

REPUBLIC OF RWANDA

SUPREME COURT P.o. Box. 2197 KIGALI www.judiciary.gov.rw



ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 4 - 2020 Ukwakira, 2020



RWANDA LAW REPORTS

Law Report V. 4 - 2020 October, 2020





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ISHAKIRO

ABAGIZE KOMITE Y'UBWANDITSI	iiiii
KOMITE YEMEZA IMANZA	v
IRIBURIRO	iix
IBIKUBIYE MURI IKI CYEGERANYO	xi
INYITO	xi
AMATEGEKO YASHINGIWEHO	xiii
IMANZA ZIFASHISHIJWE	XV
AMAGAMBO MPINE	xvii
Re. GLIHD	1
TUYISENGE N'UNDI v. RWANDA MOTOR S.A	27
NZITONDA v. COGEBANQUE LTD N'ABANDI	45
AKISANTI v. TUYISHIMIRE	63
NIWEMUGENI v. KCB RWANDA Ltd	95
STRONG CONSTRUCTIONS Ltd v. RADIANT INST	
UBUSHINJACYAHA v. GATABAZI	

ABAGIZE KOMITE Y'UBWANDITSI

I. ITSINDA RY'ABANYAMATEGEKO BATEGUYE IMANZA

KABERA Jean Claude

KAGABO U. Stephanie

KAVUTSE M. Claude

KUBWIMANA Jean Claude

MUJABI K. Naphtal

NINAHAZWA Roselyne

UMUHOZA Ange Mireille

UMURANGAMIRWA Anastase

UWINKINDI Angelique

II. 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

NSENGIYUMVA Jean Claude : 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

RUTAZANA Angeline : Umugenzuzi Mukuru w'Inkiko

KALIWABO Charles : Umucamanza w'

Urukiko rw'Ubujurire

Dr. KAYIHURA Didas : Umuyobozi wa ILPD

BURAYOBERA UMUZAYIRE

Bibiane : Visi Perezida wa Komisiyo

y`u Rwanda ishinzwe Ivugururwa ry`Amategeko BWIZA N. Blanche : 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

GIRANEZA Clémentine : Umucamanza mu Rukiko

Rwisumbuye

Dr. NSHIMIYIMANA Didace : Umucamanza mu Rukiko

Rwisumbuye

BAGABO Faustin : Avoka mu Rugaga

rw'Abavoka

GAPARAYI Idi : Umwarimu muri University

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Dr. SHEMA Pierre : Umwarimu muri ULK

KARAKE Canisius: Umwarimu muri UNILAK

HABIMANA Pie : Avoka mu Rugaga rw'Abavoka

RWIGEMA Royck : Umucamanza mu Rukiko

rw'Ubucuruzi

YANKURIJE Dorothée : Umucamanza w'Urukiko

rw'Ibanze

IRIBURIRO

Basomyi bacu,

Tunejejwe no kubagezaho Icyegeranyo cy'Ibyemezo by'Inkiko, Volime 4 [2020]. Nk'uko mubizi, tubahitiramo imanza 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: Urubanza rumwe (1) rurebana n'ikirego gisaba kwemeza ko itegeko rinyuranye n'Itegeko Nshinga, urubanza rumwe (1) rw'imbonezamubano, urubanza rumwe (1) rw'umurimo, urubanza rumwe (1) rw'ubucuruzi n'urubanza rumwe (1) rw'inshinjabyaha naho imanza ebyiri (2) zisigaye zerekeranye n'imiburanishirize y'imanza.

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

Dr NTEZILYAYO Faustin Perezida w'Urukiko rw'Ikirenga akaba na Perezida w'Inama Nkuru y'Ubucamanza

IBIKUBIYE MURI IKI CYEGERANYO

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

INYITO

Imanza ziri muri iyi volime zikoreshwa muri ubu buryo: [2020] 4 RLR

AMATEGEKO YASHINGIWEHO

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003ryavuguruwe mu 2015, ingingo ya 15, 16 na344
Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, ingingo ya 65, 73
Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'imirimo n'iz'ubutegetsi; ingingo ya 9
ingingo ya 9 n'iya 10
Itegeko N° 41/2016 ryo ku wa 15/10/2016 rishyiraho laboratwari y'u Rwanda y'ibimenyetso bishingiye ku bumenyi n'ubuhanga bikoreshwa mu butabera (RFL), rikanagena inshingano, imiterere n'imikorere byayo, ingingo ya 26, agace ka 6 n'aka 767
Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n'umuryango, ingingo ya 28266
Itegeko N° 45/2011 ryo kuwa 25/11/2011 rigenga amasezerano, ingingo ya 64 na 137128
Itegeko N°59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, ingingo ya 394
Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo;

ingingo ya 7667 ingingo ya 119157
Itegeko N^o 86/2013 ryo ku wa 11/09/2013 rishyiraho sitati rusange igenga abakozi ba Leta (ryakoreshwaga icyo gihe), ingingo ya 7898
Itegeko N° 30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha (ryakoreshwaga icyo gihe), ingingo ya 165157
Itegeko N° 22/2012 ryo ku wa 14/07/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi (ryakoreshwaga icyo gihe), ingingo ya 19529
Itegeko N° 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda (ryakoreshwaga icyo gihe), ingingo ya 29 n'iya 3298
Itegeko N^o 16/2005 ryo ku wa 18/08/2005 rigena imisoro itaziguye ku musaruro (ryakoreshwaga icyo gihe), ingingo 4, 13
Itegeko N° 18/2004 ryo ku wa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi (ryakoreshwaga icyo gihe) ingingo ya 192
Iteka rya Perezida No 65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi

IMANZA ZIFASHISHIJWE

Gatera	Johnson	na	Kabalisa	Teddy,
	ST/Pén.0003/10 1/2011			_
•	vanda v. Nkong rw'Ikirenga ku	,		
1 0	Hope, RS/I w'Ikirenga ku			
Industries,	go Isabelle v RCAA 0116/11/ 013	/CS rwaciwe	e n'Urukiko rw	'Ikirenga ku
00043/2010	Charles n 5/CS rwaciwe	e n'Urukik	to rw'Ikireng	a ku wa
SCC 576	asudeo Badwai rwaciwe n'Ur	ukiko rw'Ik	tirenga rwo n	ıu Buhinde

AMAGAMBO MPINE

1.	Amasezerano –	Amasezeran	o y'umurim	o – Iseswa			
	ry'amasezerano y	y'akazi y'ig	ihe kitazwi	Umukozi			
	usezerewe mu ka	azi nta nteg	guza, ahabwa	a mafaranga			
	angana n'amafaranga y'umushahara atahana mu ntoki (net)						
	hamaze kuvan	wamo in	nisoro ku	musaruro			
	n'ay'ubwiteganyir	ize.					
	NIWEMUGENI	v.	KCB	RWANDA			
	LTD	••••••	• • • • • • • • • • • • • • • • • • • •	95			
	Gusesa amasezerano y'umurimo – Impamvu yumvikana -						
	Imyitwarire y'umukozi - Amakosa umukozi yakora mu						
	rwego rw'akazi			•			
	yumvikana ishobo	.	•				
	NIWEMUGENI	_	•				

Gusesa amasezerano y'umurimo – Inshingano yo gutanga ibimenyetso – Igihe havutse impaka, umukoresha washeshe amasezerano niwe utanga ibimenyetso bigaragaza ko umukozi yakoze ikosa.

NIWEMUGENI v. KCB RWANDA LTD......95

Amasezerano y'umurimo – Amakosa yo mu rwego rw'akazi – Kuba umukozi yagizwe umwere cyangwa atakurikiranywe mu rwego rw'inshinjabyaha, ntibibuza ko afatirwa ibihano mu rwego rw'akazi, hashingiwe ku mpamvu z'uko ikirego cy'inshinjabyaha mu nkiko ntaho gihuriye n'ibihano byo mu rwego rw'akazi bikomoka ku ikosa.

				RWANDA 95
	solidaire) – Iyo uwatanze umw umwishingizi kw ubwishyu mu n utubahirije ins y'ubwishingizi umwishingizi ag STRONG CO INSURANCE C	uwafashe u enda afite vishyura um nutungo w' shingano bikaza gu omba kubit NSTRUCT COMPANY	burenganz wenda hatab uwishingiwe zikubiye tera igihom angira indish IONS LTI	v. RADIANT
2. Ai	bumenyi (scient Urukiko rwagon ku bumenyi (rushobore kugar	ific evidenc nbye kwifa science) ig agaza ukuri	e) – Mu nyo shisha ibime gihe bishob	etso gishingiye ku ungu z'ubutabera, nyetso bishingiye oka kugira ngo
	cy'ubwicanyi – cause the death nyakwigendera n'icyaha hashing inyungu mu rupariwe wishe	Mu manza z " bisobanu yapfiriye giwe ku gul ofu ariko nt - Uregwa	z'ubwicanyi, ye kurutera – Ntawug keka gusa ko a kimenyets tabwo ya	vaha – Icyaha gutera urupfu "to ku gihe n'ahantu gomba guhamwa o ariwe wari ufite o kimuhamya ko hamwa n'icyaha boka ko agikora,

ahubwo icyo gihe, uko gukekeranya kuramurengera

UBUSHINJACYAHA v. GATABAZI......155

akagirwa umwere.

3.Amategeko agenga imiburanishirize y'imanza mbonezamubano – Irangizwa ry'urubanza ku kintu kitagihari – Irangizarubanza rikorerwa ku cyaburanywe cyangwa ku gisa nacyo, byaba bidashobotse hagatangwa ingurane y'agaciro kacyo kabariwe ku gaciro k'ifaranga kariho icyo gihe.

TUYISENGE N'UNDI v RWANDA MOTOR S.A...27

Amategeko agenga imiburanishirije y'imanza z'ubucuruzi – Ikirego cyerekeye gutesha agaciro cyamunara – Ikirego cyerekeye gutesha agaciro cyamunara kiburanishwa nk'ikirego cyihutirwa kidashamikiye ku kindi kuko aba ari ukurengera nyiri umutungo ndetse n'uwegukanye ingwate kugira ngo hatagira utezwa igihombo no gutinda kw'imanza mu nkiko. – Ikirego gisaba guhagarika cyangwa gutesha agaciro cyamunara gishobora kujuririrwa bwa kabiri iyo cyujuje ibisabwa kuko aba ari ikirego cyigenga kidashamikiye ku kindi kirego cy'iremezo ariko kikajuririrwa mu gihe kitarenze iminsi itatu – Itegeko No 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ingingo ya 260.

NZITONDA v COGEBANQUE LTD N'ABANDI...45

4.Amategeko agenga umuryango – Ikirego cy'umwana kigamije gushaka umubyeyi - Ibimenyetso bishingiye ku kizamini cya ADN – Ibisubizo bitanzwe n'ikizamini cya ADN bifite agaciro kanini kandi birizewe kuko ari ikimenyetso gishingiye ku bumenyi budashidikanywaho.

AKISANTI v. TUYISHIMIRE......63

5. Imikorere y'inkiko – Ihame ryo kubahiriza umurongo wafashwe (stare decisis) – Urukiko rw'Ikirenga nk'Urukiko rukuriye izindi kandi rufite imiterere yihariye

ituma rugira ububasha ku moko y'imanza zose inkiko zishyikirizwa kugira ngo rubashe kuzitangaho umurongo uyobora izindi nkiko mu micire y'imanza bituma ari rwo soko nkuru y'imirongo inkiko zindi zigenderaho.
Re. GLIHD1
Mu rwego rwo kubahiriza amahame ashingiye ku kubahiriza umurongo wafashwe (stare decisis), buri Rukiko rugomba kubahiriza umurongo rwafashe ku kibazo runaka, cyangwa umurongo wafashwe kuri icyo kibazo n'urukiko rurukuriye. Re. GLIHD
6.Itegeko Nshinga — Uburenganzira ku mutungo — Uburenganzira ku mutungo ku babana batarashyingiranywe — Ishingiro ry'ukugabana umutungo kw'abari basanzwe babana nk'umugore n'umugabo batarashingiranywe nuko nyine uwo mutungo baba bari bawusangiye cyangwa barawushakanye — Ababana nk'umugore n'umugabo n'ubwo baba batarashyirangiranywe, umutungo bungutse bakibana, waba utimukanwa cyangwa uwimukanwa, iyo batandukanye bawugabana.
Re CLIHD 1

IKIREGO GISABA KWEMEZA KO ITEGEKO RINYURANYE N'ITEGEKO

Re. GLIHD

[Rwanda URUKIKO RW'IKIRENGA – RS/INCONST/SPEC 00002/2019/SC – (Rugege, P.J., Nyirinkwaya, Cyanzayire, Rukundakuvuga na Hitiyaremye, J.) 4 Ukuboza 2019]

Itegeko Nshinga – Uburenganzira k'umutungo – Uburenganzira ku mutungo ku babana batarashyingiranywe – Ishingiro ry'ukugabana umutungo kw'abari basanzwe nk'umugore n'umugabo batarashingiranywe nuko nyine uwo mutungo baba bari bawusangiye cyangwa barawushakanye n'umugabo nk'umugore haba Ahahana n'ubwo batarashyirangiranywe, umutungo bungutse bakibana, waba utimukanwa cvangwa uwimukanwa, iyo batandukanye bawugabana.

