of at least fifty million Rwandan francs (50,000,000Frw), or when the value of the case , as determined by the judge in case of a dispute, is at least fifty million Rwandan francs (50,000,000 Frw)".

The case file indicates that, at the first instance, GISA [22] Frediane sued BRALIRWA Ltd for using her images and photographs advertise its Heineken beer. to claiming 100,000,000Frw for economic compesation, moral damages for 20,000,000Frw, procedural fees of 5,000,000Frw<sup>2</sup> and counsel fees of 10,000,000Frw,all amounting to 135,000,000Frw. On the first instance, GISA Frediane was not awarded damages because he lost the case, and on the second instance (at the Commercial High Court) he was awarded 5,000,000Frw in damages on the ground that her images and photos were posted by BRALIRWA Ltd on its products without her permission, 2,000,000Frw were awarded to her moral damages for being dragged into

<sup>&</sup>lt;sup>2</sup> In the Commercial High Court the plaintiff stated that the procedural fess is 3,000,000Frw.

unnecessary lawsuits and 1,200,000Frw for counsel and procedural fees, all totaling to 8,200,000Frw.

### **DETERMINATION OF THE COURT**

The Court finds that, although, as already explained, the [23] at the beginning the damages claimed for was 130,000,000Frw which is above 50,000,000Frw, referred to in article 28 of the above mentioned Organic Law N ° 03/2012 / OL, however pursuant to the provisions of paragraph 2, section 7, of that article, the amount of damages awarded by a judge in the event of a dispute shall be the basis for determining whether the appeal of BRALIRWA Ltd is within the jurisdiction of the Supreme Court, instead of merely the value of the subject matter submitted by the plaintiff in his claim as alleged by the counsel of BRALIRWA Ltd. The fact that in this case the damages awarded by the judge is 8,200,000 Frw, which did not reach 50,000,000 Frw provided for in article 28, paragraph 2, section 7°, of Organic Law N ° 03 / 2012 / OL cited above, this undoubtedly proves that the appeal of BRALIRWA Ltd is not within the jurisdiction of the Supreme Court. This was also the position taken by this Court in the Judgment RCOMAA 00020/2016 / SC - RCOMAA 0025/15CS rendered 21/04/2017 (RURAL / on DEVELOPMENT SOLUTION COMPANY LTD vs NYABIHU DISTRICT).

[24] The Court therefore finds that, on the basis of the foregoing motivation, the objection of lack of jurisdiction of the Supreme Court, on the ground that the damages awarded in the appealed judgment is less than 50,000,000Frw which aws raised by Gisa Frediane is sustained.

# **III. DECISION OF THE COURT**

[25] The objection of lack of jurisdiction of the Supreme Court raised by Gisa Frediane is sustained;

[26] The appeal of BRALIRWA Ltd is rejected because it is not within the jurisdiction of the Supreme Court;

[27] Orders that the court fees deposited by BRALIRWA Ltd be equivalent to the expenses in this case.

# **CASES IN MERITS**

# **CIVIL CASE**

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# CANDARI V. MUKAMANA ET AL.

[Rwanda SUPREME COURT – RCAA 0024/14/CS (Mukanyundo P.J., Kayitesi R. and Gatete J.) April 10, 2015]

Family law – Family – Succession – The children who were not born by the deceased, can not inherit him because they have no relation unless it is proven that they were adopted.

Family law – Family – Matrimonial regime – When spouses are married under community property regime all properties are considered to be owned by both spouses unless one of them put a reservation clause in that agreement (réserve) regarding the property which belongs to his/her children who were born before that marriage.

Evidence law – Private document – Irregularity of a document – A document, even if it is made before a notary but in violation of the provisions of the law, is not considered valid.

**Fact:** Havugimana and Mwamini had two children who are Mukamana Mamique and Havugimana Celestin.Mwamini died and Havugimana re- married again with Candali and had a child called Iradukunda Jean Luc. Havugimana also died and then the children of Mwamini sued Candari in Intermediate Court of Gasabo claiming the estate left behind by their parents. That Court ruled that the estate left behind by Havugimana be inherited by all his children and  $\frac{1}{2}$  of the remaining estate be given to Candari as a wife he legally married.

Candari appealed against that judgment before the High Court, whereby Umuhoza recognized by the Court as also a child of Havugimana, intervened requesting to inherit her father. The High Court based on the Law N° 22/99 of 12/11/1999 relating to the matrimonial regime, liberalities and succession which was in force at that time, ruled that the estate of Havugimana have to be divided into two, a half of it ( $\frac{1}{2}$ ) be given to Candari as his wife and another half ( $\frac{1}{2}$ ) given to all Havugimana's children.

Candari appealed before the Supreme Court stating that, some of the properties to be inherited are not jointly owned with Havugimana because she had some of them before they got married while others she acquired them after the death of Havugimana. She also states that she has sold some of them. Thus, they should not be included among Havugimana's estate to be inherited.

She further claims that she made a transactional agreement with Havugimana's children before the notary, whereby they agreed that she will get 40% of the deceased's estate whereas the children will get 60%, they also agreed that the children that Candari had before she got married with Havugimana have also to have a share on that estate, thus, she prays that the court considers that transactional agreement. She explains that the reason why one of the deceased's children was not among the family council was that she had not yet known that he was a deceased's child.

The defendants before this Court, argue that there is no proof that there are properties that Candari brought to Havugimana and in case she brought any, should be among the property to be inherited by all heirs of the deceased because they were married in community property regime. Concerning the properties, she sold, they argue that she sold them after the lawsuits had begun, thus she did that to misappropriate them. They request the Court to invalidate the sale of the house and be included among the properties to inherit. Concerning the transactional agreement concluded before the notary, they argue that it should not be considered by the Court because it was concluded while the case was ongoing before the Court, it was made in absence of one of the deceased's children and also it gave rights to the properties to unknown children, who were never cited during the last court hearings.

**Held:** 1. The children who were not born by the deceased, can not inherit him because they have no relation unless it is proven that they were adopted.

2. When spouses are married under the community property regime all properties are considered to be owned by both spouses unless one of them puts a reservation clause in that agreement (réserve) regarding the property which belongs to his/her children who were born before that marriage.

3. A document, even if it is made before a notary but in violation of the provisions of the law, is not considered validthe notary, but disregarding the provision of the Law, is void.

#### The appeal has merit in part. The cross-appeal has merit.

#### Statutes and statutory instruments reffered to.

- Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3.
- Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions. article 3.
- Decree-Law of 30/07/1888 relating to contracts or obligations, (abrogated by the law N° 020/2019 of 22/08/2019

abrogating all laws established before the independence) articles, 263 and 590.

No case Law reffered to.

# I. BACK GROUND OF THE CASE.

[1] This case started before Gasabo Intermediate Court, where Mukamana Mamique and his brother Havugimana Emmanuel, were accusing Candari Verena, the wife of their late father Havugimana Céléstin whom he married after the death of their respective mother, in their pleadings, they were praying the Court the rights on the properties left by their parents.

[2] That Court decided that the properties left by Havugimana Céléstin be inherited by all his children, ½ of the remaining properties be given to Candari Verena as his wife whom he legally married.

[3] Candari appealed for that judgment before the High Court, and Umuhoza Aïsha recognized by the judgment RC0095/12/TB/Kma as a child of Havugimana Céléstin intervened, in that case, praying to have right to inherit his father.

[4] The Court decided on 25/04/2014, that, the properties composed of a house where Candari lives, a house located at Gisozi near Agakinjiro, a house located at Kiyovu of Kagugu and a vehicle parked at Candari Verena's house, are properties to be divided by two, ½ of it to be given to Candatri as legal wife of Havugimana Céléstin, while ½ be given to all children of Havugimana Céléstin who are, Mukamana Mamique,

Havugimana Emmanuel, plus Umuhoza Aïsha and Shema Iradukunda Jean Luc, which should be shared equally.

[5] Candari Verena appealed before the Supreme Court arguing that the High Court disregarded the fact that before she married Havugimana Célestin she had properties, also it decided that the properties to be inherited include the properties she acquired after the death of her husband, while those properties were not available at the opening of the inheritance after the death of Havugimana, also that the Court disregarded the provisions of the Law governing matrimonial regime.

[6] The hearing of the case was scheduled on 04/11/2014, but it has been postponed awaiting the decision in the case opposing Umuhoza Aïsha to Candari Verena, at 03/03/2015, it was heard in public Candari Verena was present assisted by Counsel Mbonyimpaye Elias, Havugimana Emmanuel and Mukamana Mamique were also present assisted by Counsel Nzabonimana John Peter, while Umuhoza Aïsha was assisted by Counsel Umutesi Jeanne d'ArcAïsha was assisted by Counsel Umutesi Jeanne d'Arc.

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

#### Whether the properties acquired by Candari Verena after the death of Havugimana Célestin must be withdrawn from the properties to be inherited.

[7] Counsel Mbonyimpaye Elias and Candari Verena who he represents state that this case is based on inheritance of Havugimana Céléstin's properties who was legally married to Candari Verena, that the property she acquired together with Havugimana Céléstin is available and is composed of one house built at Gisozi near the memorial, that other properties are composed of a house located at Kiyovu of Kagugu and another one located at Gisozi near Agakinjiro and a vehicle which Havugimana's children state that she acquired it together with their father but it is not true because she bought it after the death of her husband, thus it should not be included in the properties to be inherited because after the death of Havugimana, the contract of marriage with Candari was terminated as provided by article 236 of civil code book I, which implies that, the matrimonial regime of Community property which they chose is consequently terminated as provided by article 24 of the Law governing matrimonial regime, donation and succession.

He continues stating that, in their submissions, they [8] indicated how Candari acquired her properties, and they provided evidence indicating that she sold them and are no longer in her possession: that the vehicle was taken by Dusabemengu Aloys also. her husband) in the (who used to be case RC0277/12/HC/KIG, thus, it is no longer available. He states that, afterward, Candari made an agreement with Havugimana's children before the Notary on 02/09/2014 and Candari agreed to receive 40% of de cujus's properties, and children agreed to take 60%, they agreed also that, Candari's children which she had before she marries Havugimana have also to get a share, thus she prays the Court to consider that transactional agreement basing on article 155 of the civil code book I, Candari explains that, Umuhoza Aïsha was absent from the family council because she did not know whether she is also Havugimana Céléstin's child.

[9] In her appeal submissions, Candari Verena states that the house of Kagugu has no link with the properties she acquired together with Havugimana Célestin because that house was lent

for her in the beginning by a white man called Jeff who was her friend and who had pity for her because she had a toddler, then he gave it to her to raise that child because was not for Havugimana.

[10] He explains that within the properties that Havugimana's children want to inherit, comprise the properties that Candari Verena got after the death of Havugimana, that there is a house she built in a plot she bought for the children she had with Bukuru Ananie before she marries Havugimana though they added it to the plot possessed by Havugimana for an extension, she consented because she believed that, there will not be discrimination between her children and those for her husband, thus, that property belongs to her and is registered on her.

[11] Counsel Ndacyayisenga in the submissions she made for Candari Verena, states that the judge for High Court disregarded the properties that Candari Verena brought for wedding Havugimana, and did not decide about the children she had before marrying him who are Dufatanye Trésor and Uwimana David instead, he decided that their properties should be beneficial to Havugimana's children while they have no property remained either from Havugimana or from their father Bukuru Ananie, thus the judge erred in the provisions of the Law governing matrimonial regime, liberalities and succession, the latter was opened at the death of Havugimana Célestin meaning that the properties that Candari got after his death can not be shared between his heirs.

[12] He explains that Candari delayed in handing to the heirs of Havugimana Céléstin their properties because they were still minors and was making profit from them as buying and reselling, he states that she joined the plot she brought from Bukuru to theirs, then she built in many houses in the year 2000, using her proper funding, thus, the children can not argue that she did not look after them while she paid for them school fees though, they escaped her due to expropriation fee of house. Located at Kimicanga.

Counsel Nzabonimana John Peter, who represents [13] Mukamana Mamique and assisting Havugimana Emmanuel, state that, the grounds of appeal of Candari have no merit, because no evidence indicates that there are properties that Candari brought to Havugimana Céléstin from Bukuru Ananie, however, if it is true, nothing prevents all his heirs to inherit all properties of the de cujus because they were in the regime of Community property, mostly because the Law provides that the widower remain with the obligation of management of the whole property and look after the children left by the de cujus but Candari Verena disregarded that obligation of looking after the children because after the death of their father, they run away and they did not even attend university while their father had financial means. The children of Havugimana agree that the succession was open when their father died, but as heirs, they requested Candari Verena to share the properties left by Havugimana but she denied. As she denied while she is the one on the management of properties, this does not vet her the rights to appropriate and keep alone the properties of the *de cujus*, unless she proves that the succession occurred after the death of Havugimana.