Imikorere y'inkiko — Ihame ry'ukubahiriza umurongo wafashwe (stare decisis), — Urukiko rw'Ikirenga nk'Urukiko rukuriye izindi kandi rufite imiterere yihariye ituma rugira ububasha ku moko y'imanza zose inkiko zishyikirizwa kugira ngo rubashe kuzitangaho umurongo uyobora izindi nkiko mu micire y'imanza bituma ari rwo soko nkuru y'imirongo inkiko zindi zigenderaho.

Imikorere y'inkiko — Ihame ry'ukubahiriza umurongo wafashwe (stare decisis) — Mu rwego rwo kubahiriza amahame ashingiye ku kubahiriza umurongo wafashwe (stare decisis), buri Rukiko rugomba kubahiriza umurongo rwafashe ku kibazo runaka cyangwa umurongo wafashwe kuri icyo kibazo n'urukiko rurukuriye

Incamake y'ikibazo: GLIHD yareze mu Rukiko rw'Ikirenga isaba kwemeza ko igika cya 2 cy'ingingo ya 39 y'Itegeko N°

59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina kinyuranye n'ingingo ya 15,16 na 34 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 nk'uko ryavuguruwe muri 2015.

Mu gusobanura ikirego cyayo, GLIHD ivuga ko igika cya 2 cy'ingingo ya 39 y'itegeko ryavuzwe haruguru, aho iteganya ko igabana ku babana nk'umugabo n'umugore riba gusa iyo umwe muri bo agiye gushakana n'undi batabanaga; bityo ababana batarashyingiranywe ntibahawe amahirwe angana cyangwa ngo abarengere kimwe kuko nta yindi mpamvu itari ishyingirwa yateganyijwe. Yasobanuye kandi ko mu gihe umwe muri bo ashatse uruhare rwe ku mutungo kugira ngo abe yawikenuza, adashobora kurubona atabanje kugaragaza ko icyatumye atandukana na mugenzi we, ari ugushaka undi mugore cyangwa undi mugabo; ibi bagatuma uyu ntacyo akora ku mitungo yahahanye n'uwo batandukanye.

Leta y'u Rwanda yari yahamagajwe muri uru rubanza, uyihagarariye avuga ko ibyo urega asaba nta shingiro bifite kuko igika cya 2 cy'ingingo ya 39 y'itegeko ryavuzwe haruguru kivuyemo nta burenganzira bwo kugabana ku babanaga batarashyingiranywe ahubwo baba babwambuwe burundu, kandi ko ingingo ubwayo nta gisobanuro (sens) yaba igifite kuko ibika 4 byose biyigize byuzuzanya. Yongeyeho ko ahubwo byaba byiza igika cva 2 cy'ingingo ya 39, cyakorerwa ubugororangingo, iryo gabana rikaba ryabaho mu gihe umwe muri abo babanaga nk'umugabo n'umugore agiye gushyingirwa, cyangwa mu gihe habayeho iyindi mpamvu ituma bareka kubana.

Kaminuza y'u Rwanda, Ishami ry'amategeko yaje mu rubanza nk'Inshuti y'Urukiko ivuga ko igika cya 2 cy'ingingo yavuzwe haruguru itanyuranye n'Itegeko Nshinga kuko nta cyiciro cy'abashakanye iri tegeko ryaheje, ndetse ko umurongo

watanzwe n'Urukiko rw'Ikirenga urengera ku buryo bumwe abatandukanye barabanaga nk'abashakanye hatitawe ku mpamvu ituma batandukana.

Ku birebana no kumenya niba imanza zaciwe n'Urukiko rw'Ikirenga kuri icyo kibazo zakemuye impaka ku birebana n'uburenganzira urega avuga ko buvutswa abatandukanye batagamije kongera gushaka, Urega avuga ko izo imanza zaciwe zitamaze impaka, kuko nta rubanza rwagisuzumye muri ubwo buryo, kandi ko kuba mu mategeko ariho ubu nta kigitegeka inkiko zo hasi gukurikiza umurongo watanzwe n'Urukiko rw'Ikirenga bitera impungenge ko inkiko zo hasi zishobora kurenganya abatandukanye ku mpamvu zitari izo gushaka undi mugore/umugabo igihe ikirego cyayo cyaba kidahawe agaciro.

Leta y'u Rwanda kimwe na Kaminuza y'u Rwanda nk' Inshuti y'Urukiko basanga izo manza zarakemuye icyo kibazo kuko zemeje ko ababanaga nk'umugore n'umugabo, igihe batandukanye, bafite uburenganzira ku mutungo bashakanye kandi zikaba ntaho zikumira abatandukanye ku zindi mpamvu zitari ugushaka.

Incamake y'icyemezo: 1. Ikibazo kirebana n'uburenganzira ku mutungo bw'abatandukanye barabanye nk'umugabo n'umugore batarashyingiranywe mu buryo bukurikije amategeko hatanitawe ku mpamvu zituma batandukana cyatanzweho umurongo n'Urukiko rw'Ikirenga mu manza zitandukanye rwaciye.

- 2. Ishingiro ry'ukugabana umutungo kw'abari basanzwe babana nk'umugore n'umugabo batarashingiranywe nuko nyine uwo mutungo baba bari bawusangiye cyangwa barawushakanye.
- 3. Ababana nk'umugore n'umugabo n'ubwo baba batarashyirangiranywe, umutungo bungutse bakibana, waba

utimukanwa cyangwa uwimukanwa, iyo batandukanye barawugabana.

- 4. Urukiko rw'Ikirenga, nk'Urukiko rukuriye izindi kandi rufite imiterere yihariye ituma rugira ububasha ku moko y'imanza zose inkiko zishyikirizwa kugira ngo rubashe kuzitangaho umurongo uyobora izindi nkiko mu micire y'imanza, bituma ari rwo soko nkuru y'imirongo inkiko zindi zigenderaho.
- 5. Mu rwego rwo kubahiriza amahame ashingiye ku kubahiriza umurongo wafashwe (stare decisis), buri Rukiko rugomba kubahiriza umurongo rwafashe ku kibazo runaka cyangwa umurongo wafashwe kuri icyo kibazo n'urukiko rurukuriye

Ikirego nta shingiro gifite. Igika cya kabiri cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose ntaho kinyuranyije n'ibiteganywa mu ngingo ya 15, 16 n'iya 34 z'Itegeko Nshinga rya Repubulika y' U Rwanda.

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 15, 16 na 34.

Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, ingingo ya 65, 73.

Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'imirimo n'iz'ubutegetsi, ingingo ya 9.

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

Imanza zifashishijwe:

Uwiragiye Charles v Uwamahoro Jeanine, RCAA 00043/2016/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 15/09/2019.

Gatera Johnson v Kabalisa Teddy, RS/INCONST/Pén.0003/10/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 07/01/2011.

Mpangare Hope, RS/INCONST/Pén.0001/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 29/04/2011.

Urubanza

I. IMITERERE Y'IKIREGO

[1] GLIHD ishingiye ku ngingo ya 72 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko¹, yaregeye Urukiko rw'Ikirenga isaba ko igika cya 2 cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina gikurwaho kugira ngo uburenganzira bw'ababana nk'umugabo n'umugore batarashyingiwe burengerwe kimwe hashingiwe ku mahame ateganyijwe mu Itegeko Nshinga rya Repubulika y'u Rwanda ndetse n'andi mategeko mpuzamahanga y'uburenganzira bwa muntu u Rwanda rwashyizeho umukono.

[2] GLIHD ivuga ko ayo mahame ari aya akurikira:

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¹ Iyi ngingo iteganya ko: "Umuntu ku giti cye, ikigo cyangwa umuryango ufite ubuzimagatozi bashobora kuregera Urukiko rw'Ikirenga basaba kwemeza ko itegeko rinyuranyije n'Itegeko Nshinga iyo babifitemo inyungu..."

- a. Uburenganzira bwo kureshya imbere y'amategeko (equality before the law);
- b. Uburenganzira bwo kurengerwa kimwe n'amategeko (Equal protection of the law);
- c. Uburenganzira bwo kutavangurwa mu bandi (Non-discrimination);
- d. Uburenganzira k'umutungo (Right to property).
- [3] Ni muri urwo rwego yatanze ikirego mu Rukiko rw'Ikirenga isaba ko igika cya kabiri cy'ingingo ya 39² y' Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, gikurwaho.
- [4] Ikirego cyanditswe kuri N° RS/INCONST/SPEC 00002/2019/SC, Leta y'u Rwanda iruhamagazwamo, ndetse na Kaminuza y'u Rwanda isaba kuruzamo nk'Inshuti y'Urukiko. Iburanisha ryashyizwe ku wa 08/11/2019, uwo munsi ugeze, ababuranyi bose bitabye, GLIHD ihagarariwe na Umulisa Vestine (Umuyobozi wayo wungirije) yunganiwe na Me Sezirahiga Yves na Me Gumisiriza Hillary, Leta y'u Rwanda ihagarariwe na Gahongayire Miriam naho Kaminuza y'u Rwanda ihagarariwe n'abarimu b'amategeko, Shenge Laurent na Uwineza Odette.

ngingo ntirivutsa abana babyaranye uburenganzira bahabwa n'amategeko."

² Iyo ngingo iteganya ko: "Ababanaga nk'umugore n'umugabo batashyingiranywe mu buryo buteganywa n'amategeko, bashyingirwa hakurikije ihame ry'ubushyingiranywe bw'umugabo umwe n'umugore umwe. Mu gihe umwe mu barebwa n'ibivugwa mu gika kibanziriza iki, yabanaga n'abagore cyangwa n'abagabo benshi, abanza kugabana ku buryo bungana na buri wese mu bo babanaga, umutungo bari bafitanye cyangwa bahahanye mbere y'uko ashyingirwa. Igabana ry'umutungo rivugwa mu gika cya 2 cy'iyi

[5] Mu gusobanura ingingo z'ikibazo bashyikirije Urukiko, Umuyobozi wungirije wa GLIDH ari we Umulisa Vestine, Me Sezirahiga Yves na Me Gumisiriza Hillary bavuga ko uburyo igika cya 2 cy'ingingo ya 39 y'Itegeko rya GBV cyanditse bunyuranye n'ibiteganywa n'ingingo ya 15, 16 na 34 z'Itegeko Nshinga, bakabisobanura mu buryo bukurikira:

Re. GLIHD

- a. Ku byerekeye kunyuranya n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda.
- [6] Iyi ngingo igira iti: "Abantu bose barareshya imbere y'amategeko. Itegeko ribarengera ku buryo bumwe". GLIHD ivuga ko iyo uyisomye ukayisesengurana n'ibiteganyijwe mu gika cya 2 cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina yavuzwe haruguru, usanga mu guteganya ko igabana ku babana nk'umugabo n'umugore riba gusa iyo umwe muri bo afashe icyemezo cyo gushyingirwa n'undi utari uwo basanzwe babana; umushingamategeko akaba atarahaye amahirwe angana cyangwa ngo arengere kimwe ababana batarashyingiranywe batandukanye kubera indi mpamvu itari ishyingirwa ry'umwe muri bo, kuko kuri bo igabana ry'umutungo bari basangiye ridateganyijwe.
 - b. Ku byerekeye kunyuranya n'ingingo ya 16 y'Itegeko Nshinga rya Repubulika y'u Rwanda.
- [7] GLIHD ivuga ko ingingo ya 16 y'Itegeko Nshinga rya Repubulika y'u Rwanda itenganya ko **abanyarwanda bose bavukana kandi bagakomeza kugira uburenganzira n'ubwisanzure bingana.** Iyo ngingo ikomeza igira iti « ... ivangura iryo ari ryo ryose cyangwa kurikwirakwiza byaba bishingiye ku bwoko, ku muryango cyangwa ku gisekuru, ku nzu,

ku ibara ry'umubiri, ku gitsina, ku karere, ku byiciro by'ubukungu, ku idini cyangwa ukwemera, ku bitekerezo, ku mutungo, ku itandukaniro ry'umuco, ku rurimi, ku bukungu, ku bumuga bw'umubiri cyangwa ubwo mu mutwe no ku rindi vangura iryo ari ryo ryose, birabujijwe kandi bihanwa n'amategeko ».

[8] GLIHD ivuga ko iyo ngingo, iyo isomewe hamwe n'ibiteganyijwe mu gika cya 2 cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, usanga cyaravanguye bamwe mu babanaga nk'umugabo n'umugore kuko kibashyira mu ngeri 2 zitandukanye : bamwe bakagira uburenganzira ku kugabana umutungo bari bafitanye cyangwa bashakanye, abandi ntibagire ubwo burenganzira kandi bose bari muri « conditions » zimwe : kubana nk'umugabo n'umugore. Bityo rero, ikaba isanga ibyo binyuranije n'ihame riteganywa n'Itegeko Nshinga muri iyi ngingo, ry'uko abantu bose bareshya imbere y'amategeko kandi barengerwa nayo mu buryo bumwe ndetse bikananyuranya n'ihame ribuza ivangura iryo ari ryo ryose n'icyo ryaba rishingiyeho icyo ari cyo cyose mu gihe kidashingiye ku mpamvu zemewe n'amategeko.

c. Ibyerekeye kunyuranya n'ingingo ya 34 y'Itegeko Nshinga rya Repubulika y'u Rwanda.

[9] Ingingo ya 34 y'Itegeko Nshinga rya Repubulika y'u Rwanda igira iti "Buri muntu afite uburenganzira k'umutungo bwite, waba uwe ku giti cye cyangwa uwo asangiye n'abandi. Umutungo bwite, uw'umuntu ku giti cye cyangwa uwo asangiye n'abandi ntuvogerwa. Uburenganzira ku mutungo ntibuhungabanywa keretse ku mpamvu z'inyungu rusange kandi hakurikijwe ibiteganywa n'amategeko."

[10] GLIHD ivuga ko iyo ngingo isomewe hamwe n'ibiteganyijwe mu gika cya 2 cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, usanga iki gika gikumira ndetse kikambura uburenganzira ku mutungo bamwe mu bari basanzwe babana nk'umugabo n'umugore batashyingiranywe, mu gihe impamvu yo gutandukana atari ishyingirwa ry'umwe mu babanaga muri ubwo buryo kuko mu gihe umwe muri bo ashatse uruhare rwe ku mutungo kugira ngo abe yawikenuza, adashobora kurubona atabanje kugaragaza ko icyatumye atandukana na mugenzi we, ari ugushaka undi mugore cyangwa undi mugabo. Bityo, uyu akaba adafite uburenganzira bwo kugira icyo akora ku mitungo yahahanye n'uwo batandukanye.

[11] Uhagarariye Leta y'u Rwanda avuga ko asanga ibyo urega ashingiraho asaba Urukiko rw'Ikirenga ko rwakuraho igika cya 2 cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina kuko kinyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda nta shingiro bifite, kuko icyo gika kivuyemo noneho n'abari bemerewe ubwo burenganzira bwo kugabana igihe hari ufashe umwanzuro wo gushyingirwa baba basa n'aho babwambuwe burundu, kandi ingingo ubwayo nta gisobanuro (sens) yaba igifite kuko ibika 4 byose biyigize byuzuzanya. Havuyemo igika kimwe ntacyo yaba ikimaze kuko nta n'uwo yaba ikirengera ahubwo yaba itaye agaciro.

[12] Leta y'u Rwanda ivuga kandi ko mu rubanza N° RS/INCONST/Pén 0003/10/CS³, Urukiko rw'Ikirenga rwasanze

³ Muri uru rubanza Gatera Johnson na Kabarisa Teddy basabaga Urukiko rw'Ikirenga kuvanaho ingingo ya 39 y'itegeko No 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku

iyo ngingo ya 39 itanyuranije n'Itegeko Nshinga ahubwo ari uburyo umushingamategeko yahisemo bwo kugira ngo hatabaho akarengane ku byerekeye umutungo ku bantu bifuza kureka kubana nk'umugabo n'umugore batarashyingiranywe, umwe muri bo agahitamo gushyingirwa hakurikijwe icyo amategeko ateganya.

[13] Leta y'u Rwanda isanga ahubwo byaba byiza igika cya 2 cy'ingingo ya 39, urega asaba ko cyavaho, gikorewe ubugororangingo, iryo gabana rikaba ryabaho mu gihe umwe muri abo babanaga nk'umugabo n'umugore agiye gushyingirwa, cyangwa mu gihe habayeho iyindi mpamvu ituma bareka kubana. Isanga rero byasobanuka neza kurushaho hongewemo igika gikurikira icya 2 kigira kiti « iryo gabana ribaho kandi iyo habayeho impamvu iyo ari yo yose ituma ababanaga nk'umugore n'umugabo bareka kubana ».

Kaminuza y'u Rwanda, Ishami ry'amategeko, nk'Inshuti y'Urukiko muri uru rubanza yavuze ko itemeranya na GLIHD mu kuvuga ko igika cya 2 cy'ingingo ya 39 yavuzwe haruguru inyuranye n'Itegeko Nshinga, kuko nk'uko byagaragaye mu n'Urukiko rw'Ikirenga, cviciro zaciwe nta manza cy'abashakanye iri tegeko ryaheje, kuko umurongo watanzwe buryo bumwe abatandukanye ku barabanaga nk'abashakanye hatitawe ku mpamvu ituma batandukana.

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gitsina, kuko inyuranyije n'ingingo ya 26 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko Ubushyingiranywe bw'umugabo umwe n'umugore umwe bukorewe mu butegetsi bwa Leta ari bwo bwonyine bwemewe (...). Bavuga ko ubundi bushyingiranywe cyangwa kubana nk'umugabo n'umugore bitazwi n'Itegeko Nshinga bidashobora gutanga cyangwa gukomorwaho inshingano n'uburenganzira bingana n'iby'abashyingiranywe mu buryo bukurikije amategeko.

- [15] Kaminuza y'u Rwanda itanga urugero ku manza zikurikira:
 - a. urubanza N° RCAA 00043/2016/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 15/09/2019 haburana Uwiragiye Charles na Uwamahoro Jeanine;
 - b. urubanza N° RS/INCONST/Pén.0003/10/CS rwa Gatera Johnson na Kabalisa Teddy rwaciwe kuwa 07 Mutarama 2011;
 - c. urubanza N° RS/INCONST/Pén.0001/11/CS rwa Mpangare Hope rwaciwe kuwa 29 Mata 2011.
- [16] Kaminuza y'u Rwanda isobanura ko muri izo manza zose, ababuranyi bari barashakanye kandi batandukana batagamije kongera gushaka. Nyamara, Urukiko rw'Ikirenga, rutitaye ku mpamvu ituma batandukana, kandi rushingiye ku ngingo ya 39 y'Itegeko ryavuzwe haruguru, rwemeje kubagabanya umutungo bashakanye ku buryo bungana.
- [17] Nyuma yo kumva ibisobanuro by' Inshuti y'Urukiko, Leta y'u Rwanda nayo yunzemo ivuga ko isanga koko impungenge za GLIHD zaracyemutse naho GLIHD yo ntiyava ku izima, ahubwo ikomeza kwemeza ko iriya ngingo ya 39 y'itegeko ryavuzwe, mu gika cyayo cya kabiri inyuranye n'Itegeko Nshinga, kandi ko imanza zavuzwe zitakemuye icyo kibazo kuko zitagisuzumye ku buryo bwihariye.
- [18] Urukiko rw'Ikirenga rusanga rero ibibazo bikwiye gusumwa ari ibi bikurikira:
 - Kumenya niba igika cya kabiri cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008

- kibuza uburenganzira ku mutungo ababanaga nk'umugore n'umugabo igihe batandukanye batagamije gushaka undi utari uwo babanaga;
- Kumenya niba imanza zaciwe n'Urukiko rw'Ikirenga ku kibazo cy'abatandukanye babanaga nk'umugore n'umugabo zitaramaze impaka ku birebana n'uburenganzira GLIHD ivuga ko buvutswa abatandukanye batagamije kongera gushaka.

II. ISESENGURA RY' IBIBAZO ZO BIGIZE URUBANZA

- a. Kumenya niba igika cya kabiri cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 kibuza uburenganzira ku mutungo ababanaga nk'umugore n'umugabo igihe batandukanye batagamije gushaka undi utari uwo babanaga;
- [19] GLIHD ivuga ko ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina itarengera kimwe ababana nk'umugabo n'umugore batarashyingiwe kuko igika cya kabiri cy'iyo ngingo gisobanura uburenganzira bagira ku mutungo bari barahahanye iyo biyemeje gutandukana ngo bashyingiranywe n'uwo badasanganywe, ariko iyo ngingo ntigire icyo ivuga ku babana batagamije gushaka undi. Ibyo GLIHD, nk'uko byasobanuwe mu bika bya 6-10, isanga ari ivangura rikorerwa abari muri icyo cyiciro cya nyuma kuko ribakumira ku mutungo bari barashatse nk'umugabo n'umugore, kandi ibyo bikaba bibangamiye uburenganzira buteganyirizwa buri muntu n'Itegeko nshinga rya Repubulika y'u Rwanda ndetse n'andi

mategeko mpuzamahanga y'uburenganzira bwa muntu u Rwanda rwashyizeho umukono.

[20] Mbere yo gushyigikira ibisobanuro byatanzwe n' Inshuti y'Urukiko bigaragaza ko imanza zaciwe n'Urukiko rw'Ikirenga zakemuye icyo kibazo, Leta y'u Rwanda n'ubwo itemeranyaga na GLIHD ko iyi ngingo ya 39, igika cya kabiri inyuranyije n'Itegeko Nshinga, nayo yari yasabye ko yakosorwa ikandikwa mu buryo budatera urujijo, ikongerwamo igika gikurikira icya 2 kivuga ngo « iryo gabana ribaho kandi iyo habayeho impamvu iyo ari yo yose ituma ababanaga nk'umugore n'umugabo bareka kubana ».

UKO URUKIKO RUBIBONA.

- Mu magambo yayo yose, ingingo ya 39 y'Itegeko N° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose igira iti: "Ababanaga nk'umugore n'umugabo batashyingiranywe mu buryo buteganywa n'amategeko, hakurikije bashyingirwa ihame ry'ubushyingiranywe bw'umugabo umwe n'umugore umwe. Mu gihe umwe mu barebwa n'ibivugwa mu gika kibanziriza iki, yabanaga n'abagore cyangwa n'abagabo benshi, abanza kugabana ku buryo bungana na buri wese mu bo babanaga, umutungo bafitanye cyangwa bahahanye ashyingirwa. Igabana ry'umutungo rivugwa mu gika cya 2 cy'iyi ngingo ntirivutsa abana babyaranye uburenganzira bahabwa n'amategeko."
- [22] Iyo usesenguye ibyo iyo ngingo ivuga, usanga icyari kigenderewe ari ibintu bitatu:

- Kwereka inzira ababana batarashakanye mu buryo bwemewe n'amategeko bakurikiza igihe bifuje gushakana mu buryo bukurikije amategeko ariko ikanabibutsa ko igihe cyose babikoze bagomba kuzirikana ko ihame ry'uko "gushyingirwa mu buryo bwemewe n'amategeko bikorwa hagati y'umugabo umwe n'umugore umwe". Ibi nibyo biri mu gika cya cy'iyi ngingo bikaba bigaragara mbere umushingamategeko yashatse kwereka umuryango muri ubwo buryo, ko umugabo/umugore yaba afite abagore/abagabo benshi kandi akaba abakunze kimwe, atemerewe gusezerana na bo bose mu buryo bukurikije amategeko.
- uburenganzira bw'ababanaga b. Kugaragaza nk'umugore n'umugabo (batagize amahirwe yo gutoranywa nk'umugore/umugabo) ku mutungo bari basangiye, igihe umwe muri bo yifuje gushaka mu buryo bukurikije amategeko. Ibi nibyo bisobanuye mu gika cya kabiri cy'iyi ngingo. Nk'uko bigaragara, mu kubahiriza ibivugwa mu gika cya mbere cyayo gusa, hashoboraga kuvuka birebana ibibazo ku n'uburenganzira (ku mutungo) bw'abagore/abagabo basigave igihe umugabo/umugore gusezerana n'umwe muri bo, cyangwa uburenganzira bw'umugabo/abagabo basigaye, igihe umugabo/umugore ahisemo, itegeko nk'uko ribiteganya, gushakana n'umwe gusa muri bo cyangwa undi utari muri abo babanaga.
- c. Kugaragaza uburenganzira bw'abana igihe hagize ushaka undi mu buryo buvugwa muri iyi ngingo (ibi biri mu gika cya gatatu).