[14] They state that Candari Verena can not exclude the house of Kagugu among properties to inherit based on the fact that she sold it, but she did so, on 28/02/2014, while that house was still in disputes, even the Court has included it among the properties to inherit, this also applies for the house located at Gisozi near

60

Agakinjiro, thus as she dared to sale the properties which were still in disputes, it is a fault for which she should bear the consequences, they pray the Court to order void that sale contract, rather restore the house in Havugimana's properties to inherit because Candari Verena sold it aiming at embezzling the properties to inherit.

[15] Counsel Nzabonimana continues adducing that the statement of Candari Verena that, she built the houses she pretends to be hers by her own money is false because she has no other source of income which would help her to get a loan from a bank so that she could buy the houses rather she looked for the properties together with Havugimana Céléstin and requested for titles after his death. Concerning the house of Kagugu sold while it was still in dispute, he finds that everything proves that a property transfer was completed, that the Court should also look at the letter dated 20/08/2012 which Candari wrote to Gisozi sector's administrators notifying them about the properties left by Havugimana Céléstin.

[16] Concerning the agreement made before a notary, Counsel Nzabonimana states that it is void because Candari Verena abused the children by making them believe that the government will take away their plot if they didn't sign, but they erred in the procedure because the family council was not complete as Aïsha was not present while she has been intervening in the case. He states that another critic toward that document is that, it mentions the children that Candari had with Bukuru Ananie while they don't count among Havugimana Célestin's heirs. He states also that; this document was made by children for expropriation because Candari was telling them that if they don't sign the government will take it for free without compensation. They pray

the Court to consider the letter dated 20/08/2012 which Candari wrote to Gisozi sector's administrators notifying them about Havugimana Céléstin's properties.

[17] Concerning the vehicle that Candari Verena states that she lost in the case opposing her to Dusabemungu Aloys, he states that it is staging, because the latter who won it, is also her husband with whom she has a child, but the children accept to remove it from the properties to inherit and only houses should remain.

[18] Counsel Umutesi Jeanne d'Arc and Umuhoza Aïsha whom she assists state that as long as Havugimana Céléstin died whereas the liquidation of the succession did not follow because Candari did not allow her husband's children to inherit him just after his death, rather she kept on benefiting that property, all properties have to be shared.

[19] They state that the argument of Candari Verena that there are properties she brought from her previous husband and incorporated them to Havugimana's properties, has no merit because she would have separated them, if she failed to do so, it can not be considered by the Supreme Court.

[20] Concerning the issue on not opening the succession, Counsel Umutesi states that the fact that Candari failed to indicate to Havugimana's children his properties to inherit rather she continued benefiting from them and making other properties from them, thus all properties must be shared, the argument that she got other properties after the death of Havugimana has no merit as she was in community property as the matrimonial regime is concerned and there was no succession if Havugimana died while his children were minor, Candari Verena was the one to manage their properties, then when they get the majority age, she would give them 50% of their properties while she would remain also, with 50%.

[21] Counsel Umutesi continues stating that, before the High Court, the judge motivated what is the community property regime, he stated that the spouses who choose that regime, share all properties, either in their possession before the marriage or whether they acquired them during their marriage. She states that at the time Candari Verena married Havugimana, she did not mention that she has other children or mention that, there are properties for those children she keeps aside, that, she just mentions those children before the Court.

[22] Concerning the document made before the notary, argued by Candari Verena, Counsel Umutesi states that it has no merit as it was made in the course of the hearing of the case by the Court, also it was made disregarding Aïsha, whereas she is also Havugimana Célestin's child, also that, even though the Court includes Aïsha, it will still have no merit because other unknown children who were never mentioned in all previous Court cases, thus, reference should be made on article 70 of the Law relating to matrimonial regime, donation and succession.

[23] Concerning the sold properties, she states that it is Candari Verena's fault, which she should bear because as long as there was no sharing, Candari would manage all properties and handle them to children within the appropriate time. Umuhoza Aïsha on her side states that the vehicle has to be returned because she lost the case due to her faults as she married another man after the death of her husband, and there is money for the expropriation of the house of Kimicanga that she dismissed while other children benefited from it.

# **DETERMINATION OF THE COURT**

[24] Article 3 of the Law N° 22/99 of 12/11/1999 relating to matrimonial regimes liberalities and succession provides that, the regime of community property is a contract by which the spouses opt for a marriage settlement based on joint ownership of all their property-movable as well as immovable and their present and future charges.

[25] Article 49 of the Law N° 22/99 of 12/11/1999 provides that succession is an act by which the rights and obligations on the property of the *de cujus* are transferred to the heir. The second paragraph provides that, the succession goes through probate at the death of the cujus, at his/her domicile or residence.

[26] Article 50 provides that, all legitimate children of the *de cujus,* in accordance with civil laws, inherit equally without any discrimination; between male and female children.

[27] Article 51 provides that, at the time of the succession between children, the family council shall determine the part of the property to be earmarked for the raising of minors and the part to be shared between all the children of the *de cujus*.

[28] Article 70 litera 1° provides that in case of death of one of the spouses, the surviving spouse shall ensure the administration of the entire property while assuming the duties of raising the children and assistance to the needy parents of the *de cujus*; The litera 7, provides that, the surviving spouse who no longer has any children under his/her care and wants to remarry shall obtain full ownership of the 1/2 of the property and another half shall be given to the deceased's heirs;

[29] The interpretation of those articles mentioned in previous paragraphs, means that if one of the spouses who are in community property regime dies, the widower, keep on managing the entire property (acte d'administration) while assuming the duties of raising the children and assistance to the needy parents of the *de cujus*, this means that the widower does not inherit the property of the deceased spouse, rather the deceased spouse is inherited by his/her children and his/her parents as indicated by the order provided by article 66 of the Law N° 22/99 of 12/11/1999. Concerning the property left by the *de cujus*, the widow retains 50% of it.

[30] Among the documents of the case file, there is a certificate of marriage between Havugimana and Candari Verena given by Kacyiru sector's administration, that certificate indicates that they were legally married, and they chose community property as the matrimonial regime was concerned.

[31] The case file indicates also that Candari Verena and Havugimana Céléstin gave birth to a child called Iradukunda Jean Luc, while Havugimana Céléstin had Havugimana Emmanuel and Mukamana Mamique with Mwamini who died before him, plus Umuhoza Aïsha who has been declared by the Court as a child of Havugimana Céléstin from another wife. All parties to the case recognize these children as are for Havugimana, even the High Court held so, in the case RCA0557/13/HC/Kig, even before this Court none of the parties appealed for the ground that, among the children decided by the Court to share the estate left by Havugimana there is some included who are not eligible.

[32] Concerning the properties to be inherited, the Court finds that there is a house located at Gisozi near the Kigali Genocide memorial, a house located at Kiyovu of Kagugu and another house located at Gisozi near Agakinjiro. The vehicle mentioned in the hearing is clear that Candari Verena lost it in the case RCA0577/12/HC/KIG opposing her to Dusabemungu Aloys, which decided that the vehicle belongs to Dusabemungu Aloys<sup>1</sup>, it should be then excluded from property to inherit even the heirs of Havugimana Célestin agree upon that<sup>2</sup> except for Umuhoza Aïsha but she is not indicating other alternatives.

[33] Concerning the properties sold by Candari Verena while she owns them jointly with Havugimana's children, the Court finds that the sale Contract is contrary to Law especially article 263 of civil code book III because she was not the sole owner, and she sold them disregarding that those properties were still in disputes even the previous Courts had decided upon them.

[34] The Court finds that as decided by the High Court, it sustains the motivations of that Court, thus, basing on articles mentioned in the previous paragraph, the property comprising of the compound of houses located at Gisozi near the Kigali Genocide memorial with title n° 2710, a house located at Gisozi near Agakinjiro, a house located at Kiyovu of Kagugu, which has to be shared by Havugimana Célestin's heirs whereby  $\frac{1}{2}$  has to be given to Candari Verena as his wife who he legally married, the remaining  $\frac{1}{2}$  has to be shared between Havugimana Emmanuel, Mukamana Mamique, Umuhoza Aïsha and Iradukunda Jean Luc based on the provisions of article 70, litera 7°, of the Law N° 22/99 of 12/11/1999 aforementioned.

<sup>&</sup>lt;sup>1</sup>, In this case, it has been decided that a vehicle Toyota Harrier with

Congolese plate n° 9880AA/19 be returned to Dusabemungu Aloys.

 $<sup>^{2}</sup>$  See the hearing minutes of this case of 03/03/2015 page 5.

[35] The Court finds also without merit, the argument of Candari Verena that there are properties she acquired after the death of Havugimana Célestin, because, as the opening of succession occurred just after the death of Havugimana Célestin as provided by article 49 of the Law N° 22/99 of 12/11/1999 aforementioned, however, the "liquidation" of the *de cujus*'s properties did not occur as well, whereas Candari Verena had the obligation to manage the whole property on behalf of Havugimana Célestin's heirs as provided by article 70, litera one<sup>3</sup> of the Law N° 22/99 of 12/11/1999, this means that even the properties she may be acquired after, though she is not evidencing for it, they must be considered as derivative from the benefit produced by community property she had with Havugimana Célestin. Her request that she should keep them for her alone, it could be seen as unjust enrichment (enrichissement sans cause).

[36] The Court finds also without merit the argument of Candari Verena that her children Dufatanye Trésor and Uwimana David she had with Bukuru Ananie, have to share the community properties she has with Havugimana Célestin, because these children have no relation with Havugimana Célestin as he is not their father and no certificate indicates that he adopted them. Furthermore, there is no particularity in the matrimonial contract of Candari Verena and Havugimana Célestin regarding the property of those children, which she pretends to have brought from her husband Bukuru Ananie, from which the Court may refer to decide that the concerned property belong to those children, thus, basing on the provisions of article 3 of the Law N°15/2004 of 12/06/2004, relating to evidence and its

<sup>&</sup>lt;sup>3</sup> If one of the spouses dies, the widower, keep on managing the entire property while assuming the duties of raising the children and assistance to the needy parents of the *de cujus* 

production<sup>4</sup> Candari can not get relief for her requests to Court because she has no evidence.

[37] Though the document of 02/09/2014 was made before the notary, its signatories agreed how to share Havugimana Célestin's property, the Court finds it void because it has been made disregarding the provisions of article 50 of the Law N° 22/99 of 12/11/1999, as motivated in the previous paragraph, the children Dufatanye Trésor and Uwimana David, that Candari Verena had with Bukuru Ananie, were included among the heirs of Havugimana Céléstin whereas nothing proves that they are his according to the Civil Law. Furthermore, Umuhoza Aïsha who intervened in this case, was forgotten as one of Havugimana Célestin's children recognized by the Law, thus, its signatories can not produce it as provided by article 590<sup>5</sup> of civil code book III, because it was made on 02/09/2014 whereas Umuhoza Aïsha was recognized as a child of Havugimana Célestin on 28/12/2012

[38] The Court finds without merit the argument that Umuhoza Aïsha did not get her share on the money for the expropriation of the house of Kimicanga, because a document was produced before the High Court dated 20/12/2013, in which all parties to the case including Umuhoza Aïsha, agreed to share the money from expropriation between Candari Verena, Mukamana Mamique and Havugimana Emmanuel, that issue was resolved by that transactional agreement made by all parties, thus,

<sup>&</sup>lt;sup>4</sup> Any contending party has to produce elements of proof to support her/his argument

<sup>&</sup>lt;sup>5</sup> A transactional agreement made by any person who shares interests with others, is neither enforceable to whom he/she shares interests nor they can take advantage of it.

it should not be raised again in this case as provided by article 591 Civil book III.

#### **Regarding the cross appeal**

[39] Counsel Nzabonimana John Peter file a cross appeal case, requesting for Mukamana Mamique and Havugimana Emannuel, moral damages equivalent to 5,000,000Frw because they are orphans but were deprived the rights to their property which was left to her by the de cujus instead of looking after them, she dragged them into an unnecessary lawsuit. They request also 1,000,000Frw for counsel fee and 500,000frw for procedural fee.