- [23] Muri rusange nk'uko bisobanuye mu gika kibanziriza iki, iyi ngingo yagiriyeho gukemura ikibazo kihariye kijyanye n'ababanaga nk'umugore n'umugabo bifuje gusezerana n'umwe mu bo babanaga, igihe yabanaga na benshi. Iyi ngingo ntigamije guheza ku mutungo abatandukanye ku zindi mpamvu, ntawe igamije guha uburenganzira bwihariye cyangwa kugira uwo irenganya nkana ku buryo byakwitiranywa no kubangamira ingingo z'Itegeko Nshinga zavuzwe (ingingo ya 15, 16 na 34), ahubwo ikigaragara ni uko igamije kuyobora ababanaga nk'umugore n'umugabo bifuje gushaka mu buryo bukurikije amategeko. Abo itagize icyo ivugaho, ni ukuvuga ababanaga nk'umugore n'umugabo batandukanye batagamije gushaka, ni uko batari mu murongo w'ibyo yari igamije. Bityo aho gufatwa nk'aho yabakumiriye, bigomba kumvikana ko ahubwo bo ntacyo yabavuzeho.
- [24] Urukiko rw'Ikirenga rusanga rero iyo hari ikibazo kiriho kandi itegeko ritarateganyije uko gikwiye gukemuka, ibyo ubwabyo bidasobonuye ko abo kireba bavukijwe uburenganzira runaka bahabwa n'Itegeko Nshinga, cyangwa ko hari Itegeko ribubabuza, rikaba rigomba kuvaho. Ahubwo ikibazo nk'icyo gikemuka binyuze mu busesenguzi busanzwe bukorwa n'inkiko nk'uko biteganywa n'ingingo ya 9 y'Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'imirimo n'iz'ubutegetsi. Iyo ngingo ivuga ko: ".... Iyo nta tegeko rijyanye n'ikiburanwa ririho, umucamanza ashingira ku mategeko asanga yashyiraho mu gihe yaba ashinzwe kuyashyiraho, yifashishije ibyemezo byagiye bifatwa n'inkiko, umuco, amahame rusange agenga amategeko n'inyandiko z'abahanga mu mategeko".

- [25] Urukiko rw'Ikirenga rusanga ibivugwa mu gika kibanziriza iki ari byo byakozwe mu manza zaciwe n'Urukiko rw'Ikirenga ku manza rwaciye ku bibazo bireba uburenganzira bw'ababanaga batandukanye kandi batagamije gushaka, bityo ikirego cyatanzwe na GLIHD kivuga ko bambuwe uburenganzira bemerewe n'Itegeko Nshinga bakanaheraho basaba ko igika cya kabiri cy'ingingo ya 39 y'Itegeko ryavuzwe kivanwaho, kikaba nta shingiro gifite.
 - b. Kumenya niba imanza zaciwe n'Urukiko rw'Ikirenga ku kibazo cy'abatandukanye babanaga nk'umugore n'umugabo zitaramaze impaka ku birebana n'uburenganzira GLIHD ivuga ko buvutswa abatandukanye batagamije kongera gushaka
- GLIHD ivuga ko imanza zaciwe n'Urukiko rw'Ikirenga [26] ku kibazo cy'ababanaga nk'umugore n'umugabo batandukanye batagamije gushaka zitamaze impaka ku kibazo cyo kuba igika cya kabiri cy'ingingo ya 39 y'Itegeko ryavuzwe kibavutsa uburenganzira mu buryo bunyuranye n'Itegeko Nshinga kuko nta rubanza rwagisuzumye muri ubwo buryo. GLIHD yongeraho kandi ko kuba mu mategeko ariho ubu, nta kigitegeka inkiko zo hasi gukurikiza umurongo watanzwe n'Urukiko rw'Ikirenga, nabyo bitera impungenge ko inkiko zo hasi zishobora kurenganya abatandukanye mpamvu zitari ku izo gushaka mugore/umugabo igihe ikirego cyayo cyaba kidahawe agaciro.
- Leta y'u Rwanda kimwe na Kaminuza y'u Rwanda nk' Inshuti y'Urukiko basanga nta mpungenge GLIHD yari ikwiye kugira kuko uburenganzira bushingiye ku ngingo ya 15, iya 16 Nshinga n'iya 34 z'Itegeko iharanira ku babanaga batarashakanye bagatandukana batagamije gushaka butabangamiwe, kuko nk'uko byasobanuwe mu

zatanzweho ingero mu gika cya 15, Urukiko rwagaragaje ko ubwo burenganzira babufite kuko izo manza zemeje ko ababanaga nk'umugore n'umugabo, igihe batandukanye, bafite uburenganzira ku mutungo bashakanye kandi zikaba ntaho zikumira abatandukanye ku zindi mpamvu zitari ugushaka.

UKO URUKIKO RUBIBONA

[28] Urukiko rurasanga nk'uko bigaragara mu manza zitandukanye zaciwe n'Urukiko rw'Ikirenga, uru Rukiko rwaratanze umurongo wagombye kuba waramaze impungenge GLIDH ku bijyanye n'abo ivuga ko bavukijwe uburenganzira ku mutungo nk'uko bigaragara mu bika bikurikira.

[29] Mu rubanza RS/INCONST/Pén 0003/10/CS rwaciwe ku wa 07/01/2011 rwa Gatera na Kabalisa, Urukiko rwasuzumye ikibazo cyo "kumenya niba ingingo ya 39 y'Itegeko rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, yerekeye igabana ry'umutungo ku babanaga nk'umugabo n'umugore batarashyingiranywe inyuranye n'Itegeko Nshinga rya Repubulika y'u Rwanda" kuko ibyo byaba ari uguha ababanaga batarashyingiranywe uburenganzira bungana n'ubw'ababanaga barashyingiranywe mu buryo bukurikije amategeko. Urukiko, kugaragaza rumaze ko ababana batarashyingiranywe bafite uburenganzira ku mutungo bashakanye no kugaragaza ko ubwo burenganzira bunyuranye barashyingiranywe mu buryo bukurikije n'ubw'ababana amategeko, rwemeje ko ".... ababanaga nk'umugabo n'umugore batarashyingiranywe bahagaritse kubana, kugira ngo bagabane umutungo (ari) uko bagomba kuba bawufitanye cyangwa barawushakanye⁴." Rwasobanuye kandi neza ko kugira uburenganzira ku mutungo bidashingiye gusa ku kuba barabanye nk'umugabo n'umugore batarashyingiranywe, ko ahubwo bigomba kuba bigaragara ko bawufitanye cyangwa ko bawushakanye⁵.

[30] Nk'uko bigaragara muri uru rubanza, n'ubwo koko Urukiko rutasubije ku buryo bw'umwihariko ku kibazo cy'uburenganzira bw'abatandukanye batagamije gushaka kuko atari nacyo kibazo rwari rwaregewe, ariko rwasobanuye ko ishingiro ry'ukugabana umutungo kw'abari basanzwe babana ari uko nyine bafite umutungo bari basangiye cyangwa bashakanye. Ibyo bikaba byari bikwiye kwereka GLIHD ko n'ababanaga batandukanye batagamije gushaka, bashobora guhera kuri iki gisobanuro bakumva ko nabo uru rubanza rwabahaye uburenganzira; bapfa gusa kuba bagaragaza ko hari umutungo basangiye cyangwa bashakanye.

[31] Byongeye kandi ubu burenganzira ku mutungo bw'abatandukanye batarashyingiranywe mu buryo bukurikije amategeko hatanitawe ku mpamvu zituma batandukana, bwaje gushimangirwa mu buryo bweruye mu rubanza RCAA 00043/2016/SC rwa Uwiragiye Charles na Uwamahoro Jeanine. Muri uru rubanza, ababuranyi baburanaga "Kugabana umutungo bashakanye babana nk'umugore n'umugabo ugizwe n'inzu ifite 367 n'ikibanza gifite 0139, hamwe n'imodoka ebyiri", Urukiko rw'ikirenga rwemeje ko "... ababana nk'umugore n'umugabo n'ubwo baba batarashyirangiranywe, umutungo bungutse bakibana, waba utimukanwa cyangwa uwimukanwa, iyo

⁴ Reba igika cya 14 cy'urwo rubanza

⁵ idem

batandukanye bawugabana⁶". Aha hakwibutswa ko muri uru rubanza impamvu yari yaratumye Uwiragiye na Uwamahoro batandukana itari ugushaka nk'uko bigaragara mu manza RCA 00239/2016/HC/KIG na RC 0281/15/TGI/GSBO, nyamara ntibyabujije Urukiko rw'Ikirenga kubagabanya umutungo bari basangiye mbere yo gutandukana.

Naho ibyo GLIHD ivuga ko nta kigitegeka izindi nkiko gukurikiza umurongo watanzwe n'Urukiko rw'Ikirenga kuva aho ingingo ya 47 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 ryagenaga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga⁷ riviriyeho, nabyo nta shingiro bifite, kuko ahubwo ihame ryo kubahiriza umurongo wafashwe ku bibazo bisa (use of precendents) mu micire y'imanza ryongerewe ingufu mu itegeko rishya rigenga ububasha bw'inkiko⁸. Nk'uko bigaragara, iryo Tegeko ryahaye Urukiko rw'Ikirenga ububasha bwihariye, bushingiye cyane cyane ku guca imanza zitanga icyerekezo n'umurongo ngenderwaho ku zindi nkiko. Ibyo bigaragarira cyane cyane mu isobanurampamvu y'Itegeko Ngenga rishyiraho Urukiko rw'Ubujurire mu gika cya kabiri, aho risobanura ko imiterere yihariye y'Urukiko rw'Ikirenga ari ukugira ngo rube Urukiko rwitaruye, rureberera izindi, rukazikosora aho zateshutse, rugahuza imicire y'imanza ku bibazo runaka, rukanatanga umurongo ngenderwaho izindi nkiko zo hasi zikwiye gukurikiza⁹ Iki gitekerezo cyaje gushimangirwa mu ngingo ya 65 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018

⁶ Reba igika cya 16 cy'urwo rubanza.

⁷ Igika cya 6 cy'iyo ngingo giteganya ko:" Imanza n'ibyemezo by'Urukiko rw'Ikirenga bigomba kubahirizwa n'izindi nkiko zose zo mu gihugu."

 $^{^8}$ Itegeko n°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko.

⁹ Reba raporo ya Sena (Komisiyo ya Politiki n'Imiyoborere Myiza) yo kuwa 21 Werurwe 2017.

rigena ububasha bw'inkiko aho bigaragara ko kubahiriza umurongo usanzweho mu gukemura ikibazo runaka ari ihame ndakuka kuko, kugira ngo uwo murongo uhinduke bisaba kuwuregera Urukiko rw'Ikirenga mu kirego kihariye; narwo kandi, nk'uko bigaragara mu ngingo ya 73 y'iryo Tegeko mu gika cyaryo cya nyuma, rukawuhindura rubanje kugaragaza ikibazo kigaragara mu murongo wari usanzweho, mbere yo gutanga umurongo mushya ngenderwaho.

Mu mikorere y'inkiko zubahiriza amahame ashingiye ku kubahiriza umurongo wafashwe (stare decisis), buri Rukiko rugomba kubahiriza umurongo rwafashe ku kibazo runaka cyangwa umurongo wafashwe n'urukiko rurukuriye kuri icyo kibazo (The basis of the system of precedent is the principle of stare decisis and this requires a later court to use the same reasoning as an earlier court where the two cases raise the same legal issues)¹⁰, bityo uko inkiko zisumbana (the higher up a court is in the hierarchy, the more authoritative its decisions: decisions of the higher courts will bind lower courts to apply the same decided principle)¹¹. By'umwihariko rero, Urukiko rw'Ikirenga nk'Urukiko rukuriye izindi, birumvikana ko ari narwo soko nkuru y'imirongo inkiko zindi zigenderaho, akaba nayo mpamvu y'imiterere yarwo yihariye nk'uko ari byasobanuwe mu gika kibanziriza iki, imiterere ituma rugira ububasha ku moko y'imanza zose inkiko zishyikirizwa kugira

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¹⁰ The open University, OpenLearn, Judges and the law, available at https://www.open.edu/openlearn/society-politics-law/judges-and-the-law/content-section-3.4

¹¹ Idem. There are two exceptions to this principle: Overruling (the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case) and distinguishing (the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent, so it will not find itself bound to follow that precedent).

ngo rubashe kuzitangaho umurongo uyobora izindi nkiko mu micire y'imanza.

III. ICYEMEZO CY'URUKIKO

- [34] Rwemeje ko ikirego cyatanzwe na GLIHD cyakiriwe rugisuzumye rusanga nta shingiro gifite;
- [35] Rwemeje ko igika cya kabiri cy'ingingo ya 39 y'Itegeko N° 59/2008 ryo ku wa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose ntaho kinyuranyije n'ibiteganywa mu ngingo ya 15, 16 n'iya 34 z'Itegeko Nshinga rya Repubulika y' U Rwanda.

IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA

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

TUYISENGE N'UNDI v. RWANDA MOTOR S.A

[Rwanda URUKIKO RW'IKIRENGA – RS/REV/INJUST/RC 00041/2017/SC (Rugege, P.J., Mutashya na Kayitesi E., J.) 22 Gashyantare 2020]

Amategeko agenga imiburanishirize y'imanza mbonezamubano – Irangizwa ry'urubanza ku kintu kitagihari – Irangizarubanza rikorerwa ku cyaburanywe cyangwa ku gisa nacyo, byaba bidashobotse hagatangwa ingurane y'agaciro kacyo kabariwe ku gaciro k'ifaranga kariho icyo gihe.

Incamake y'ikibazo: Urubanza rwatangiriye mu Rukiko rwa mbere rw'Iremezo rwa Kigali muri 1995, aho Tuyisenge na Uzamukunda baregaga Rwanda Motor kuba itarabahaye imodoka baguze muri 1993 cyangwa ngo ibahe agaciro kayo. Urukiko rwafashe icyemezo ko ikirego cyabo gifite ishingiro kandi ko Rwanda Motor igomba kubaha ubwoko bw'imodoka baguze.

Rwanda Motor yajuririye Urukiko rw'Ubujurire rwa Kigali, narwo rwemeza ibyo Urukiko rwa Mbere rw'Iremezo rwa Kigali rwemeje. Rwanda Motor yongeye kutishimira imikirize y'urubanza, bituma isaba ko urubanza ruseswa; ariko nyuma y'ivugururwa y'Urwego rw'Ubucamanza, urubanza rwoherejwe mu Rukiko Rukuru rurarusiba kubera ko Rwanda Motor itigeze ikurikirana ikirego cyayo.

Nyuma y'aho, Tuyisenge na Uzamukunda batanze ibirego bitandukanye mu Rukiko Rukuru ku nshuro ya kabiri, bwa mbere basaba ko rwasobanura urubanza rwaciwe n'Urukiko

rw'Ubujurire, ubundi barega basaba ko Urukiko rwakemura ikibazo gituruka kw'irangizwa ryarwo; maze Urukiko Rukuru rwemeza ko ntacyo gusobanura gihari, kandi ko urubanza rurangizwa uko rwaciwe.

Irangizwa ry'uru rubanza ntiryashobotse, kuko uruganda rutari rugikora ubwoko bw'izo modoka, kandi Rwanda Motor S.A ikaba yaranze gutanga isa nayo. Ibi byatumye Tuyisenge na Uzamukunda basaba gusubirishamo urubanza ku mpamvu z'akarengane, maze Perezida w'Urukiko rw'Ikirenga yemeza ko rwongera kuburanishwa. Mu miburanire yabo basabye ko bahabwa agaciro k'imodoka mu mafaranga kabariwe aho ifaranga rigeze uyu munsi.

Rwanda Motor yavuze ko ikirego cyabo nta shingiro gifite kuko icyatumye urubanza rutarangizwa ari uko ubwoko bw'iyo modoka iburanwa butagikorwa.

Incamake y'Icyemezo: Irangizarubanza rikorerwa ku cyaburanywe cyangwa ku gisa nacyo, byaba bidashobotse, hagatangwa ingurane y'agaciro kacyo, kabariwe ku gaciro k'ifaranga kariho icyo gihe.

Ikirego gifite ishingiro; Urubanza RCA 0081/09/HC/KIG ruvanyweho; Uregwa agomba gutanga ingurane mu mafaranga ku modoka yaguzwe ntiboneke; Amagarama aherereye ku isanduku ya Leta.

Amategeko yashingiweho:

Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano,

iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 9 na 10.

Itegeko N° 22/2012 ryo ku wa 14/07/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, (ryakoreshwaga icyo gihe) ingingo ya 192

Itegeko N° 18/2004 ryo ku wa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

Imanza zifashishijwe:

Nyirabugungo Isabelle v Etablissement Mironko Plastic Industries, RCAA 0116/11/CS rendered on 08/02/2013 by the Supreme Court

Inyandiko z'abahanga:

Ephrem GASASIRA, Procédure civile et commerciale, 1993, page 260.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rukomoka ku masezerano yo ku wa 15/02/1994 y'ubugure bw'imodoka ya MAZDA E 2000 ifite imyanya 15 cyangwa 18, yabaye hagati ya Tuyisenge Zabuloni na Uzabumwana Dorothée, na Rwanda Motor S.A, nyuma bagiye kuyifata, Rwanda Motor ibabwira ko imodoka yabo yasahuwe kimwe n'ibindi yari ifite.

- [2] Tuyisenge Zabuloni na Uzabumwana Dorothée baregeye Urukiko rwa Mbere rw'Iremezo rwa Kigali, basaba guhabwa imodoka cyangwa agaciro kayo, ibirego byabo bihurizwa hamwe, urubanza ruhabwa N° RC 23.394/95/S1-RC 23.742/95/S1.
- [3] Ku wa 30/06/1997, urwo Rukiko rwaciye urubanza rwemeza ko ikirego cya Tuyisenge Zabuloni na Uzabumwana Dorothée gifite ishingiro, rutegeka Rwanda Motor S.A kubaha imodoka baguze ari yo MAZDA E.2000 y'imyanya 15 cyangwa 18, ikanatanga amagarama y'urubanza ahwanye na 3500 Frw.
- [4] Rwanda Motor S.A ntiyishimiye imikirize y'urubanza, ijuririra Urukiko rw'Ubujurire rwa Kigali, urubanza rwandikwa kuri N° RCA 12206/KIG-RC 3742/92, ivuga ko Tuyisenge Zabuloni na Uzabumwana Dorothée bishyuye imodoka mu byiciro bitatu, icyiciro cya nyuma bagitanga ku wa 15/02/1994, Rwanda Motor S.A ibereka imodoka yabo SG 28 ifite n° ya chassis SRYOEZ 622110, N° ya moteur 930156 y'ibara ry'umweru, bakaba batarayitwaye kubera impamvu zabo bwite bigera igihe isahuwe hamwe n'izindi mu gihe cya Jenoside yakorewe Abatutsi mu Rwanda muri 1994.
- [5] Urukiko rw'Ubujurire rwa Kigali rwasobanuye ko Rwanda Motor S.A idakwiye kuburanisha ''Force majeure'' kuko yemera ko na Tuyisenge Zabuloni na Uzabumwana Dorothée barishye igiciro cy'imodoka bari batumije ku wa 15/02/1994, intambara iba ku wa 07/04/1994, ikaba itabasha gusobanura ukuntu muri ayo mezi abiri itashyikirije iyo modoka ba nyirayo kandi barayishyuye. Rwasobanuye ko Tuyisenge Zabuloni na Uzabumwana Dorothée batigeze berekwa imodoka kuko itari yakabonye ibiyiranga (identification), ndetse batanasinye kuri fagitire yayo bemeza ko bayihawe.

- [6] Rwasobanuye ko nta masezerano y'ububitsi (contrat de dépôt) yabayeho hagati ya Rwanda Motor S.A na Tuyisenge Zabuloni na Uzabumwana Dorothée kuko batari kubitsa imodoka batahawe, ko indishyi z'amafaranga iyi modoka iba yarakoreye mu gihe cy'imyaka 5 zidakwiye kuko itigeze igaragara ngo ikore ngo abe ari ho ahera bagena umusaruro wayo, rutegeka Rwanda Motor S.A guha Tuyisenge Zabuloni na Uzabumwana Dorothée imodoka Minibus MAZDA E 2000 y'imyanya 15 cyangwa 18, kuko bayitangiye ikiguzi kandi Rwanda Motor S.A ikaba igicuruza amamodoka.
- [7] Rwanda Motor S.A ntiyishimiye imikirize y'urubanza isaba ko urubanza ruseswa, ikirego cyayo cyandikwa kuri RCP 1000 nyuma y'ivugurura ry'inzego z'Ubucamanza muri 2004, urubanza rwoherezwa mu Rukiko Rukuru rwandikwa kuri N° RCAA 0597/06/HC/KIG ku wa 02/11/2007. Urukiko rwategetse ko ikirego gisibwa kuko Rwanda Motor S.A itagikurikiranye ngo kiburanishwe.
- [8] Nyuma Tuyisenge Zabuloni na Uzabumwana Dorothée batanze ikirego mu Rukiko Rukuru basaba gusobanura urubanza RCA 12.206/KIG-RC 3742/92, urubanza rwandikwa kuri N° RC 0030/09/HC/KIG, ku wa 12/05/2009, Urukiko rwemeza ko ntacyo gusobanura gihari kubera ko urubanza ubwarwo rusobanutse.
- [9] Tuyisenge Zabuloni yongeye gutanga ikirego asaba gukemura ikibazo gituruka ku irangiza ry'urubanza RCA 12.206/KIG-RC 3742/92 ashingiye ku kuba baragiye kurangirisha urubanza Rwanda Motor S.A ikababwira ko imodoka zo muri ubwo bwoko zitagikorwa, asaba ko yahabwa agaciro kayo cyangwa agahabwa indi modoka ifite agaciro nk'akayo, ikirego cyandikwa kuri N° RCA 0081/09/HC/KIG. Ku

wa 14/02/2011, Urukiko rwemeza ko ibyo Tuyisenge Zabuloni asaba, bigamije guhindura icyemezo cy'Urukiko kandi rwarabaye itegeko, rutegeka ko urubanza RCA 12.206/KIG-RC 3742/92 rurangizwa uko rwakabaye.

- [10] Tuyisenge Zabuloni na Uzabumwana Dorothée bashyizeho umuhesha w'Inkiko ngo arangize urubanza nawe abasubiza ko kurangiza urubanza ku ngufu bidashoboka kubera ko ntacyo yabona afatira bitewe n'uko imodoka ya MAZDA E 2000 Urukiko rwategetse, ntazo Rwanda Motor S.A ifite kandi ko hatafatirwa indi mu gihe Umucamanza ntabyo yategetse, ndetse akaba yaranasabye Rwanda Motor S.A kwishyura indi isa nayo, ikabyanga.
- [11] Nyuma y'izo manza zose, Tuyisenge Zabuloni na Uzabumwana Dorothée bandikiye urwego rw'Umuvunyi basaba kurenganurwa. Uru rwego nyuma yo gusesengura urubanza RCA 12206/KIG-RC 3742/92, rwasanze n'ubwo imikirize yarwo yumvikana, ariko icyo Urukiko rwategetse kidashobora gushyirwa mu bikorwa bitewe n'uko imodoka MAZDA E 2000 y'imyanya 15 cyangwa 18 rwategetse ko Rwanda Motor S.A iha Tuyisenge Zabuloni na Uzabumwana Dorothée, itakibaho.
- [12] Urwego rw'Umuvunyi rwandikiye Urukiko rw'Ikirenga ku wa 23/05/2016 rusaba ko urubanza RCA 0081/09/HC/KIG rwasubirwamo. Perezida w'Urukiko rw'Ikirenga nyuma yo kubona raporo y' Ubugenzuzi Bukuru bw'Inkiko yakozwe kuri urwo rubanza, yafashe icyemezo ku wa 01/811/2017 ategeka ko urubanza RCA 12.206/KIG-3742/92 haburana Rwanda Motor S.A na Tuyisenge Zabuloni na Uzabumwana Dorothée rwaciwe n'Urukiko rw'Ubujurire rwa Kigali ku wa 04/06/2001 rusubirwamo ku mpamvu z'akarengane.

- [13] Iburanisha mu ruhame ryabaye ku wa 21/01/2019, hitabye Rwanda Motor S.A ihagarariwe na Me Rutembesa Phocas, Tuyisenge Zabuloni na Uzabumwana Dorothée bahagarariwe na Me Kazeneza Théophile.
- [14] Mbere y'uko iburanisha mu mizi ritangira, Me Rutembesa Phocas uburanira Rwanda Motor S.A yasabye ko iburanisha ryahagarara bakajya kumvikana kugira ngo barebe niba ikibazo bagikemura mu bwumvikane, naho Me Kazeneza Théophile uburanira Tuyisenge Zabuloni na Uzabumwana Dorothée avuga ko asanga ubwo bwumvikane budakwiye guhagarika urubanza, ko ahubwo iburanisha ryakomeza, noneho babasha kumvikana bakazamenyesha Urukiko, urubanza rwaba rutarasomwa, rugahagarara.
- [15] Urukiko rwafatiye icyemezo mu ntebe rutegeka ko iburanisha rikomeza, ababuranyi bazabasha kumvikana bakazabimenyesha Urukiko mbere y'uko urubanza rusomwa.
- [16] Me Rutembesa Phocas uburanira Rwanda Motor S.A yatanze inzitizi avuga ko ashingiye ku ngingo ya 86, igika cya 2, agace ka 1° n'aka 2°, y'Itegeko Ngenga n° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha bw'Urukiko rw'Ikirenga¹, asanga ikirego cyatanzwe na Tuyisenge Zabuloni

¹ Imanza zaciwe ku rwego rwa nyuma mbere y'uko iri Tegeko Ngenga ritangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda zishobora gusubirishwamo ku mpamvu z'akarengane hakurikijwe ibiteganywa n'ingingo ya 81 y'iri Tegeko Ngenga. Izo manza ni izi zikurikira:

^{1°}Imanza zivugwamo akarengane zaciwe burundu nyuma y'ishyirwaho ry'Urwego rw'Umuvunyi mu mwaka wa 2003 zaba izarangijwe cyangwa izitararangizwa, zizashyikiriwa Urwego rw'Umuvunyi mu gihe kitarenze umwaka umwe (1) kuva iri Tegeko Ngenga ritangajwe mu Igazeti ya Leta ya Repubulika y'u Rwanda.

na Uzabumwana Dorothée mu rwego rw'Umuvunyi kidakwiye kwakirwa kubera ko cyatanzwe gikererewe. Ibyo akaba abihera ko urubanza rusabirwa gusubirwamo ku mpamvu z'akarengane, rwaciwe ku wa 04/06/2001, rukaba rutabarirwa mu manza za nyuma ya 2003, bityo rukaba rwaragombaga gushyikirizwa Urwego rw'Umuvunyi mu gihe kitarenze amezi atandatu (6) kuva Itegeko Ngenga rimaze kuvugwa, ritangajwe mu Igazeti ya Leta ya Repubulika y'u Rwanda. Ko kuba Rwanda Motor S.A yarahamagawe n'Urwego rw'Umuvunyi muri 2015, Me Rutembesa Phocas avuga ko n'ubwo atazi neza itariki urubanza rwashyikirijweho Urwego rw'Umuvunyi, uwo mwaka awufata ko ari wo ikirego cya Tuyisenge Zabuloni na Uzabumwana cvashvikirijwe Dorothée urwo rwego, bitvo rutaragombaga kucyakira kuko igihe giteganyijwe n'Itegeko cy'amezi atandatu (6) cyari cyararenze.