[40] Counsel Umutesi Jeanne d'Arc based on article 167 of the Law N° 18/2004 of 20/06/2004 aforementioned, states that Umuhoza Aïsha sue for cross appeal requesting the Supreme Court to order Candari Verena to pay for moral damages equal to 5,000,000Frw for depriving her the rights to her father's property, and dragging her into an unnecessary lawsuit, to pay 1,000,000Frw for counsel fee and 500,000Frw for procedural fee.

[41] Counsel Mbonyimpaye Elias's submissions state that the Court has to decide that the appeal of Candari Verena has merit then decides that the accused should be the ones to pay the moral damages equivalent to 1,000,000Frw and 500,000Frw for procedural fees, including counsel fee.

### **DETERMINATION OF THE COURT**

[42] The Court finds that the moral damages requested by the defendants, in this case, have merit because Candari Verena ignored them and they have spent a long time living hard life

whereas there are properties left by their father Havugimana Céléstin which would support them to solve some daily life problems. The Court in its discretion, award moral damages to Mukamana Mamique, Havugimana Emannuel and Umuhoza Aïsha, each 1,000,000Frw, 500.000Frw for counsel and procedural fee and 500.000Frw for counsel and procedural fee for Umuhoza Aïsha.

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

[43] Decides that, the appeal of Candari Verena has merit with regard to the vehicle wich is removed from properties to be inherited;

[44] Decides admissible the cross appeal lodged by Mukamana Mamique, Havugimana Emmanuel and Umuhoza Aïsha and declares that, it has merit;

[45] Decides that the appealed judgment RCA0557/13/HC/KIG rendered by the High Court on 25/04/2014 is reversed only regarding the vehicle whose plate number is 9880AA/19 which has to be removed from the properties to be inherited.

[46] Decides that, the heirs of Havugimana Céléstin and Candari Verena's property are: Mukamana Mamique, Havugimana Emmanuel, Umuhoza Aïsha and Iradukunda Jean Luc;

[47] Orders Candari Verena to pay to Mukamana Mamique, Havugimana Emmanuel and Umuhoza Aïsha each 1,000,000Frw for moral damages and pay 500,000Frw to Mukamana Mamique

70

and Havugimana Emmanuel for procedural and counsel fee, and also pay 500.000Frw to Umuhoza Aïsha for procedural and counsel fee, all amounting to 4,000,000Frw.

[48] Orders Candari Verena to pay Court fee equivalent to 100,000Frw.

### NIYIGENAV. NYIRISHEMA

#### [Rwanda SUPREME COURT – RS/INJUST/RC 00010/2017/SC (Hatangimbabazi, P.J., Ngagi and Kanyange, J.) January 12, 2018]

Land law – Immovable properties – Origin of immovable property – Contract of sale – The contract of sale alone cannot be a basis to prove the ownership of the land without proving whether the one you acquired that land from is the right owner.

**Facts:** Niyigena took Nyirishema Hodari to Nyarugenge Intermediate Court for illegally occupying the house left to her by her father Ahishakiye Musafiri while Nyirishema Hodari claims that he bought that house from Maso Tharcisse. The court hold that the house belonged to Niyigena because she inherited it from her father Ahishakiye Musafiri, thus ordered Nyirishema to vacate the house and pay various damages.

Not satisfied with the decision, Niyigena appealed to the High Court, which found that Niyigena had not provided sufficient evidence to prove that the house belonged to her father, or that Nyirishema had illegally occupied it, thus reversed the judgment under appeal on all points and ordered Niyigena to pay damages and counsel fees.

Then, Niyigena applied to the Office of the Ombudsman to review this judgment on the grounds of being vitiated by injustice. After analysing the issue, the Office of the Ombudsman wrote a letter to the Chief Justice requesting him to review this judgment on the grounds of injustice. The judgment challenged on the grounds of injustice was reviewed before the Supreme Court, with Niyigena alleging that the house belonged to Ahishakiye Musafili, that Maso Tharcisse occupied it after 1994 and then ceded it to Nyirishema Hodari, that there are even writings from the administrative authorities which prove that Maso Tharcisse who had appropriated the house had indeed ceded it to Nyirishema Hodari.

Nyirishema claims that Niyigena Marlene did not suffer any injustice because she had not proved the origin of that house in dispute, thus claiming damages for this action which he finds reckless and vexatious.

In order to ascertain the truth of the case, the Supreme Court heard various witnesses, including those who had signed the contract of sale between Nyirishema Hodari and Maso Tharcisse, and others who had knowledge of the house in dispute: Uwimana Philippe, one of the witnesses, pointed out that it was he who had built this house in 1981, in the plot given to him as Nkundabagenzi Abdallah who thought he was his son, that he had stayed in this house until 1988 when he sold it to Ahishakiye Musafiri. Murari François added that the house was built by Uwimana Philippe in a plot of land that had been given to him by Nkundabagenzi Abdallah, and that he, in turn, sold it to Ahishakiye Musafiri, that Maso had only appropriated this house, that he had given it to Nyirishema Hodari, from the same locality as him, because he was forced to return to his native village following a serious illness. Mukanyindo Clotilde, another witness who married Ngaboyayezu Tharcisse (nicknamed Maso) in 1995, claims that they lived in the house in dispute and that her husband told her that it did not belong to them, that they would return the house as soon as the owner claimed it. She explained that the time came when her husband wanted to return to his home village and handed over the house to his friend from his home village, which

74

she must not have signed on the contract of sale of the said house as she already knew that it did not belong to them.

Witness Dusengimana Perijine, for his part, explained that Nyirishema Hodari told him one day that he had found a house to buy and asked her to accompany him to testify to the sales agreement, that everyone thought the house belonged to Maso Tharcisse because he was the one who occupied it. Uwamariya Immaculée, another witness, explained that after the genocide against the Tutsis, Ngaboyayezu Tharcisse (Maso) was staying with him, that an old man named Rubagumya Georges had shown him a house for sale, telling him that it had no further consequences and that Ngaboyezu Tharcisse then repainted the house, even married into it, but later he gave it to Nyirishema Hodari because he was forced to return to his home village after a great illness.

Niyigena Marlène was called upon to reply to the various testimonies and retorted that those from Uwimana Philippe, Murari François, Uwimana Immaculée and Mukanyindo Clotilde completed her claim that the house in dispute had been occupied by Maso Tharcisse without belonging to him and that he had sold it to Nyirishema Hodari without any title of sale. She asked the court to declare that the house belonged to her because it was only she who presented the evidence of its origin.

Nyirishema, for its part, criticised the testimony of Mukanyindo, wife of Maso Tharcisse, accusing her of having been inclined to side with her opponent when she signed on to the contract for the sale of the house, which she intended to nullify the contract. Finally, he points out that Maso Tharcisse's wife wants to attribute to him the claim that he mentioned that the house did not belong to him because he is no longer alive, that this cannot be true because he could not rehabilitate a house that did not belong to him, that the Court should not base its decision solely on the testimonies when he submitted written evidence based on a contract of sale.

**Held:** The contract of sale alone cannot be a basis to prove the ownership of the land without proving whether the one you acquired that land from is the right owner. Thus, the fact that Nyirishema Hodari was unable to prove that Ngaboyayezu whom he claims to have assigned the house to her by way of sale was also the owner of the house, this contract of sale is not valid because the seller would have sold her what did not belong to her, therefore, the house must be attributed to Niyigena because she managed to prove that she inherited it from her father.

#### Application for case review due to injustice allowed.

#### Statutes and statutory instruments referred to:

- Law Nº 15/2004 relating to evidence and its production, article 3, paragraph 1 and 65.
- Decree-law of 30/07/1888 relating to contract or conventional obligation (Repealed by law N° 020/2019 of 22/08/2019 repealing all legal instruments brought into force before the date of independence)

#### No cases referred to.

#### Authors cited:

François Terré et Philippe Simler, Droit civil, Les Biens, Dalloz, 7ème éditional, p. 418.

# Judgment

# I. BRIEF BACKGROUND OF THE CASE

[1] Niyigena Marlène filed a complaint in the Nyarugenge High Court accusing Mrs. Hodari of releasing her father's house, Ahishakiye Musafiri, in Ramiro Village, Karambo Cell, Gatenga Sector in Kigali City, claiming that she had bought it on the 15th. / 06/1997 in Maso Tharcisse.

[2] In judgment N° RC 0025/12/TGI/NYGE of 29/06/2012, the court declared that Niyigena Marlene inherited the house of her father Ahishakiye Musafiri, that Nyirishema Hodari should release her from it, and finally ordered her to pay damages, lawyers' fees and court costs equivalent to the sum of Frw 1,000,000.

[3] Not satisfied with this decision, Nyirishema Hodari appealed to the High Court of Kigali, which rendered judgment N° RCA 0433/12/HC on 24/01/2014, overruled the contested decision after finding that Niyigena Marlène had not produced sufficient evidence to prove that the house in dispute was owned by her father Ahishakiye Musafiri, hence it can't be claimed that Nyirishema Hodari had illegally occupied it. The Court declared that the house should be returned to Nyirishema Hodari, thus condemning Niyigena Marlene to pay 2,000,000Frw including damages and counsel fees.

[4] Niyigena Marlaine referred the matter to the Office of the Ombudsman requesting that judgment No RCA 0433/12/HC/KIG be reviewed on the grounds of injustice. After

analyzing the file, the Office of the Ombudsman wrote to the President of the Supreme Court requesting to review the alleged injustice.

[5] The public hearing took place on 14/11/2017, Niyigena Marlene represented by Counsel Gahutu Joseph while Nyirishema Hodari was represented by Counsel Bimenyimana Emmanuel. The hearing was postponed to 13/12/2017 and on that the court heard the testimony of the witnesses as had been agreed in the previous hearing, the parties were represented as before.

# **II. ANALYSIS OF LEGAL ISSUES**

# 1. Whether the litigated house is owned by Niyigena Marlene, who inherited it from her father Ahishakiye Musafiri

[6] Counsel Gahutu Joseph claims that in holding that the house is owned by Niyigena Marlène, the Court based its decision on the testimony of Murari Francois who testified that it was owned by Ahishakiye Musafiri before 1994 and later occupied by Maso Tharcisse who fell ill and left the house in the hands of Nyirishema Hodari. He added that the Court also based on the documents issued by the administration demonstrating that the house was given to Nyirishema Hodari by Maso Tharcisse who had illegally occupied it.

[7] He also argues that this testimony is corroborated by the testimony of Uwimana Philippe, the first owner of that house and sold it to Ahishakiye Musafiri and that of Mukanyindo Clotilde, the wife to Maso Tharcisse, who testified that they lived in that house aware that it was not theirs. He adds that the documents from by the local administration, especially the one dated

01/12/2009, Nyirishema Hodari had promised to hand over the house with all its documents on 30/12/2009, which proves that he acknowledged that he did not own it.

[8] Regarding his opponent's arguments that the property that Nivigena had requested to inherit is the one located in Rugunga, he rebuts that it cannot stop his client from claiming the house located in Gatenga because she has the right to inherit her father's entire estate wherever its located. He requests the Court to declare that the house belongs to Nivigena because she has a proved the origin of the house, that she acquired through inheritance of her father Ahishakiye Musafiri's estate who also acquired it through sale, he brought it from Uwimana Philippe who built it on a plot of land given to him by Nkundabagenzi Abdallah, therefore, based on the provisions of article 276 of the Civil Code, Book III, the contract of sale on which Nyirishema Hodari bases to claim the ownership of the house is null and void because it was concluded by someone who is not the owner of the property.

[9] The counsel for Nyirishema Hodari argues that Niyigena Marlene did not suffer any injustice because she did not the origin of the house in dispute, that contrary to her claims, the evidence presented to the court proves that Ahishakiye Musafiri never owned a house in Karambo cell.

[10] He further claims that even if they do not intend to invoke the statute of limitations, however, they wonder why Niyigena Marlene's mother, who never left the country, would have initiated lawsuits to claim the houses located Rugunga leaving the one in Gatenga, that it was 16 years after the first lawsuit that she felt entitled to do so, even if there were legitimate grounds not to follow up on that house, but Ahishakiye Musafiri's sister called Ahishakiye M. Rose from doing so especially that she was a witness in the judgment No RC 0224/08/TB/NYMBO, whereby she testified that Niyigena Marlene is her brother's daughter, this proves that Ahishakiye Musafiri's properties are located in Biryogo where he lived with the mother of Niyigena Marlene, especially that even in the case she initiated requesting that Niyigena Marlene inherit the estate of her deceased father, she stated that those properties are located in Biryogo but never mentioned the house located at Gatenga.