[17] Me Kazeneza Théophile uburanira Tuyisenge Zabuloni na Uzabumwana Dorothée, avuga ko atumva icyo iyi nzitizi igamije, kuko niba ari inenge igaragara mu cyemezo cy'Urwego rw'Umuvunyi, atagombye kuyiregera muri uru Rukiko, ko kandi kugira ngo uru rubanza rwongere kuburanishwa, byemejwe na Perezida w'Urukiko rw'Ikirenga; ko rero atumva niba arimo gushaka kujuririra icyo cyemezo bityo ko kubera iyo mpamvu asanga inzitizi itanzwe na Rwanda Motor S.A nta shingiro ifite.

²º Imanza zaciwe n'inkiko zisanzwe, inkiko z'ubucuruzi n'iza Gisirikare ku rwego rwa nyuma zivugwamo

akarengane zashyikirijwe inzego zinyuranye, zizashyikirizwa Urwego rw'Umuvunyi mu gihe kitarenze

amezi atandatu (6) kuva iri Tegeko Ngenga ritangajwe mu Igazeti ya Leta ya Repubulika y'u Rwanda.

- [18] Urukiko rw'Ikirenga nyuma yo kwiherera rwafashe icyemezo cy'uko inzitizi yatanzwe na Me Rutembesa Phocas mu izina rya Rwanda Motor S.A nta shingiro ifite, kubera ko urubanza rwasabiwe gusubirishwamo ku mpamvu z'akarengane ari RCA 0081/09/HC/KIG rwaciwe ku wa 14/02/2011, akaba atari urubanza RC 23.394/95/S1- RC 23.742/95/S1 rwaciwe ku wa 04/06/2001 nk'uko Me Rutembesa abivuga, ko ibyo avuga by'uko rwashyikirijwe Urwego rw'Umuvunyi impitagihe, atabitangira ibimenyetso. Rutegeka ko urubanza rukomeza mu mizi
- [19] Muri uru rubanza ikibazo ababuranyi batumvikanaho, ni ukumenya niba igihe ikigomba kurangirizwaho urubanza kitagihari, uwatsinze ashobora guhabwa agaciro kacyo mu mafaranga.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

Kumenya niba igihe ikigomba kurangirizwaho urubanza kitagihari, uwatsinze ashobora guhabwa agaciro kacyo mu mafaranga.

- [20] Me Kazeneza Théophile uburanira Tuyisenge Zabuloni na Uzabumwana Dorothée avuga ko kuva bagura imodoka na Rwanda Motor S.A muri 1994, bakayishyura, nanubu batarayibona, impamvu Rwanda Motor S.A itanga, ikaba ari uko ngo iyo modoka iri muzasahuwe igihe cya Jenoside, ubu ikaba idashobora kuboneka kuko n'inganda zazikoraga zitakizikora.
- [21] Avuga ko nubwo izo modoka zitagikorwa, Rwanda Motor S.A yari ifite ubundi buryo bwo kwishyura ariko

ntiyabikora, nko gutanga indi modoka imeze nkayo, cyangwa agaciro kayo mu mafaranga, ariko muri ibyo byose nta na kimwe yakoze, ahubwo ikomeza kugundira amafaranga yabo iyacuruza, kandi bo batarabonye imodoka baguze.

- [22] Avuga ariko ko nubwo bari bifuje ko bahabwa imodoka ifite agaciro nk'ak'iyo bari baguze, ubu icyo gitekerezo batakigihagazeho, kuko imodoka nk'iyo ubu mu Rwanda ntacyo yakora, kandi abo aburanira bakaba bari bayiguze kugira ngo bayikoreshe ubucuruzi (Gutwara abantu), ahubwo icyifuzo kikaba ari uko bahabwa agaciro kayo mu mafaranga kabariwe aho ifaranga rigeze uyu munsi, asaba gusubizwa ikiguzi kingana n'agaciro k'imodoka uyu munsi kangana na miliyoni mirongo ine n'imwe n'ibihumbi magana atanu (41.500.000Frw), bagendeye ko muri 1993 idorali rimwe ryari 80 Frw, ubu rikaba ringana na 850 Frw, kandi ko icyo gihe batanze 3.900.000Frw.
- [23] Me Rutembesa Phocas uburanira Rwanda Motor S.A avuga ko ibyo basaba ko byashyirwa mu bikorwa atari byo Urukiko rwategetse, kuko rwategetse ko bahabwa imodoka bari baguze muri Rwanda Motor S.A. Avuga ko asanga kuba urubanza rwongeye kugaruka imbere y'urukiko, Rwanda Motor S.A ikwiye kurenganurwa kuko yagaragaje impamvu bitakunze ko ishyikiriza abaguze iyo modoka ariko ntibyahabwa agaciro, aho yerekanye ko iyo modoka yaguzwe nkuko byari byemeranijwe ndetse Rwanda Motor S.A ikayigeza mu bubiko bwayo ariko abari barayiguze ntibihutire kuza kuyitwara kubera impamvu zabo bwite, ko rero kuba itarageze mu maboko yabo nabo babifitemo uruhare
- [24] Avuga ko ikibazo cyatumye urubanza rutarangizwa, ari uko ubwoko bw'izo modoka butagikorwa, Rwanda Motor S.A ikaba itabasha kubona indi isa nayo, ko muri icyo gihe, bari

kwemera bagahabwa amafaranga yabo batanze angana na 3.900.000Frw, ariko bakomeje gushyiraho amaniza bavuga ko bashaka agaciro k'iki gihe mu gihe Rwanda Motor S.A nta ruhare yagize kugira ngo iyo modoka idatangwa.

UKO URUKIKO RUBIBONA

[25] Ihame ry'amategeko agenga imiburanishirize rivuga ko amategeko y'imiburanishirize akurikizwa ako kanya itegeko rigisohoka (les règles de procédure sont d'application immédiate).

[26] Itegeko N° 20/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi rikurikizwa ubungubu, ntaho ryateganyije uko bigenda mu gihe icyaburanwaga ari nacyo kigomba kurangirizwaho urubanza, kitagihari. Urukiko rusanga ariko kuba ibyo bitarateganyijwe, atari ku mpamvu z'uko Umushingamategeko yashatse ko bene ibyo bibazo bidakemurwa ku buryo uwatsinze urubanza yabura ingurane mu gihe icyo yatsindiye kitagihari, ahubwo byumvikana ko byibagiranye, ibi kandi bikaba bitagomba kubuza Urukiko guca urubanza hagendewe ku kuba Itegeko rikoreshwa ubu, ntacyo ryateganyije kuri bene ibyo bibazo, ko ahubwo Urukiko rugomba guca urubanza rushingiye ku ngingo ya 9 igika cya mbere n'icya kabiri y'iryo Tegeko rivuzwe muri iki gika², iteganya ko umucamanza

² Umucamanza aca urubanza ashingiye ku ngingo z'amategeko zirebana n'ikirego yaregewe. Iyo nta tegeko rijyanye n'ikiburanwa ashingira ku mategeko asanga yashyiraho mu gihe yaba ashinzwe kuyashyiraho, yifashishije ibyemezo byagiye bifatwa n'inkiko, umuco, amahame rusange agenga amategeko n'inyandiko z'abahanga mu mategeko. Umucamanza ntashobora kandi kwanga guca urubanza yitwaje impamvu iyo ari yo yose,

adashobora kwanga guca urubanza yitwaje impamvu iyo ari yo yose, n'iyo ntacyo itegeko ryaba riteganya, ridasobanutse mu buryo bwumvikana cyangwa ridahagije.

Impamvu Urukiko rusanga harabayeho kwibagirana mu [27] itegeko bijyanye gukemurira mu ibibazo no kubura kw'icyagombaga kurangirizwaho urubanza, ari uko mu Itegeko Nº 22/2012 ryo ku wa 14/07/2012 ryerekeye imiburanishirize z'imbonezamubano, iz'ubucuruzi, iz'umurimo y'imanza n'iz'ubutegetsi ryakoreshwaga ubwo Urwego rw'Umuvunyi rwagezaga ikirego mu Rukiko rw'Ikirenga, mu ngingo yaryo ya 195, ryateganyaga ko irangiza ry'imanza rigamije guha uwatsinze icyo yatsindiye, atabibona agahabwa ingurane yabyo³, ibivugwa muri iyo ngingo, bikaba ari nabyo byari biteganyijwe mu ngingo ya 192 y'Itegeko Nº 18/2004 ryo ku wa 20/06/2004 imiburanishirize y'imanza z'imbonezamubano, ryerekeye iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ryakoreshwaga ubwo urubanza kuri iki kibazo rwaburanishwaga (mu mwaka wa $2011)^4$.

[28] Iki gitekerezo kandi gishimangirwa n'umuhanga mu mategeko Gasasira Ephrem mu gitabo cye « Procédure civile et commerciale, 1993, page 260», aho avuga ko irangizarubanza rikorerwa ku cyaburanywe cyangwa ku gisa nacyo, byaba

n'iyo ntacyo itegeko ryaba riteganya, ridasobanutse mu buryo bwumvikana cyangwa ridahagije.

³ Irangiza ry'imanza n'iry'inyandiko rigamije guha uwatsinze ibintu afitiye uburenganzira bwo guhabwa, akabibona ubwabyo cyangwa akabona ingurane.

⁴ Irangiza ry'imanza n'iry'inyandiko rigamije guha uwatsinze ibintu afitiye uburenganzira bwo guhabwa, akabibona ubwabyo cyangwa akabona ingurane.

bidashobotse, hagatangwa agaciro kacyo kabariwe mu mafaranga.⁵

[29] Uwatsindiye ibintu ariko, siwe uhitamo igihe ashakiye niba mu kurangiza urubanza ahabwa ibyo bintu cyangwa niba ahabwa ingurane yabyo, ahabwa ingurane ari uko irangiza ry'urubanza kucyo yatsindiye ryananiranye, kandi iyo ngurane akayihabwa hagendewe ku gaciro kariho ubu ngubu⁶.

[30] Ku bijyanye n'uru rubanza, Urukiko rurasanga ababuranyi bose bemeranya ko imodoka Minibus Mazda E 2000 y'imyanya 15 cyangwa 18 ari yo yaguzwe na Tuyisenge Zabuloni na Uzabumwana Dorothée muri Rwanda Motor S.A muri 1994, ikaba ari nayo Urukiko rw'Ubujurire rwa Kigali rwategetse Rwanda Motor S.A guha Tuyisenge Zabuloni na Uzabumwana Dorothée mu rubanza RC 23.394/95/S1-RC 23.742/95/S1 rwaciwe ku wa 04/06/2001.

Urukiko rurasanga kandi ababuranyi bose bemeranywa inganda zakoraga bene ubwo bwoko bw'imodoka, irangizarubanza riverekeveho bivuze ko zitakizikora, ridashoboka kubera ko icyagombaga kurangirizwaho urubanza kidahari; bityo, hashingiwe ku byavuzwe haruguru mu bika bibanziriza iki, Tuyisenge Zabuloni na Uzabumwana Dorothée bakaba bagomba guhabwa na Rwanda Motor S.A ingurane

⁵ L'exécution est directe ou en nature, lorsque c'est la prestation même qui constitue l'objet de l'obligation qui est fournie au créancier. L'exécution par equivalent a lieu lorsque l'exécution directe est impossible, soitque l'objet du litige ne s'y prête pas, sit qu'il y ait mauvaise volonté du débiteur.

⁶ Urubanza Nº RCAA 0116/11/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 08/02/2013 haburana Nyirabugingo Isabelle v Etablissement Mironko Plastic Indistries mu izina ry'uyihagarariye.

y'agaciro k'iyo modoka mu mafaranga kabariwe aho ifaranga rigeze ubu.

- [32] Urukiko rurasanga ku wa 15/02/1994 ubwo Tuyisenge Zabuloni na Uzabumwana Dorothée batangaga igice cya nyuma cy'ubwishyu bw'imodoka, idorali rimwe ryavunjaga amafaranga y'u Rwanda 145,0248Frw⁷ nkuko bigaragara ku rubuga rwa Banki Nkuru y'u Rwanda, bityo bakaba baratanze amadolari angana na USD 26.896 kuko amafaranga y'amanyarwanda yose batanze bagura imodoka angana na 3.900.000 Frw (3.900.000 Frw: 145,0248= USD 26.896) .
- [33] Urukiko rurasanga ubu idolari ku munsi wa none rigeze ku mafaranga y'u Rwanda 875 Frw⁸ nk'uko nanone bigaragara ku rubuga rwa Banki Nkuru y'u Rwanda, bivuze ko, rushingiye kuri iryo vunja, Tuyisenge na Uzabumwana bagomba guhabwa na Rwanda Motor S.A ingurane ingana na 875 Frw x 26.896=23.534.000 Frw.

Kumenya niba amafaranga Tuyisenge Zabuloni na Uzabumwana Dorothée batanze bagura imodoka ntibayihabwe, agomba gutangirwa inyungu yagombye kuba yarungutse.

[34] Me Kazeneza Théophile uburanira Tuyisenge Zabuloni na Uzabumwana Dorothée avuga ko abo aburanira bataba barenganuwe baramutse bahawe gusa icyo baguze cyangwa agaciro kacyo gusa, badahawe inyungu yari kukivanamo mu gihe kirekire nk'iki. Ikaba ariyo mpamvu basaba guhabwa inyungu

 $^{^7}$ https://www.bnr.rw/index.php?id=89 urubuga rwa Banki Nkuru y'u Rwanda rwasuwe ku wa 14/02/2019 saa yine n'iminota 55

^{8 &}lt;a href="https://www.bnr.rw/index.php?id=89">https://www.bnr.rw/index.php?id=89 urubuga rwa Banki Nkuru y'u Rwanda rwasuwe ku wa 14/02/2019 saa yine n'iminota 55

bavukijwe zibariwe kuri 18% ku mwaka z'agaciro k'imodoka yagombye kuba ifite uyu munsi, mu gihe cy'imyaka 10.

[35] Me Rutembesa Phocas uburanira Rwanda Motor S.A avuga ko izi ndishyi asanga nta shingiro zifite, kuko kugira ngo indishyi zatakajwe zisuzumwe, ari uko icyo zishingiyeho cyagombye kuba nibura cyarabayeho.

UKO URUKIKO RUBIBONA

[36] Ingingo ya 10 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 Urukiko ruca urubanza ku cyasabwe cyonyine kandi kuri icyo gusa.

[37] Urukiko rurasanga ikiburanwa muri uru rubanza, atari inyungu zikomoka ku mafaranga y'inguzanyo cyangwa amafaranga yishyurwa buri mwaka cyangwa mu kindi gihe kitageze ku mwaka nkuko ingingo ya 657 yo mu gitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano, amasezerano n'imirimo nshinganwa ibiteganya⁹, ko ahubwo icyaregewe ari ukurangiza ibyemezo byafashwe burundu n'inkiko hasabwa ingurane.

buzimye.

⁹ Iyo ngingo iteganya ko amafaranga yishyurwa uko igihe gitashye, amafaranga y'ubukode bw'inzu cyangwa icyatamurima, inyungu z'amafaranga yagurijwe, muri rusange n'andi mafaranga yose yishyurwa buri mwaka cyangwa mu kindi gihe kitageze ku mwaka, ko ayo mafaranga yose iyo hashize imyaka itanu (5) ntawe uyakurikiranye, ubwo burenganzira buba

- [38] Urukiko rurasanga hashingiwe kuri ibyo bisobanuro bitanzwe, ibyo Me Kazeneza Théophile asaba mu izina rya Tuyisenge Zabuloni na Uzabumwana Dorothée by'uko yahabwa inyungu bavukijwe zibariwe kuri 18% ku mwaka z'agaciro k'imodoka yagombye kuba ifite uyu munsi, mu gihe cy'imyaka 10, nta shingiro bifite, ko ahubwo icyo bavukijwe ari amahirwe (perte d'une chance) yo kubyaza umusaruro iyo modoka.
- [39] Urukiko rurasanga nkuko byagiye bifatwaho icyemezo mu manza zinyuranye haba muri uru Rukiko cyangwa mu nkiko zo mu mahanga¹⁰, kuvutswa amahirwe bitakwitwa igihombo nkuko Me Kazeneza Théophile ubaburanira abivuga, ahubwo ari impamvu ituma uwayavukijwe abihererwa indishyi z'uko atashoboye kubyaza umusaruro icyo yari afiteho uburenganzira, izo ndishyi zikaba zigenwe mu bushishozi bw'Urukiko.
- [40] Rushingiye kuri ibyo bisobanuro bimaze gutangwa, Urukiko rurasanga inyungu Me Kazeneza Théophile asaba mu izina ry'abo aburanira, nta shingiro zifite.

Ibijyanye n'indishyi zisabwa.

[41] Me Kazeneza Théophile mu izina rya Tuyisenge Zabuloni na Uzabumwana Dorothée asaba guhabwa indishyi z'akababaro kubera gusiragizwa mu manza ku maherere, kutarangirizwa urubanza, angana na 5.000.000Frw, bakanahabwa amafaranga

¹⁰ -Comme en responsabilité délictuelle, le juge du fond apprécie souverainement le préjudice dès l'instant qu'il a caractérisé la perte de chance. Cf. Civ. 1ère, 10 juillet 2002, Bull.civ. I, n° 19.7

⁻Urubanza RCOMAA 0008/12/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 06/06/2008, Banki ya Kigali iburana na Kampire na Sibomana

y'ikurikiranarubanza n'igihembo cya Avoka nayo angana na 5.000.000Frw yose hamwe akaba 10.000.000Frw.

[42] Me Rutembesa Phocas uburanira Rwanda Motor S.A avuga ko indishyi basaba nta shingiro kuko aribo ubwabo bishoye mu manza bitari ngombwa.

UKO URUKIKO RUBIBONA

- [43] Urukiko rurasanga, ku byerekeye indishyi Tuyisenge Zabuloni na Uzabumwana Dorothée bagomba kugenerwa zivugwa mu gika cya 38 na 39 by'uru rubanza zo kuba baravukijwe amahirwe yo kubyaza umusaruro imodoka baguze, bakaba baramaze igihe kirekire bayitegereje ariko ntibayibone kandi barayishyuye, rubageneye 2.000.000 Frw mu bushishozi bwarwo.
- [44] Urukiko rurasanga ku byerekeye indishyi z'akababaro Me Kazeneza Théophile asaba mu izina rya Tuyisenge Zabuloni na Uzabumwana Dorothée kubera gusiragizwa mu manza ku maherere, nta shingiro zifite, kuko nibo baregaga ntabwo ari Rwanda MOTOR S.A, ntabwo rero ariyo yabasiragije mu manza nkuko babivuga.
- [45] Ku byerekeye indishyi basaba z'ikurikiranarubanza n'igihembo cya Avoka, Urukiko rurasanga Tuyisenge Zabuloni na Uzabumwana Dorothée bazikwiye kuko baburanye bahagarariwe, kandi hari n'ibyo batakaje kubera gukurikirana uru rubanza, bakaba bagomba ariko kuzigenerwa mu bushishozi bw'Urukiko kuko izo basaba ari nyinshi, Urukiko rukaba rubageneye 300.000Frw y'ikurikiranarubanza, na 500.000 Frw y'igihembo cya Avoka, yose hamwe akaba 800.000Frw.

III. ICYEMEZO CY'URUKIKO

- [46] Rwemeje ko ikirego cyatanzwe na Tuyisenge Zabuloni na Uzabumwana Dorothée gisaba gusubirishamo ku mpamvu z'akarengane urubanza RCA 0081/09/HC/KIG rwaciwe n'Urukiko Rukuru rwa Kigali ku wa 14/02/2011, gifite ishingiro;
- [47] Rwemeje ko urubanza RCA 0081/09/HC/KIG rwaciwe n'Urukiko Rukuru rwa Kigali ku wa 14/02/2011 ruvuyeho;
- [48] Rutegetse Rwanda Motor S.A guha Tuyisenge Zabuloni na Uzabumwana Dorothée ingurane ingana na 23.534.000Frw ku modoka MAZDA E 2000 bari baguze yo ntibayihabwa;
- [49] Rutegetse Rwanda Motor S.A guha Tuyisenge Zabuloni na Uzabumwana Dorothée indishyi zingana na 2.000.000Frw, amafaranga y'ikurikiranarubanza angana na 300.000Frw, ay'igihembo cya Avoka angana na 500.000Frw, yose hamwe akaba 2.800.000Frw;
- [50] Rutegetse ko amagarama y'ibyakozwe mu rubanza aherera ku Isanduku ya Leta.

NZITONDA v. COGEBANQUE Ltd N'ABANDI

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00012/2019/CA (Karimunda, P.J.) 09 Ukuboza 2019]

Amategeko agenga imiburanishirije y'imanza z'ubucuruzi – Ikirego cyerekeye gutesha agaciro cyamunara — Ikirego cyerekeye gutesha agaciro cyamunara kiburanishwa nk'ikirego cyihutirwa kidashamikiye ku kindi kuko aba ari ukurengera nyiri umutungo ndetse n'uwegukanye ingwate kugira ngo hatagira utezwa igihombo no gutinda kw'imanza mu nkiko — 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 260.

Amategeko agenga imiburanishirije y'imanza z'ubucuruzi – Ikirego cyerekeye gutesha agaciro cyamunara – Ikirego gisaba guhagarika cyangwa gutesha agaciro cyamunara gishobora kujuririrwa bwa kabiri iyo cyujuje ibisabwa kuko aba ari ikirego cyigenga kidashamikiye ku kindi kirego cy'iremezo ariko kikajuririrwa mu gihe kitarenze iminsi itatu – 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 260.

Incamake y'ikibazo: Entreprise de Construction & Techniques d'Architecture (E.C.T.A) imaze gutsidira isoko ryo kubaka isoko rya kijyambere ku Mulindi yagiranye amasezerano y'inguzanyo na Cogebank Ltd, maze Nzitonda umuyobozi wayo ayibera

umwishingizi, ayitangira n'ingwate. E.C.T.A ntiyubahirije ayo masezerano bituma iyo ngwate itezwa cyamunara.

Nzitonda yatanze ikirego mu Rukiko rw'Ubucuruzi asaba ko iyo cyamunara yateshwa agaciro kuko yakozwe mu buryo bunyuranyije n'amategeko. Urwo Rukiko rwaciye urubanza rwemeza ko igurishwa ry'ingwate muri cya munara ritubahirije amategeko rushingiye ku kuba Nzitonda atamenyeshejwe inyandiko ikubiyemo amabwiriza yo kugurisha ingwate muri cyamunara, ntiyashyikirijwe igenagaciro ry;umutungo we, ndetse ko Umwanditsi Mukuru ntiyubahirije iminsi irindwi itegenywa n'Amabwiriza y'Umwanditsi Mukuru agenga ibyerekeye cyamunara, bityo rutegeka Cogebank Ltd gusubiza Higiro waguze ingwate amafaranga yayiguze,, ko kandi Cogebank na Gashema bagomba guha Nzitonda indishyi zinyuranye.

Higiro na Gashema ntibishimiye imikirize y'urwo rubanza maze bajuririra mu Rukiko Rukuru rw'Ubucuruzi, aho Higiro yavuga ko Urukiko rw'Ubucuruzi rwemeje ko Nzitonda atamenyeshejwe amabwiraza ya cyamunara kandi byarakozwe, ibijyanye no kumumenyesha igenagaciro ntaho biteganyijwe mu mategeko, naho kuba umwanditsi mukuru ataremeje cyamunara mu minsi 7 ikaba atari impamvu yo gusesa cyamunara asaba ko mu gihe hakwemezwa ko cyamunara iteshejwe agaciro, yasubizwa amafaranga yakoresheje avugurura inzu yaguze. Gashema we urukiko ko rwasuzuma niba koko **Nzitonda** ataramenyeshejwe amabwiriza, niba kubimumenyesha byari inshingano ze, asaba n' indishyi.