[11] He goes further to argue that Mukanyindo Clotilde, wife of Maso Tharcisse, who also signed on the sales contract of 15/06/1997, now claims that the house did not belong to them purposely to nullify that contract, for her to repossess it through others she alleges that they are the owners.

[12] Concerning the arguments that the house was built by Uwimana Philippe who then sold it to Ahishakiye Musafiri, Counsel Bimenyimana responded that no one in the vicinity of Karambo knows Ahishakiye Musafiri, that also even the testimony of Murari François which was based on by the Intermediate Court of Nyarugenge as a person who resided there before 1994 is contradicted by the evidence they submitted (on cote 15) which proves that he moved there after 1994 from Bugesera. Besides, he testified that the house was built by Ahishakiye Musafiri while Uwimana Philippe stated that he is the one who sold the house to him, this creates doubt on who built it.

[13] On the argument that Nyirishema Hodari agreed to hand over the house and its documents on 01/12/2009, the Counsel argues that his learned fellow is misinterpreting that document, rather he stated that he could hand over the house or the documents of the house, including the sales contract and the title

which bestows to him the ownership of the house which he bought from Maso Tharcisse who was occupying it, who was considered as the owner because the buyer found him occupying it, and therefore the argument that Maso Tharcisse left the house to Nyirishema in the category of renting it to him should not be considered since there is no tenancy agreement produced.

[14] As explained above, in order to determine the owner of the house, the Court heard various witnesses, including those who signed the sale agreement between Nyirishema Hodari and Maso Tharcisse, and those who had the information about the house in litigation.

[15] Uwimana Philippe testified that he built that house in 1981 on a plot of land given to him by Nkundabagenzi Abdallah who treated him as his son, that he lived in that house until 1988 when he sold it to Ahishakiye Musafiri.

[16] In his testimony, Murari François also stated that the house was built by Uwimana Philippe in the plot given to him by Nkundabagenzi Abdallah, that he then sold it to Ahishakiye Musafiri, that Maso Tharcisse illegally occupied but later due to his illness he went back to his village and left the house to Nyirishema Hodari, his friend and village mate. He also explained that he lived in Karambo since 1981 renting a house of Nkundabagenzi Abdallah, those who argue that he never lived in Karambo may have not moved there yet.

[17] Mukanyindu Clotilde told the Court that she married Ngabonziza Tharcisse nicknamed Maso in 1995, that even though they occupied that house, her husband had told her that it was not his, that at any time the owner may come and repossess it. She stated that time came when her husband wanted to return

to the village, that he first wanted to leave the house to his brothers who were soldiers so that they hand over the house once the owner came, but that they refused because of the nature of their job, that it when he left it with Nyirishema Hodari, who was his friend and village mate, that he requested him to give him 150. 000Frw to facilitated him to go back to his home village, but he only gave him 60,000Frw. Furthermore, she states that within a short period her husband died, that later, she went to Nyirishema Hodari and requested him to give her some money on the remaining balance, the latter gave her 10,000Frw, when she went back to him she chased her and told her that she should not claim anything because the house did not belong to them either. She adds that she does not remember signing the sales agreement because she could not dare sign it because the house was not theirs, especially that the agreement only mentions her first name Clotilde (Korotirida) and she wonders why Mukanyindo is not mentioned and that the signature on it is not hers.

[18] Dusengimana Perijine also testified before the Court and explained that he worked together with Nyirishema Hodari as taxi men, one day he told her that he had found a house to buy and asked her to accompany him to be a witness on the sales agreement, that they thought that the house belonged to Maso Tharcisse because he was the one who was occupying it.

[19] The court also heard from Uwamariya Immaculate, who testified that she has been living in Karambo since 1991, that after the Genocide against the Tutsis in 1994, Ngaboyayezu Tharcisse (Maso) lived at her place because he was her husband's brother. She went on to explain that an elderly man named Rubagumya Georges showed him the house in litigation which was by then occupied by carpenters and told him that it has no one to follow up on it soon, Ngaboyayezu Tharcisse rehabilitated it and even brought a wife but later fell sick and decided to return to his home village. She states that he told her that he requested to leave the house to his brothers but they refused and that he will leave it with Nyirishema Hodari and that she asked him what they agreed on the value he added on the house, he told her that he will give him 120,000Frw or 150,000Frw (that she does not precisely remember the figure), but later told her that he gave him only 60,000Frw.

[20] She further added that later Ngaboyayezu Tharcisse died, his wife went to request Nyirishema Hodari to give her some money from the remaining balance, she told her that he only gave her 10,000 Frw and when she returned to claim for the balance, he chased her and told her that the house was not theirs.

[21] Another person who made a statement to the Court but was not considered as a witness because is a wife to Nyirishema Hodari is Umutesi Chantal, she stated that her husband brought the house from Maso Tharcisse in the presence of the authorities, that the house was his because he was the one living in it and also took care of its maintenance.

[22] Mujyambere Schadrack also explained to the Court that he was witness to the sales agreement between Maso Tharcisse and Nyirishema Hodari and that they thought the house belonged to Maso because he was the occupant.

[23] Concerning these testimonies, Niyigena's counsel states that the testimonies of Uwimana Philippe, Murari François, Uwimana Immaculée and Mukanyindo Clotilde support the argument that Maso Tharcisse illegally occupied the house and left it with Nyirishema Hodari, who was his friend, this implies that he also knew that the house was not owned by Maso, and also this is substantiated by the testimony<sup>1</sup> of Mutambuka Evariste, who testified that Nyirishema Hodari wanted to erect a fence around the house, but was refused by the chief of the cell (Responsible) called Gitenge to erect it on the land which is not his.

[24] The counsel for Nyirishema Hodari argues that the testimony of Mukanyindo Clotilde demonstrates the hatred she harbours towards his client, that is the reason she wants to have the sales contract nullified and that alleging that Maso Tharcisse himself said that the house is not his, are only words attributed to him because he died, that he could not repair a house which is not his. He requests the Court not to rely on testimony when there is a written agreement of sale.

### **DETERMINATION OF THE COURT**

[25] Article 3, paragraph 1 of the law N° 15/2004 of 12/06/2004 on evidence stipulates that " Each party has the burden of proving the facts it alleges. Article 65 of that Law provides the following "Only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence. It shall not be influenced by the number of witnesses. It shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonies.

[26] As can be seen from the pleadings of both parties, the major evidence that Nyirishema Hodari presented to the court is

84

<sup>&</sup>lt;sup>1</sup> In the village meeting convened on 07/09/2015 by the Executive Secretary of Gatenga Sector.

the contract of sale that he allegedly entered into with Maso Tharcisse dated 15/06/1997, while Niyigena Marlène alleges that the house originally belonged to her father Ahishakiye Musafiri, that Maso Tharcisse only occupied it in his absence, and that he gave it to Nyirishema Hodari when he was forced to return to his native village.

[27] The Court finds that even if Nyirishema Hodari proves that he bought this house from Maso Tharcisse (Ngabonziza), this is not sufficient as a title deed to this house, because it is also necessary to prove the origin of this house as stated by the legal scholars, such as that of François Terré and Philippe Simler, that legal acts of acquisition, such as sales contract, are not sufficient to prove the right owner of the movable property, but must also prove that the person he acquired it from was also the rightful owner<sup>2</sup>.

[28] As regards the origin of the house in dispute, the witnesses Murari François, Mukanyindo Clotilde and Uwamariya Immaculée, all concur that the house in dispute did not belong to Ngaboyezu Tharcisse (Maso) rather he had illegally occupied it after the Genocide perpetrated against the Tutsis in 1994, there is

<sup>&</sup>lt;sup>2</sup> Lorsque le demandeur est en mesure de faire état de titre de propriété, c'està-dire d'actes juridiques d'acquisition (achat, échange, donation, testament...), ceux-ci ne sont pas invoqués en tant que conventions translatives du droit. Ils ne permettent pas, en effet, d'établir avec une absolue certitude la régularité du transfert. En prouvant par un titre que l'on a acquis tel immeuble, on ne prouve pas irréfutablement que l'on en est devenu propriétaire. On n'a pu le devenir que si le cédant ou disposant avait lui-même cette qualité. Et il ne suffit pas de fournir le titre en vertu duquel ce dernier est devenu propriétaire, car il faudra démontrer que son propre auteur l'était déjà, et ainsi de suite: François Terré et Philippe Simler, Droit civil, Les Biens, Dalloz, 7e edition, P.418

no ground to reject their testimonies because the witnesses demonstrate that they knew much about the house, especially Murari Francois, who was in charge of the area where that house is located, Uwamariya Immaculate also have enough information about it because she resides in that area and knew Ngaboyayezu Tharcisse (Maso), and Mukanyindo Clotilde's testimony is also based on the fact that she stayed in that house with her husband Ngaboyayezu Tharcisse (Maso) as a tenant.

[29] Apart from what has been confirmed by the witnesses mentioned above that the house had been illegally occupied by Ngaboyayezu Tharcisse (Maso), there is also the testimony of Uwimana Philippe stating that he is the one who built that house in the plot that Nkundabagenzi Abdallah, which was confirmed by Murari François. He also retaliated that he is the one who built the house in the villager's meeting convened by the Executive Secretary of Gatenga sector on 07/09/2015, he was not challenged rather his testimony was emphisised by the residents who had attended that meeting, including Simbayobewe Elisé, who stated that he had stayed in the locality since 1975 and he knew Uwimana Philippe as the one who built that house in the plot given to him by Abdallah, and subsequently sold it to Ahishakiye Musafiri.

[30] In the same meeting, Minani Emmanuel also testified that he carried out carpentry activities in that house in 1995, but later Ngarambe who was «Responsable» gave it to Ngaboyayezu Tharcisse this was also supported by Nyirababirigi Annonciata, who was also in the meeting.

[31] The Court finds that for Nyirishema Hodari basing the origin of this house on the agreement of sale he had with Ngaboyayezu Tharcisse (Maso), but failed to prove that the seller

was indeed the owner, whereas, on the other hand, the testimony given by various people mentioned above demonstrate that Ngaboyayezu Tharcisse was not the owner of that house rather it was temporary given to him, the Court finds that those testimonies should be given value especially that they concur on many issues in their statements, even Nyirishema Hodari has not been able to put forward strong arguments why these testimonies should not be given value, except on Mukanyindo Clotilde whereby he states that she habours much hatred for him but without specifying the reason for that hatred when her testimony corroborates with that of others.

[32] In addition, the Court finds that the testimonies of Mujyambere Schadrack and Dusengimana Perijine cannot be taken into account because they do not know the origin of the house in dispute, to merely allege that the house belonged to Maso Tharcisse because they saw him in that house or because he resided there, that only does not confer on him the ownership as motivated above.

[33] Therefore, the Court finds that the sales agreement which Nyirishema Hodari bases on to claim ownership of the house is invalid, because Ngaboyayezu Tharcisse (Maso) knowingly sold someone else's property, as was proved by the witnesses including Uwamariya Immaculate and Mukanyindo Clotilde who stated that Maso only left the house to him as a friend, and even Uwimana Philippe who testified that he is the one who built that house and sold it to Ahishakiye Musafiri, and this had been supported by other testimonies.

[34] Pursuant to the motivations provided above and on the provisions of article 276 of the Civil Code, Book Three, which provides that "the sale of someone's property is null and void and

it can entail damages if the buyer was not aware that the seller is not the owner", therefore the Court finds that the sale between Nyirishema Hodari and Ngaboyayezu Tharcisse (Maso) was null and void and thus the owner of the house in litigation is Niyigena Marlène because she has proved that she acquired it from her father Ahishakiye Musafiri.

# 2. Whether the damages claimed by each of the two parties have merit.

[35] The court submissions of Niyigena Marlene's counsel, he explains that Nyirishema Hodari refused to hand over the house, well knowing that it originates from his father, dragged her into unnecessary lawsuits instead of making that house profitable, for that reason Niyigena should be awarded 5,000,000 Frw which includes moral damages, vexatious lawsuits damages, procedural fees and also 1,000,000Frw for counsel fees.

[36] The counsel for Nyirishema Hodari argues that the damages claimed by Niyigena Marlene are unfounded, rather she should be compelled to pay his client 5,000,000Frw in damages for vexatious lawsuits.

### **DETERMINATION OF THE COURT**

[37] The Court finds that the damages of 5,000,000Frw which Niyigena Marlène claims include moral damages and procedural fees should only be awarded in the court's discretion 300,000Frw for procedural fees as it's obvious that she incurred expenses to follow up the on the lawsuits. Whereas those for moral damages and vexatious lawsuits damages are not awarded because they are not justified. The court also finds that she hired a legal counsel on all instances up to the Supreme Court, thus, the court awards her on all instances 1,000,000 Frwfor counsel fees, all totaling to 1,300,000 Frw.

[38] Concerning the damages claimed by Nyirishema Hodari, the Court finds that they should not be awarded because he lost the case as motivated above.

# **III. DECISION OF THE COURT**

[39] The Court finds the application for review due to injustice filed by Niyigena Marlène with merit;

[40] Holds that judgment N° RCA 0433/12/HC/KIG rendered by the High Court on 24/01/2014 is reversed;

[41] Holds that the house located in Ramiro village, Karambo cell, Gatenga Sector belongs to Niyigena Marlène;

[42] Orders Nyirishema Hodari to vacate that house;

[43] The Court orders Nyirishema Hodari to give to 1,300,000 Frw to Niyigena Marlene for procedural and counsel fees;

[44] The Court orders Nyirishema Hodari to pay court fees.

# **COMMERCIAL CASES**

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### ENTREPRISE TWAHIRWA FAUSTIN (ETF) Ltd v. BRALIRWA Ltd

[Rwanda COURT OF APPEAL – RCOMA 00003/2018/CA (Karimunda, P.J., Ngagi and Munyangeri, J.) January 25, 2019]

Commercial law – Company – A private company with one director – Replacement of the director – The document issued by Rwanda Development Board (RDB) is the only proof to confirm the successor of the Director of a company in which s/he was the sole shareholder.

Commercial procedure – Admissibility of the claim – Standing of the plaintiff – The claim is only admissible to court when the plaintiff and the defendants have the standing – Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 3.

**Facts:** Entreprise Twahirwa Faustin (ETF Ltd) represented by its CEO, who is also its sole shareholder, Twahirwa Faustin, concluded a contract with Bralirwa Ltd to construct a school. The duration of the contract lapsed without completion of the work, which led Bralirwa to terminate the contract, prompting Entreprise Twahirwa to take the matter for arbitration claiming that the contract was illegally terminated. In its award, the arbitral tribunal held that Bralirwa should pay ETF Ltd 2,462,090Frw and immediately return all the material at the construction site.

ETF was not satisfied with the award and thus appealed to the Commercial High Court but the CEO of ETF died before the closure of the trial, the case was continued by the deceased's legal counsel, the court found that the case was filed contrary to article 46 of Law N°005 / 2008 of 14/02/2008 on Arbitration and Mediation in Commercial Matters.

On behalf of ETF Ltd, its counsel appealed to the Supreme Court, following the reform of the Judiciary, the appeal was transferred to the Court of Appeal, he requests that the decision of the arbitral tribunal be reversed, stating that the arbitration tribunal did not examine the issue that BRALIRWA Ltd illegally terminated the contract and assessing the loss incurred as a result of the termination of the contract but on the contrary, it ruled that ETF Ltd should be given back its material which was at the construction site and also ordered BRALIRWA Ltd to pay 2,462,090Frw, while the value of that material and the damages claimed by ETF Ltd are more than two hundred million.

Bralirwa immediately raised a preliminary objection of inadmissibility, arguing that ETF Ltd's appeal should not be admitted accepted because it was filed by a person who had no standing and capacity to represent it, because EFT Ltd's former CEO and its sole shareholder died and no one has replaced him in those duties because he had not been replaced in those responsibilities as CEO, as there is no document issued by Development Board (RDB) conforming his successor.

On that objection, on behalf of ETF Ltd, its representative argues that it is unfounded because the wife of the deceased and the children he left behind are the only ones left in the management of the company as they are entitled to under succession laws, especially that ETF Ltd which was a party to the case at the first level is the one that appealed.

**Held:** 1. The minutes of the general meeting of the members of the company are not a proof of who replaced its Director, when

its evident that he was the sole shareholder, rather the successor is proved by a document issued by RDB to that effect.

2. The claim is only admissible to court when the plaintiff and the defendants have the standing.

#### The preliminary objection of inadmissibility sustained; Court fees deposit covers the expenses incurred in this case.

#### Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 3. Law N° 17/2018 of 13/04/2018 governing companies, article142.

#### No cases referred to.

#### **Authors cited:**

Serge GUINCHARD, Droit et pratique de la procedure civile, 5e edition, Paris, Dalloz, 2006-2007.

#### Judgment

# I. BRIEF BACKGROUND OF THE CASE

[1] Entreprise Twahirwa Faustin (ETF Ltd) entered into a contract with BRALIRWA Ltd for the construction of Rambo school in Rubavu District, in which both parties agreed that in

case of any dispute relating to that contract will be resolved through arbitration.

[2] BRALIRWA Ltd later terminated the contract based on the fact that the term of the contract was over, ETF Ltd later saw it as an illegal termination of the contract, which led to the commencement of the proceedings before the Arbitrator Rusanganwa Jean Bosco who was appointed by the Commercial Court. of Nyarugenge in the Judgment RCOM 01657/2016 / TC / NYGE, rendered on 23/03/2017 at the request of ETF Ltd.

[3] On 26/09/2017, the Arbitral Tribunal issued an award ordering BRALIRWA Ltd to pay ETF Ltd 2,462,090 Frw and to immediately return all the equipment to the building site "chantier" as they were computed on 24/08/2017.

ETF Ltd was dissatisfied with the award and appealed to [4] Commercial High Court and in its judgment RCOMA the 00035/2017 / CHC / HCC rendered on 27/04/2018, it found the appeal of ETF Ltd which seeks to modify (réformation) the award of the Arbitration tribunal is inconsistent with the provisions of article 46 of Law N°005 / 2008 of 14/02/2008 on arbitration and mediation in commercial matters, which states that the request submitted to the appealed court is the annulment of the award ((annulation) instead of its modification as requested by ETF Ltd in its appeal, therefore, it finds that since ETF Ltd has no ground of appeal which are provided under the provisions of Article 47 of Law N°005 / 2008 of 14/02/2008 mentioned above, makes its appeal inadmissible and that the award rendered on 26/09/2017 by the arbitration tribunal remains in force, it ordered ETF Ltd to pay BRALIRWA Ltd 600,000Frw in damages for both procedural and counsel fees.

[5] Counsel Buhuru Pierre Célestin, on behalf of ETF Ltd, appealed to the Supreme Court, the case was registered on RCOMA 00004/2018 / SC. Following the reform of the Judiciary, its appeal was transferred to the Court of Appeal and registered on RCOMA 00003/2018 / CA, he claimed that the award of the Arbitration Tribunal be reversed in accordance with the provisions of article 46 of Law N°005 / 2008 of 14/02/2008 on arbitration and mediation in commercial matters, he stated that the award was vitiated by contradictions and breach of the provisions of the law, he requests the Court to establish whether BRALIRWA Ltd terminated the contract legally and whether there is no other issue which is not related to the termination of the contract except those regarding the loss it incurred caused by BRALIRWA Ltd and the determination of damages.

[6] Explaining the grounds of appeal, Counsel. Buhuru Pierre Célestin argues that the Arbitral Tribunal, instead of examining the issue of whether BRALIRWA Ltd terminated the contract illegally and assessing the losses caused by that termination of the contract, it decided that ETF Ltd should be given back its materials and equipment which was on the site and BRALIRWA Ltd to pays 2,462,090Frw, while the value of the materials and the damages claimed by ETF Ltd exceeds two hundred million; and when he appealed to the Commercial High Court, it did not reverse the award but it rejected the claim, thus he requests the Court of Appeal to rely on the provisions of article 46 of Law N°005 / 2008 of 14/02/2008 on arbitration and mediation in commercial matters and rescinds the award of the Arbitration tribunal.

[7] The case was heard in public on 09/01/2019, with EntrepriseTwahirwa Faustin (ETF Ltd) represented by Counsel

Buhuru Pierre Célestin, while BRALIRWA Ltd represented by Counsel Abijuru Emmanuel, who raised an objection of inadmissibility of the ETF Ltd's appeal as it was filed by 'a person without standing.

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

# Whether the appeal of ETF Ltd is not admissible on the ground that it was lodged by a person with no standing and ability.

[8] Counsel Abijuru Emmanuel, representing BRALIRWA Ltd, argues that the appeal of ETF Ltd should not be admitted because it was filed by someone who has no standing and capacity to represent it. He explains that ETF Ltd, was formerly headed by Twahirwa Faustin as its CEO and its sole shareholder, he died as evidenced by the death certificate dated 09/01/2018, while the case was still pending. in the Commercial High Court, so far no one has replaced him as CEO as there is no document issued by Rwanda Development Board (RDB) to identify Twahirwa Faustin's successor, accordingly, BRALIRWA Ltd does not know who mandated Counsel Buhuru Pierre Célestin to file the appeal of ETF Ltd, he requests that article 142 of Law No. 17/2018 of 13/04/2018 on Companies providing how companies are represented be complied with.

[9] Counsel. Buhuru Pierre Célestin, representing ETF Ltd, also states that Twahirwa Faustin was the sole shareholder of ETF Ltd and its CEO, now represented by Antoinette Mukandekezi together with and her five children. namely Twagirayezu Félicien, Mupenzi Jean Damascène, Mugisha Fred, Uwera Séraphine and Kwizera Claudine are its owner. He goes on to

98

argue that the members of the company may be removed but the company continues to exist belonging to those entitled to it in accordance with the succession law, therefore finds this objection to be unfounded because the appellant ETF Ltd was also a party in the case at the first instance.

### **DETERMINATION OF THE COURT**

[10] Article 3, first paragraph, of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that " Unless otherwise provided by law, a claim is admissible in court only if the claimant has standing, interest and standing to sue." Article 142, first paragraph, of Law N° 17/2018 of 13/04/2018 N° 17/2018 provides that " The business and affairs of a company are managed by or under the direction of the Board of Directors of the company which has all powers (....). The second paragraph of the article provides that " Where a private company has one Director, he/she exercises the powers and carries out the duties of a Board of Directors provided for in this Law."

[11] The analysis of the above provisions of the law, considered together, implies clearly that the power to take any action on behalf of a company including that of filing a lawsuit in a court is governed or supervised by the Board of Directors which have full power if the company has one Director is the one with the authority and responsibilities of the Board of Directors.

[12] In this case, the documents in the file demonstrations that Twahirwa Faustin was the sole shareholder and CEO of Entreprise Twahirwa Faustin (ETF Ltd) who was also its legal representative in the case., it sued BRALIRWA Ltd, until his death on 04/01/2018, when the case was in the Commercial High Court.

[13] The case file also demonstrates that after the Commercial High Court rendered judgment RCOMA 00035/2017 / CHC / HCC on 27/04/2018, and held that the claim of ETF Ltd is inadmissible, on 25/05/2018, Counsel Buhuru Pierre Célestin appealed the case to the Supreme Court on behalf of ETF Ltd, but does not prove that he was mandated by the CEO of ETF Ltd who replaced Twahirwa Faustin after his death, which BRALIRWA Ltd bases on to argue that the appellant had no standing to appeal.

[14] At the hearing of 09/01/2019, when the Court asked Counsel Buhuru Pierre Célestin to tell the Court the person who replaced Twahirwa Faustin as the CEO of ETF Ltd after his death, he replied that the company was represented by Mukandekezi Antoinette, its member and her five children, Twagirayezu Félicien, Mupenzi Jean Damascène, Mugisha Fred, Uwera Séraphine and Kwizera Claudine, tasked to prove that his statement was testified by the Registrar General in RDB, he stated that he had requested Mukandekezi Antoinette to get the relevant documents from RDB but she did not.

[15] The case file also indicates that this objection was raised by BRALIRWA Ltd in the pre-trial hearing on 30/10/2018, and at that time Counsel Buhuru Pierre Célestin was requested to submit before this court the evidence proving that Mukandekezi Antoinette replaced Twahirwa Faustin as the CEO of ETF Ltd.

[16] The Court finds that both parties agree that ETF Ltd exists legally and that is also the view of the Court, because the death of the shareholder of the company, even if he/she is a sole director

does not prevent the company's continuity and belongs to the heirs after they have consented.

[17] Besides that, the Court finds that apart from the fact that in the hearing of 09/01/2019, Counsel Buhuru Pierre Célestin claimed that he had been mandated by Mukandekezi Antoinette to appeal, he did not produce any evidence to prove that Mukandekezi Antoinette would have replaced Twahirwa Faustin as CEO of ETF Ltd, to have mandated him to file an appeal on behalf of ETF Ltd, this is emphasized by legal scholars including Serge Guinchard who argues that for a claim to be admissible, the plaintiff and the defendant must have the standing (qualité), contrary the claim is inadmissible <sup>1</sup>.

[18] Regarding the document entitled " INAMA RUSANGE Y'ABANYAMURYANGO BA ENTREPRISE TWAHIRWA Faustin (E.T.F LTD " MEMBERS) which appeared in the file of 17/01/2019, after the closing of the hearing on 09/01/2019, pursuant to article 75, Paragraphs 1, 2 and 3, of Law N° 22/2018 of 29/04/2018 Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, the Court finds that this document is inadmissible for consideration as it does not help the Court to reach its decision, because what was required which was not produced within time, was not the minutes of the meeting of the members but the document issued by RDB indicating the successor of Twahirwa Faustin as the CEO of ETF Ltd.

<sup>&</sup>lt;sup>1</sup> "La qualité est une condition d'existence de l'action, exigée tant en demandant qu'en defense. Le défaut de qualité donne lieu à une fin de non-recevoir", Serge GUINCHARD, Droit et pratique de la procedure civile, 5e edition, Paris, Dalloz, 2006-2007, p.22.

[19] Based on the provisions of the law and the explanations already given, the Court finds that Counsel Buhuru Pierre Célestin has no standing to file an appeal on behalf of ETF Ltd, therefore the objection raised by BRALIRWA Ltd is sustained and the appeal of ETF Ltd is rejected

# Whether the damages claimed by BRALIRWA Ltd should be awarded.

[20] At the pre-trial hearing on 30/10/2018, Counsel Abijuru Emmanuel, representing BRALIRWA Ltd, claimed damages for the procedural and counsel's fees amounting to 1,500,000 Frw because ETF Ltd dragged it in unfounded lawsuits and during the hearing of 09/01/2019, he requested an additional 200,000 Frw for the counsel fees.

[21] Counsel Buhuru Pierre Célestin, representing ETF Ltd, argues that the damages requested by BRALIRWA Ltd are unfounded because if the parties do not agree, they have the right to go to court, and ETF Ltd has done nothing else illegal, for which it should be charged damages.

### **DETERMINATION OF THE COURT**

[22] Article 111 Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that "the claim for legal costs is adjudicated at the same time with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted.

[23] Concerning the procedural and counsel fees claimed by BRALIRWA Ltd, the Court finds that it should be awarded because ETF Ltd dragged it in the lawsuit and had to hire a legal

counsel, but it should be awarded in the discretion of the court as it does not show how it calculated the 1,700,000Frw he requests for it, therefore BRALIRWA Ltd is to be awarded 500,000Frw for the counsel fees and 200,000Frw for the procedural fees, altogether amounting to 700,000Frw.

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

[24] Admits the objection of inadmissibility filed by BRALIRWA Ltd;

[25] The objection sustained;

[26] Orders Entreprise Twahirwa Ltd (ETF Ltd) to pay BRALIRWA Ltd 500,000Frw for the counsel fees and 200,000Frw for the procedural fees, totaling 700,000Frw;

[27] It declares that the court fees deposit covers the expenses of the trial.

# **CRIMINAL CASES**

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### **PROSECUTION v. NIYOMURAGIJE**

#### [Rwanda COURT OF APPEAL– RPAA 00475/2018/CA (Kaliwabo, P.J.) May 17, 2019]

Evidence law – Evidence in criminal matters – Contradiction of the party to the case – Conflicts between the accused and the victim – Contradiction of the party to the case is not sufficient incriminating evidence when it is not corroborating with other reliable elements of evidence because he/she is not required to accuse himself/herself – Conflicts between the accused and the victim cannot be solely considered as incriminating evidence.

Evidence law – Evidence in criminal matters – Circumstantial evidence – Conclusion of guilty can be inferred from circumstantial evidence if it is the only reasonable conclusion available on the evidence.

**Facts**: This case started before the Intermediate Court of Ngoma whereby the Prosecution accused Niyomuragije murder of his parent Uzamukunda basing on the fact that he admitted for having taken her from home to buy beer for her, and later, she was found dead. The Prosecution also relied on the statements of Niyomuragije's siblings, who affirmed that he had conflicts with the victim because of Niyomuragije's habit of theft, it also based its claim on the fact that there was blood found at the clothes and body of the accused. That Court convicted the accused for the murder of his parent and sentenced him to life imprisonment.

The accused was not contented with the ruling of that judgment and appealed before the High Court, chamber of Rwamagana stating that he had no role in the death of his parent, that he had no conflict with her because even before that incident, that day they had been together boozing, that his siblings allege false accusations against him because they want to appropriate the family property.

The High Court sustained the ruling of the appealed judgment basing on the fact that the accused failed to prove wrong the elements of evidence considered in rendering the judgment of the Intermediate Court, and that his witness had accused him instead of discharging him, his testimony was mainly based on demonstrating conflicts between the accused and his parent.

Niyomuragije again appealed before the Supreme Court, after judicial reform, his claim was transferred to the Court of Appeal. In his appeal, he stated that the High Court disregarded that he returned home earlier than his parent because of epilepsy illness, that he had no conflict with her because before that incident, that day they had been together boozing, he also reacted on the issue of blood alleged to have been found at him, he states that this was confused with dirt caused by bananas which were on his pair of shorts, he adds that his short was seized before the burial of the body, that those blood should have been examined in the laboratory to link them with Uzamukunda's death.

The Prosecution states that testimonies of the accused's siblings demonstrate the conflicts he had with their parent Uzamukunda, that they also demonstrate that he returned home with blood at his clothes. It also contends that a witness testified to have seen Niyomuragije preparing the stick which was nearly found with the body and the stick was also bloody, the Prosecution further states, the fact that the blood was not examined does not mean that other elements of evidence are not relevant. **Held**: 1. Conflicts between the accused and the victim cannot be solely considered as incriminating evidence. Therefore, The High Court should not have relied on the statement of animosity as incriminating evidence, whereas that statement does not reveal any act of the murder.

2. The contradiction of the party to the case is not sufficient incriminating evidence when it is not corroborating with other reliable elements of evidence because he/she is not required to accuse himself/herself, thus, the contradiction in Niyomuragije's statements regarding the blood alleged to have been found at his clothes and body, cannot be incriminating elements of evidence for the murder.

3. The conclusion of guilty can be inferred from circumstantial evidence if it is the only reasonable conclusion available on the evidence.

#### The appeal has merit; The ruling of the appealed judgment is overruled; Court fees to the public treasury.

#### Statute and statutory instruments referred to:

Law N° 30/2013 of 24/05/2013 relating to the code of criminal procedure, article 165.

#### Case laws referred to:

Prosecutor v Ntagerura, ICTR-99-46-A' Judgment, 7 July 2006, par.306

# Judgment

# I. BRIEF BACKGROUND OF THE CASE

[1] On 01/01/2016, Niyomuragije Xavier who resides in Rubona Sector, went with his parent Uzamukunda Vestine at Musabimana Eliane whereby he brought her for boozing, during the night of 01/01/2016 at around 22h00, along the way, Uzamukunda's dead body was found with wounds, Niyomuragije was suspiciously arrested for having murdered her using a stick of grevillea robusta.

[2] Before the Intermediate Court of Ngoma in the case RP 0069/16/TGI/NGOMA, the Prosecution sued Niyomuragije Xavier basing on the fact that he admitted for having taken her from home to buy beer for her, and later, she was found dead. The Prosecution also relied on statements of Niyomuragije's siblings, these are Nzeyimana Samuel, Umwali Anitha and Niyibizi Kevin who affirmed that he had conflicts with the victim because of Niyomuragije's habit of theft, that the stick of grevillea robusta nearly found with Uzamukunda's body was plucked by Niyomuragije, that there was also blood found at Niyomuragije's clothes and body, the Prosecution also relied on Musabimana Eliane's statement that when Uzamukunda and Niyomuragije left her place, the latter came back wearing a new t-shirt.

[3] After hearing of the case, the Intermediate Court of Ngoma found relevant the elements of evidence produced by the Prosecution, on 12/05/2016, that Court rendered the judgment convicting Niyomuragije Xavier, the murder of his parent Uzamukunda Vestine and sentenced him to life imprisonment.

[4] Niyomuragije Xavier appealed before the High Court, chamber of Rwamagana stating that he had no role in the death of his parent, that he had no conflict with her because even the day of the incident, they had been together boozing, that he left her still boozing because of epilepsy illness, that he went with his siblings for rescue when they were informed of the death of their parent. The accused appealed stating that no blood was found at him, that his siblings allege false accusations against him because they want to appropriate the family property.

In the judgment RPA 00174/2017/HC/RWG rendered on 5 27/02/2018, the High Court sustained the ruling of the appealed judgment basing on the fact that Niyomuragije Xavier failed to prove wrong the elements of evidence considered in rendering the judgment of the Intermediate Court, and that the witness of Niyomuragije, Nzevimana Samuel had accused him instead of discharging him (his testimony was mainly based on demonstrating conflicts between Niyomuragije and Uzamukunda).

[6] Niyomuragije Xavier appealed against that judgment before the Supreme Court, after judicial reform, his claim was transferred to the Court of Appeal pursuant to article 52 and 105 of the Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts.

[7] In his submissions of the appeal, Niyomuragije Xavier stated that the High Court disregarded that he went home earlier than his parent because of epilepsy illness, that he had no conflict with her because before that incident, that day they had been together boozing, that he was considered to have used the stick used in murdering Uzamukunda whilst no one found him with it. In his pleading, Niyomuragije Xavier assisted by Counsel Nyirabasinga Helene has again reacted on the issue of blood alleged to have found at him, he states that this is confused with bananas stains which were on his short, he adds that there was no investigation so that those blood be examined and link them to those of Uzamukunda, the victim.

[8] The Prosecution states that testimonies of Niyomuragije Xavier's siblings demonstrate conflicts he had with Uzamukunda Vestine, they also demonstrate that he came home with blood on his clothes and also, Musabimana testified that Niyomuragije and Uzamukunda went home being together, but the former came back later to the bar wearing a new t-shirt, the Prosecution adds that Niyibizi Kevin testified to have seen Niyomuragije preparing the stick which was nearly found with the body and the stick was also bloody, the Prosecution further states, the fact that the blood was not examined does not mean that other elements of evidence are not relevant, It adds that the illness of epilepsy does not exempt Niyomuragije from criminal liability.

[9] The Court needed to hear from the witnesses Nzeyimana Samuel, Niyibizi Kevin, Umwali Anitha and Musabimana Eliane but they all failed to appear.

[10] In this case, the Court examines the relevance of the elements of evidence of conflicts between Niyomuragije and Uzamukunda, evidence of blood found at Niyomuragije, the origin of the stick used in murdering Uzamukunda and to know about the illness of epilepsy that Niyomuragije states as the reason of going home earlier than Uzamukunda.

## **II. ANALYSIS OF LEGAL ISSUE**

## With regard to the conflicts between Niyomuragije Xavier and Uzamukunda Vestine

[11] Niyomuragije Xavier assisted by Counsel Nyirabasinga Helene pleads stating that his siblings plotted for accusing him conflicts with Uzamukunda because of their interests of keeping him in prison and appropriate the family property while he had no conflicts with his parent to the extend of murdering her, he adds that he used to booze together with his parent and the day she passed on, before that, they had been together boozing at Musabimana Eliane, thus this should not be considered as an incriminating element of evidence for the murder of Uzamukunda.

[12] The Prosecution being represented by Niyonzima Vincent, the National Prosecutor, states that the conflicts between Uzamukunda and Niyomuragije, are affirmed by his brother Nzeyimana Samuel who came as discharging witness on request of the accused, that witness testified that the conflicts with his parent were based on Niyomuragije's habit of theft and that this was also what revealed by the report of local authorities.

## **DETERMINATION OF THE COURT**

[13] The Court finds, the main ground for which the High Court relied on rendering the judgment RPA 00174/2017/HC/RWG, is Nzeyimana Samuel's statement, that Uzamukunda used to blame Niyomuragije because of his habit of theft, that the latter murdered her because he wanted her not to continue stopping him, that the witness(Nzeyimana) added that

he has no conflicts with his siblings, that he cannot wrongly accuse his young brother, that he sold the family property of land but he used money received to buy another which he also registered to the family, the previous court considered it as an incriminating testimony against Niyomuragije while the latter brought that witness as discharging witness.

The Court finds that the High Court, chamber of [14] Rwamagana failed to explain the most important issue regarding the elements of evidence charging Niyomuragije the murder of Uzamukunda Vestine, rather, the court emphasized on the conflicts between Uzamukunda and Nivomuragije. The Court finds Nzeyimana Samuel who does not even reside in the same sector with that of Uzamukunda, and he was not in the place, the day their parent was murdered, his testimony focuses on the enmity between Niyomuragije and Uzamukunda, for himself, he demonstrates that he has no issues with the family. This statement about animosity (which is not proven) should not itself be an incriminating element of evidence against Niyomuragije for the murder of Uzamukunda. Being friendly or not to someone may be a ground of committing an offence or not, but it cannot be considered as a proof to find someone's guilty. The High Court should not have relied on the statement of animosity as incriminating evidence, whereas there is no act of the murder that Nzeyimana accuses Niyomuragije especially that the former admits himself that he does not reside in the area where the offence was committed.

[15] The Court also finds, the High Court rendered the judgment without motivating it whereby on paragraph 12 of the judgment RPA 00174/2017/HC/RWG, the Court states that Niyomuragije failed to prove wrong the elements of evidence

114 \_

which were based on in rendering the appealed judgment whereas the accused criticizes testimonies produced against him and denies that he was found with blood at him. The Court should have demonstrated the relevance of elements of evidence criticized by the accused.

# Regarding the blood allegedly to have been found on Niyomuragije and the stick found near the body.

[16] Niyomuragije assisted by Counsel Nyirabasinga appealed stating that the blood allegedly to have been found at his clothes, was confused with dirt caused by bananas because of his work which includes what he did in butcher, that no blood was found at him. Niyomuragije states that he returned home and found Umwali after having cooked and that they had a meal together, that nobody asked him about the blood, he adds that he did not put clothes in water. Counsel Nyirabasinga assisting him states that the Investigation bureau argues that It seized his short alleged to be bloody, that it was seized before burial, she adds that those blood should have been examined in the laboratory, to link them with Uzamukunda's death.

[17] Counsel Nyirabasinga further states that it is not reasonable for Musabimana who had been selling beer, to have realised that Niyomuragije came back in the bar wearing new clothes, that examining those blood was only irrefutable proof, she adds that failure to do so creates a doubt which is in favour of the accused.

[18] The Prosecution pleaded that the fact that the blood was not examined does not replace other elements of evidence which include Niyomuragije's statements for having admitted that the blood was found on him because he is among those who came first for the rescue and that he used his short to wipe the legs, whereas all these are wrong because he reached the place where the body laid when it was no longer bleeding.

[19] The Prosecution further states, Niyomuragije who denied having returned in the bar, there is where he confessed that he came back getting beer to be boozed from home, thus Musabimana Eliane's statement is relevant because she saw him. The Prosecution adds that there is no interest in Niyomuragije's siblings to falsely accuse him. It contends that Niyomuragije's statement is wrong that blood found on his short was pork's oil, this statement was proven wrong by Umwali Anitha, his sister, who explained that he brought pork's oil in a sachet, that the oil was not poured on his clothes.

### **DETERMINATION OF THE COURT**

The Court finds, evidence of blood which is alleged to [20] have been found on Nivomuragije, it would have been reliable evidence, in this case, unfortunately, the way it was prepared, does not convince the Court that those blood were poured on Niyomuragije at the moment of murdering Uzamukunda. When Niyomuragije was interrogated about the blood found at his cheek and his ear as well as those found on his clothes, he explained that he was told by others that there was blood dried at his cheek and ear, that those blood may have been from the place where Uzamukunda's body laid because he approached it (image is found at identification mark 35 which shows much blood in the bush where Uzamukunda's head was broken). In his further explanations, Niyomuragije stated that his short was dirt because of bananas and pork's oil poured on him, whilst his sister Umwali Anitha stated that Niyomuragije brought pork's oil in a sachet, that it was not poured on him. On the other hand, Niyomuragije stated that his clothes had blood after using it to wipe his leg after washing himself after coming from the place where the body was put in the car.

[21] The Court finds, the statement of Niyomuragije who had been contradicting himself with regard to the blood allegedly to have been found on his clothes and his body, those statements should not serve as an incriminating element of evidence of the murder basing solely on that ground of contradiction of the accused. The statement of confession can be incriminating evidence when the court assesses it and find it to be corroborating with other elements of evidence, it also has to be relevant to the facts of the case, its veracity is not found in contradiction of the accused because he/she is not required to accuse himself/herself.

The Court finds, the Prosecution was satisfied with [22] indirect evidence whereas there was a possibility of getting direct evidence which should have been found in the test of blood that the Prosecution alleged found to have been at Niyomuragije'clothes and to link them to the dead body. The Prosecution pleads that Niyomuragije reached home and his siblings saw blood on him, that he immediately dived clothes into the water before he went back to the bar (this implies that he was not wearing those clothes when he went for the rescue), in addition, since the Prosecution reveals that those clothes were seized before burial, this was the most important element of evidence because the result of the test would have been irrefutable evidence regarding the issue of blood which might have been poured to Niyomuragije the moment of the rescue, there was also a possibility of differentiating it with pork oil or dirt from bananas, due to failure to do so, one cannot affirm

beyond any doubt that the seized clothes were bloody in relation with Uzamukunda's body. Circumstantial evidence is considered when it can prove a reasonable conclusion of guilty. "It is settled jurisprudence that the conclusion of guilty can be inferred from circumstantial evidence if it is the only reasonable conclusion available on the evidence. If there is also reasonably open from that evidence and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.<sup>1</sup>

# With regard to the stick used in the murder of Uzamukunda.

[23] Niyomuragije assisted by Counsel Nyirabasinga criticizes an element of evidence of the stick of grevillea robusta which he is charged to use it in murdering Uzamukunda whereby he states that no one saw him searching for that stick, the fact that the stick was plucked from the trees which were around their home does not imply that he is the one who picked it off, that it is not explained how the accused came from the bar to search for the stick that they allege that it was well prepared.

[24] The Prosecution contends that Niyibizi Kevin (young brother for Niyomuragije) saw him in the morning preparing that stick and he hid it later, that the investigators went at the place where the stick was plucked and found that it was picked off from the trees which were around Uzamukunda's home, also, Umwali affirmed to have accompanied Niyomuragije on the request of the latter when he wanted to go to the toilet located near the trees stated in this case file and that stick was found bloody near

<sup>&</sup>lt;sup>1</sup> Prosecutor vs Ntagerura, ICTR-99-46-A' Judgment, 7 July 2006, par.306

Uzamukunda's body, thus no one else might have used that stick rather than Niyomuragije who searched for it.

[25] The Court finds no doubt that Uzamukunda was murdered using the stick of grevillea robusta as it was found near the body being bloody, the issue is to identify who had used that stick. The Court finds that in holding that Niyomuragije used that stick, the Court based on Niyibizi Kevin's statement, a young boy who stated that he saw him preparing a stick of grevillea robusta, that young boy thought that he was making a toy for him, but it is alleged that he hid that stick which was considered as one of those located near Uzamukunda's home in a banana plantation, this is the place in which Umwali Anitha states that she accompanied Niyomuragije, the latter stated that he was going to the toilet.

The Court finds that the statement of Nivibizi Kevin, a [26] young boy, is not reliable in accusing because apart from being the statement of a child with less capacity, the Court is not convinced that Kevin saw Niyomuragije hiding that stick because he could not know that he was hiding an object without being aware of the offence to be committed. The Court further finds, Umwali's statement that she accompanied Niyomuragije to the toilet located near the trees, this statement does not accuse that he was going to get that stick used in murdering Uzamukunda because by analysing the Prosecution's statements, it is revealed that Niyomuragije is charged for having killed his parent on their way from Kangoro (this is indicated in the indictment) and that Niyomuragije returned home to wear new clothes (this is the same moment with that for which Umwali accompanied him to the toilet) before he went back to the bar as testified by Musabimana Eliane, this proves that Niyomuragije did not go to the toilet with the intent of getting the stick which was used in

murdering Uzamukunda because the motivations demonstrated above, would prove that Uzamukunda was already murdered.

# With regard to chronic illness of epilepsy that Niyomuragije states that he suffers from.

[27] Niyomuragije appealed stating that he suffers from chronic illness of epilepsy that the prison and his family are aware that he takes medicines, that the day for which he is charged to have killed Uzamukunda, the latter asked him to go home very early, for him to avoid having the illness and be barred from returning home, thus he should not respond to her death because they returned home separately.

[28] The Prosecution contends that epilepsy that Niyomuragije suffers from, cannot prevent him from committing an offence and that it does not depend on hours, hence, he should not invoke it to deny the murder of Uzamukunda, that even if he went back home earlier, he admits for having returned to bar looking for a beer to be boozed from home.

## **DETERMINATION OF THE COURT**

[29] The Court finds that Niyomuragije's statement lacks merit, that he returned home earlier due to the desease of epilepsy, because in his interrogation, he explained that after reaching their home, he went back to Musabimana Eliane looking for the beer to take home, he also explained why he did not take that beer (that it did not test good), this is the same statement with that of Musabimana Eliane. The Court finds that the desease of epilepsy which Niyomuragije states that he suffers from, does not absolve him from the offence he is charged with because there is no any link between them, rather, he is absolved because of doubt

120 \_

found in elements of evidence of the Prosecution as motivated above.

[30] The Court finds that Niyomuragije Xavier was found guilty of murder of his parent Uzamukunda Vestine without reliable evidence, therefore, doubt found in elements of evidence produced by the Prosecution, it favours the accused as provided by article 165 of the Law N° 30/2013 of 24/05/2013 relating to the code of criminal procedure.

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

[31] Finds Niyomuragije Xavier (registered as Xaverine)'s appeal with merit;

[32] Holds that Niyomuragije Xavier (Xaverine) is acquitted for the murder of Uzamukunda Vestine;

[33] Overrules the ruling of the judgment RPA 00174/2017/HC/RWG rendered on 27/02/2018 by the High Court, chamber of Rwamagana;

[34] Orders the release of Niyomuragije Xavier (Xaverine) after the pronouncement of this case;

[35] Orders that the court fees be charged to the public treasury.

### **PROSECUTION v. NZITAKUZE**

#### [Rwanda COURT OF APPEAL– RPAA 00500/2018/CA (Muhumuza, P.J.) 23 May 2019]

Criminal Law – An attempt of murder – To hold liability for an attempt of murder, it is not sufficient to rely on weapons or tools found with the accused, instead, the culpability required for an attempted murder is an intent of committing an offence – Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 27.

**Facts**: This case started before the Intermediate Court of Ngoma whereby Nzitakuze was charged with attempt of murder allegedly to be committed against someone called Nsabimana when they were together boozing and had quarrels later. The Prosecution states that in ambush, the accused waited for Nsabimana with intent of murdering him with a machete, fortunately, Nsabimana saw him and they fought for that machete, It adds that people came for rescue and found them still fighting for the machete, they took it off them and calmed the matter. That Court convicted the accused and sentenced him to life imprisonment basing on testimonies of those who came for rescue when Nsabimana and Nzitakuze were fighting as well as on the report of security organs affirming that the machete which Nzitakuze possessed, he got it from Hakizimana Valens's place.

The accused appealed before the High Court, chamber of Rwamagana stating that the Intermediate Court found him guilty of the offence he did not committed disregarding elements of evidence he produced. That Court sustained the ruling of the appealed judgment and motivated that Nzitakuze is guilty of the offence he is accused because he failed to prove wrong the elements of evidence which were relied on by the Intermediate Court of Ngoma, to find him guilty.

The accused appealed again to the Supreme Court but the case was transferred to the Court of Appeal after judicial reform. In his appeal, he states that the High Court found him guilty without enough assessment of elements of evidence relied on to find him guilty, that the Court also disregarded his defense and failed to conduct a thorough investigation while he requested so since the investigation stage, he adds that the machete he had, he was carrying it to his work of guard and on his way to work, he met Nsabimana who pretended that he was about to be hit, that they fought and people calmed the matter later. He further states that he criticizes the appealed judgment for having indicated that he waited for Nsabimana in ambush, whereas it is wrong, especially that they had no conflicts, he concludes stating that the High Court ruled without basis.

The Prosecution states that all previous Courts ruled the case considering elements of evidence which include the report of security organs, the machete found in place where Nzitakuze and Nsabimana were fighting and that those who came for rescue, testified that they found Nzitakuze being over Nsabimana fighting for the machete that the former wanted to use for hitting the latter. It adds, those who were in bar, explained that after having quarrels with Nsabimana, Nzitakuze went home immediately and get a machete, thereafter he went to wait for Nsabimana, It adds, the fact that Nsabimana had no wounds, was due to circumstances beyond control of the accused, the Prosecution concludes praying to the Court to convict the accused. **Held**: For an attempt of murder, to hold liability for an attempt of murder, it is not sufficient to rely on weapons or tools found with the accused, instead, the culpability required for an attempted murder is an intent of committing an offence, therefore, the accused is not guilty.

#### Appeal has merit; The ruling of the appealed judgment is overruled; Court fees to the public treasury.

#### Statute and statutory instruments referred to:

Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 27.

Law Nº 30/2013 of 24/05/2013 relating to the code of criminal procedure, article 165.

No case laws referred to.

#### Author cited:

Arshworth Andrew, Sentencing and Criminal Justice, sixth edition, Cambridge University Press, p.127.

## Judgment

## I. BRIEF BACKGROUND OF THE CASE

[1] Nzitakuze Théoneste was sued before the Intermediate Court of Ngoma, charged with attempt of murder allegedly to be committed against someone called Nsabimana Blaise when they were together boozing and had quarrels. The Prosecution states that when Nsabimana Blaise went home, Nzitakuze Théoneste also went and brought a machete, that he waited for him on the way intending to kill him, fortunatly Nsabimana Blaise saw Nzitakuze and they fought for the machete, and the former made a scream for help, people came for rescue and found them still fighting for the machete, they took the machete off them and calmed the matter.

[2] The Intermediate Court of Ngoma rendered the judgment RP 0402/15/TGI/NGOMA on 05/11/2015 finding him guilty and sentenced him to life imprisonment basing on the testimonies of Mukarukundo Languida and those of Nyirahabimana Juliette who are among those who came for rescue when Nsabimana Blaise na Nzitakuze Théoneste were fighting, It also relied on the report of security organs stating that the machete which Nzitakuze Théoneste had, he got it from Hakizimana Valens's home.

[3] Nzitakuze Théoneste appealed before the High Court, chamber of Rwamagana stating that the Intermediate Court found him guilty of the offence he did not committed disregarding elements of evidence he produced.

[4] The High Court, chamber of Rwamagana rendered the judgment RPA 0480/15/HC/RWG, on 12/05/2016 sustaining the ruling of the appealed judgment and motivated that Nzitakuze Théoneste is guilty of the offence he is accused of because he failed to prove wrong the elements of evidence which were relied on by the Intermediate Court of Ngoma, to find him guilty.

[5] Nzitakuze Théoneste appealed again to the Supreme Court stating that the High Court found him guilty without

enough assessment of elements of evidence relied on to find him guilty, that It also disregarded his defense and failed to conduct a thorough investigation.

[6] Before the case is heard, there were a judicial reform and the Court of Appeal was established, the present case was transferred to that Court pursuant to article 52 and 105 of the Law  $N^{\circ}30/2018$  of 02/06/2018 determining the jurisdiction of courts.

[7] The hearing of the case was held in public on 09/04/2019, Nzitakuze Théoneste being assisted by Counsel Hategekimana Gratien while the Prosecution was represented by Rudatinya Gaspard, the National Prosecutor.

## **II. ANALYSIS OF LEGAL ISSUE**

## Whether Nzitakuze Theoneste was found guilty for the offence he did not commit.

[8] Nzitakuze Théoneste states that he appealed because the High Court rendered the judgment without assessing elements of evidence he produced, that the court did not conduct investigation despite his requests since he was before the investigators whereby he asked to interrogate the owner of the bar in which they were boozing as well as Hakizimana Valens alleged to have given him the machete, Nzitakuze admits for having met Nsabimana Blaise, the latter demanded him to buy for him beer and he replied that he has no money, that he immediately went home to get a machete for his work of guard, that on his way to work, he met Nsabimana Blaise, the latter said that Nzitakuze wanted to hit him with a machete, they fought and Nsabimana Blaise made a scream for help, people came and calmed the matter, they also took the machete off them. Nzitakuze adds that the statement that he

admitted the offence is wrong because he did not confess that he was about to kill Nsabimana Blaise, rather, he admitted that he got the machete from his home carrying it to his work of guard.

[9] Counsel Hategekimana Gracien assisting him, states that together with his client criticize that the appealed judgment indicates that Nzitakuze Théoneste waited for Nsabimana Blaise in ambush, whereas it is wrong, he adds that his client requested for investigation with purpose of knowing whether Nsabimana met Nzitakuze Théoneste on his way to work in order to remove the statement that he was in ambush, especially that they had no conflicts, he adds that the High Court ruled without basis. He concludes stating that though Nzitakuze Théoneste is not guilty, if the Court finds it otherwise, he should be sentenced pursuant to the Law N°68/2018 of 30/08/2018 determining offences and penalties in general which is the one with lesser penalties.

[10] The Prosecution states that all prevoius courts ruled the case basing on elements of evidence which include the report of security organs, a machete found in place where Nzitakuze Théoneste na Nsabimana Blaise were fighting, all those who came for rescue testified that they found Nzitakuze Théoneste being over Nsabimana Blaise fighting for the machete, that the former wanted to use for hitting the latter. The Prosecution argues that before the Intermediate Court, Nzitakuze Théoneste explained how he met Nsabimana Blaise in bar, and the latter requested him to buy beer, that he explained how they had quarrels, how he went home leaving him in the place and that he returned to the work of guard carrying a machete.

[11] It proceeds stating that those who were interrogated, explained that after quarrels between Nzitakuze Théoneste and Nsabimana Blaise, the former went home immediately and get a

machete, thereafter he went to wait for Nsabimana Blaise, It adds, the fact that Nsabimana Blaise had no wounds, should not be considered because the offender did not murder him due to circumstances beyond his control, rather,Nsabimana was stronger than him, the Prosecution states that the grounds of Nzitakuze Théoneste's appeal have no merit, It prays to the Court to hold that Nzitakuze Théoneste is guilty of attempt of murder, that however,in sentencing, article 21 paragraph 3 of Law N°68/2018 of 30/08/2018 determining offences and penalties in general should apply.

## **DETERMINATION OF THE COURT**

[12] Article 27 of the Organic Law N° 01/2012 of 02/05/2012 instituting the Penal Code provides that an attempt is punishable when the plan to commit an offence has been demonstrated by observable and unequivocal acts constituting the beginning of the offence meant to enable the commission and that were suspended or failed in their purpose only because of circumstances beyond the offender's control.

[13] The Intermediate Court of Ngoma found Nzitakuze Théoneste guilty of attempt of murder basing on the statement of the witness Mukarukundo Languida who accuses him that when she came for rescue, that she found him over Nsabimana Blaise, this is supported by the report from security organs affirming that the machete which Nzitakuze Théoneste possessed, he got it from Hakizimana Valens's place.

[14] Before the High Court, chamber of Rwamagana, Nzitakuze Théoneste was found guilty basing on the fact that he failed to prove wrong the elements of evidence produced by the

Prosecution which were relied on by the Intermediate Court to find him guilty, these elements of evidence include the statements of the witnesses, the report of authorities as well as his confession before the investigators for having fought with Nsabimana Blaise for the machete.

[15] The case file demonstrates that when Mukarukundo Languida was interrogated in investigation bureau on 16/07/2015, whether she knows how Nzitakuze Théoneste intended to hit Nsabimana Blaise with a machete, she replied that she heard a scream for help and woke up for the rescue, by reaching the place, she found Nsabimana Blaise lying down, that Nzitakuze Théoneste was over him fighting for the machete, that together with others, they took the machete off them, that she instantly called the one in charge of security, she added, she does not know any ground of quarrels between Nzitakuze Théoneste and Nsabimana Blaise.

[16] The case file also demonstrates that on 11/07/2015, the authorities of the village where the offence was committed, made a report on the matter, stating that on 11/07/2015, the night time at 10pm, Nsabimana Blaise, Nzitakuze Théoneste and Hakizimana Valens were together at Nyirabungeri Alphonsine's bar but the former left his colleagues in that bar, at that moment Nzitakuze Théoneste started moving around that bar and hid himself at Nsabimana Blaise's fence carrying a machete which he wanted to use for hitting Nsabimana Blaise, and previously, they had quarrels when they were in that bar.

[17] On 12/07/2015, authorities of Ntebe cell, also made a report indicating that in ambush Nzitakuze Théoneste waited for his neighbour Nsabimana Blaise around his home with intention of hitting him with a machete but by reaching the front view of

the house, Nsabimana Blaise immediately saw Nzitakuze Théoneste hidding himself in the fence, that the latter came approaching him carrying a machete and when he was about to hit him, Nsabimana Blaise fought against him to take that machete, at the same time, he was making a scream for help, people came for rescue and took that machete off them.

[18] In his interrogation before the investigation bureau on 12/07/2015, Nzitakuze Theoneste stated that when he was in bar together with Nsabimana Blaise, that they had quarrels, thereafter, he went home to get a machete so that he reports himself to his work of guard, that he met Nsabimana Blaise around his place, that he wanted to ran but the latter caught him and they fought, he added that they kept fighting for the machete, Nsabimana Blaise made a scream for help, Hakizimana Valens came for rescue and took the machete off them, at that moment, people came for rescue, among them, there was one in charge of security, those people accuse him that he was about to murder Nsabimana Blaise, they add, that machete was not to be used in killing, rather, he was carrying it to his work of guard.

[19] In his interrogation before the investigators on 15/07/2015, Nsabimana Blaise stated that when he went home, Nzitakuze Théoneste waited for him at the front view of the house, Nsabimana further stated that he saw him coming from the fence carrying a machete and when he was about to hit him, he failed, Nsabimana Blaise fought against him to take that machete, at the same time, he was making a scream for help, Hakizimana Valens whom Nzitakuze Théoneste borrowed that machete, was first to come, he ceased the conflict and took that machete off them, among others who came, include Mukarukundo, he

concluded stating that he has no conflict with Nzitakuze except that the latter is jalous of him because he is wealthier than him.

[20] The analysis of the article 27 of the Law N° 01/2012 of 02/05/2012 mentioned above, implies that for an attempt to be qualified as such and be punishable, it requires that the acts of an offence be demonstrated by observable and unequivocal acts constituting the beginning of the offence meant to enable the commission and that were suspended or failed in their purpose only because of circumstances beyond the offender's control

[21] This is also the opinion of the legal schoolars about an attempt of the offence whereby they state that "the culpability required for an attempted murder is an intent to kill"<sup>1</sup>

[22] With regard to the present case, the Court finds that basing on the content of the case file aforementioned, though the accused and the victim do not agree, what happened between Nsabimana Blaise and Nzitakuze Théoneste is fighting due to their quarrels when they were boozing, because the Prosecution failed to prove that Nzitakuze Théoneste waited for Nsabimana Blaise in ambush with intent of murdering him.

[23] The Court finds, all witnesses affirmed to have found Nzitakuze Théoneste and Nsabimana Blaise fighting for the machete but they added that no one knows how the issue started (whether they met and suspected each other or if one waited for the other in ambush due to quarrels they had) because all those witnesses state that they came for rescue and ceased the disputes, but they do not demonstrate Nzitakuze Theoneste's intent of

<sup>&</sup>lt;sup>1</sup> Arshworth Andrew, Sentencing and Criminal Justice, sixth edition, Cambridge University Press p.127.

killing Nsabimana Blaise and whether he failed to do so because of the rescue.

[24] The Court finds that basing on the provisions of the article 165 of the Law N° 30/2013 of 24/05/2013 relating to the code of criminal procedure which provides that if the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving beyond reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal.

[25] The Court finds doubt in elements of evidence for the attempt of murder for which Nzitakuze Théoneste is charged with, because nothing proves that he had the intent of murdering Nsabimana Blaise, therefore, the Court finds no basis of convicting him.

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

[26] Holds that Nzitakuze Théoneste's appeal has merit;

[27] Overrules the ruling of the judgment RPA 0480/15/HC/RWG rendered on 12/05/2016 by the High Court, chamber of Rwamagana;

[28] Finds Nzitakuze Théoneste not guilty of attempt of murder;

[29] Orders the release of Nzitakuze Théoneste after pronouncement of this case;

[30] Orders that the court fees be charged to the public treasury.

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