Urukiko Rukuru rw'Ubucuruzi rwasanze ubujurire bwa Higiro na Gashema bufite ishingiro bityo rwemeza ko cyamunara yakozwe mu buryo bukurikije amategeko.

Nzitonda yajuririye Urukiko rw'Ubujurire avuga ko urukiko rwirengagije ko atamenyeshejwe igenegaciro ryakozwe ku umutungo we, n'imihango yo kuwugurisha muri cyamunara ndetse n'umwanditsi mukuru ntiyubahirije ibitegannywa n'amategeko.

Higiro yatanze inzitizi yo kutakira ubujurire kuko ubujurire bwa Nzitonda ari ubwa kabiri ku kirego kihutirwa kandi ikirego cyihutirwa kikaba kidashobora kujuririrwa kabiri kandi ko ubwo bujurire bwatanzwe impitagihe. Iyi nzitizi kandi akaba ayemeranyaho na Gashema.

Ku birebana n'inzitizi yatanzwe, Nzitonda (Uwajuriye) yiregura avuga ko ubujurire bwe budakomoka ku kirego kihutirwa kuko kuva urubanza rwatangira ruburanishwa mu buryo busanzwe akaba asanga rero ntampamvu yatuma ubujurire bwa kabiri butakwakirwa. Kubijyanye nuko ubujurire bwatanzwe impitagihe, avuga ko yakurikije ibihe bisanzwe by'ijurira, kandi asanga kuba ikirego yatanze ubwacyo atari ikirego cyihutirwa nta mpanvu y'uko ibihe by'ijurira bibarirwa ku bihe biteganyijwe ku manza zihutirwa

Incamake y'icyemezo: 1. Ikirego cyerekeye gutesha agaciro cyamunara kiburanishwa nk'ikirego cyihutirwa kidashamikiye ku kindi kuko aba ari ukurengera nyiri umutungo ndetse n'uwegukanye ingwate kugira ngo hatagira utezwa igihombo no gutinda kw'imanza mu nkiko.

2. Ikirego gisaba guhagarika cyangwa gutesha agaciro cyamunara gishobora kujuririrwa bwa kabiri iyo cyujuje ibisabwa kuko aba ari ikirego cyigenga kidashamikiye ku kindi kirego cy'iremezo ariko kikajuririrwa mu gihe kitarenze iminsi itatu

Ubujurire ntibwakiriwe kuko bwatanzwe igihe cy'ubujurire cyararenze; Amagarama y'urubanza aherereye k'uwajuriye.

Amategeko yashingiweho:

Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ingingo ya 21, 185, 188 na 260.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'IKIBAZO

[1] Entreprise de Construction & Techniques d'Architecture (E.C.T.A), Nzitonda Kiyengo abereye Umuyobozi, imaze gutsindira isoko ryo kubaka isoko rya kijyambere ku Mulindi, yagiranye amasezerano y'inguzanyo na COGEBANQUE Ltd, Nzitonda Kiyengo aba umwishingizi wa E.C.T.A, anatanga ingwate y'umutungo we uherereye mu mudugudu wa Bwiza, Akagari ka Kibaza, Umurenge wa Kacyiru, Akarere ka Gasabo, Umujyi wa Kigali, ubaruye kuri no UPI 1/02/07/03/1458. Byageze aho E.C.T.A ntiyubahiriza ibyo yari yumvikanyeho na COGEBANQUE Ltd, ingwate yatanzwe na Nzitonda Kiyengo itezwa cyamura. Nzitonda Kiyengo yavuze ko cyamunara yakozwe mu buryo bunyuranyije n'amategeko, atanga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge asaba ko cyamunara iteshwa agaciro.

- Mu rubanza nº RC0M 01138/2017/TC/NYGE rwaciwe ku wa 13/03/2018, Urukiko rw'Ubucuruzi rwa Nyarugenge igurisha ry'ingwate hari amategeko mu atararubahirijwe, nko kuba Nzitonda Kiyengo ataramenyeshejwe inyandiko ikubiyemo amabwiriza yo kugurisha ingwate ye muri cyamunara, kuba atarashyikirijwe igenagaciro (expertise) ry'umutungo we kandi ari uburenganzira ahabwa n'amategeko, no kuba mu kwemeza cyamunara, Umwanditsi Mukuru atarubahirije iminsi irindwi iteganywa mu mabwiriza agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, rwanzura ko cyamunara yo ku wa 24/02/2017 yakozwe hagurishwa umutungo wa Nzitonda Kivengo, uri mu kibanza gifite Nº UPI 1/02/07/03/1458 iteshejwe agaciro, rutegeka COGEBANQUE Ltd na GASHEMA Félicien gufatanya kwishyura Nzitonda Kiyengo indishyi zingana na 1.850.000 Frw, COGEBANQUE Ltd ikishyura Higiro Martin 86.417.378 Frw akubiyemo amafaranga yaguze inzu muri cyamunara, inyungu, indishyi n'igarama, COGEBANQUE Ltd na Gashema Félicien bagafatanya guha Higiro Martin indishyi zingana na 1.000.000 Frw.
- [3] Higiro Martin na Gashema Félicien ntibishimiye imikirize y'urwo rubanza, bajuririra mu Rukiko Rukuru rw'Ubucuruzi, Higiro Martin avuga ko Urukiko rw'Ubucuruzi rwemeje ko Nzitonda Kiyengo atamenyeshejwe amabwiriza ya cyamunara kandi byarakozwe, ko kumumenyesha igenagaciro ntaho biteganywa n'amategeko, naho kuba Umwanditsi Mukuru ataremeje cyamunara mu minsi irindwi akaba atariyo yaba impamvu yatuma cyamunara iseswa, asaba ko mu gihe mu bujurire hakwemezwa ko cyamunara iteshejwe agaciro, yasubizwa amafaranga yakoresheje avugurura inzu yaguze. Gashema Félicien we asaba Urukiko gusuzuma niba Nzitonda

Kiyengo ataramenyeshejwe amabwiriza ya cyamunara koko, niba kubimumenyesha byari mu nshingano ze, asoza asaba indishyi.

- Ubujurire bwa Higiro Martin bwanditswe kuri RCOMA [4] 00269/2018/CHC/HCC, ubwa Gashema Félicien bwandikwa kuri No RCOMA 00274/2018/CHC/HCC, mu kuburanisha, imanza zombi zahurijwe hamwe, urubanza rucibwa ku wa 18/09/2018, Urukiko Rukuru rw'Ubucuruzi rusanga inyandiko Nzitonda Kiyengo yitangiye igaragaza aho umugore we yasinyiye ko ashyikirijwe "Approval of Selling Terms and Conditions" iri kumwe n'amabwiriza y'igurisha, akaba ataravuze ko hari ibyo atabonye kandi ko nta tegeko riteganya ko Nzitonda Kiyengo vagombaga kumenyeshwa igenagaciro, yaramenyeshejwe inyandiko y'amabwiriza ya cyamunara igaragaramo n'agaciro k'umutungo bikaba bihagije, cyane cyane ko yari asanganywe igenagaciro yakoresheje atanga ingwate, ko kuba harashyizweho igihe cy'iminsi irindwi ngo Umwanditsi Mukuru yemeze cyamunara, hari hagamijwe ko uwaguze adahera mu gihirahiro kandi yaramaze gutanga amafaranga ye yishyura umutungo waguzwe, rwanzura ko ubujurire bwa Gashema Félicien na Higiro Martin bufite ishingiro, ko cyamunara yakozwe ku mutungo wa Nzitonda Kiyengo yakurikije amategeko, ko icyemezo cyafashwe mu rubanza rwajuririwe gihindutse, ko indishyi zari zategetswe ku rwego rwa mbere zikuweho, rutegeka Nzitonda Kiyengo guha Gashema Félicien, Higiro Martin na COGEBANQUE Ltd buri wese indishyi zingana na 1.200.000 Frw, indishyi zose hamwe zikaba 3.600.000 Frw.
- [5] Nzitonda Kiyengo ntiyishimiye imikirize y'urubanza, arujuririra mu Rukiko rw'Ubujurire avuga ko mu rubanza

rujuririrwa hirengagijwe ko atamenyeshejwe igenagaciro ryahawe umutungo we n'imihango yo kuwugurisha muri cyamunara, Umwanditsi Mukuru akaba kandi atarubahirije ibiteganywa n'ingingo ya 16 y'Amabwiriza y'Umwanditsi Mukuru no. 03/2010/ORG yo ku wa 16/11/2010 by'uko Umwanditsi Mukuru yagombaga gukora raporo yemeza ibyakozwe n'ushinzwe kugurisha ingwate muri cyamunara n'ibiyikubiyemo mu gihe kitarenze iminsi irindwi.

[6] Urubanza rwaburanishijwe mu ruhame ku wa 03/12/2019, Nzitonda Kiyengo yunganiwe na Me Fonyo Munyamashara Patient afatanyije na Me Nkaka Kagobora Séraphin, COGEBANQUE Ltd ihagarariwe na Me Kayitare Serge, Gashema Félicien ahagarariwe na Me Bikotwa Bruce, Higiro Martin ahagarariwe na Me Ndahimana Jean Bosco, Umwanditsi Mukuru ahagarariwe na Me Nkusi Fred, habanza gusuzumwa inzitizi yo kutakira ubujurire yatanzwe na Higiro Martin, wasabye ko ubujurire bwa Nzitonda Kiyengo butakwakirwa kuko ari ubujurire bwa kabiri ku kirego cyihutirwa kandi kidashobora kujuririrwa kabiri ndetse akaba yarabutanze igihe cy'ubujurire cyararenze.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

- II.1. Kumenya niba ikirego gifite kamere y'ikirego cyihutirwa gishobora kujuririrwa ubwa kabiri.
- [7] Higiro Martin na Me Ndahimana Jean Bosco, umwunganira, bavuga ko ikirego nzitonda Kiyengo yatanze ari ikirego gisaba gutesha agaciro cyamunara kikaba kiburanishwa kandi kikajuririrwa nk'ikirego cyihutirwa nk'uko biteganywa

n'ingingo ya 260 y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ari nayo mpamvu mu Rukiko Rukuru rw'Ubucuruzi batigeze bakora inama ntegurarubanza. Basobanura ko ubujurire bwa kabiri butemewe ku birego byihutirwa, ari naho bahera basaba uru Rukiko kwemeza ko ubujurire butari mu bubasha bwarwo.

- [8] Me Bikotwa Bruce, uburanira Gashema Félicien, avuga ko asanga ikirego cyihutirwa kidashobora kujuririrwa bwa kabiri kuko byaba binyuranyije n'ibiteganywa n'ingingo ya 21 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.
- [9] Me NKUSI Fred, uburanira Umwanditsi Mukuru na Me Kayitare Serge, uburanira COGEBANQUE Ltd, bavuga ko ntacyo bavuga kuri iyo nzitizi kuko ataribo bayitanze.
- [10] Me Fonyo Munyamashara Patient, uburanira NZITONDA Kiyengo, avuga ko iki kirego kitari kuba cyihutirwa ngo kiburanishwe mu buryo busanzwe. Asobanura ko kuba batarakoreshejwe inama ntegurarubanza bitatewe n'uko ikirego cyihutirwaga ahubwo ari uko ntabyari bitegenyijwe n'itegeko, ko mu Rukiko rw'Ubucuruzi hakorwaga iburanisha ry'ibanze (audience préliminaire) naho Urukiko Rukuru rugahita ruburanisha, ariyo mpamvu asanga nta mpamvu yatuma ubujurire bwa kabiri budatangwa ngo bwakirwe.

UKO URUKIKO RUBIBONA

- [11] Ingingo ya 21, igika cya mbere, agace ka 6, y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko « Umwanditsi w'Urukiko ntashobora kwandika ikirego mu gihe urega :.. 6° atanze ubujurire bwa kabiri ku birego byihutirwa ... »
- [12] Ingingo ya 185 y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi igira iti : "Iyo hari ikirego cy'iremezo, ariko hagomba kugira icyemezwa by'agateganyo mu buryo bwihuta ku rubanza rwaregewe urukiko rutaraburanishwa, ikirego cyihutirwa gishyikirizwa umucamanza ushinzwe kurangiza impaka zihutirwa w'aho zigomba gukemurirwa hakurikijwe uburyo busanzwe bw'ihamagara. Ikirego cyihutirwa gitangwa mu buryo bumwe n'ubw'ikirego gisanzwe".
- [13] Ingingo ya 260, igika cya 5, y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko «Guhagarika no gutesha agaciro cyamunara ku mitungo igurishwa hashingiwe ku cyemezo cyo kugurisha ingwate cyatanzwe n'Umwanditsi Mukuru, bisabwa Umwanditsi Mukuru. Umwanditsi Mukuru atanga igisubizo mu gihe kitarenze iminsi itatu (3) y'akazi. Iyo hari utishimiye igisubizo cy'Umwanditsi Mukuru cyangwa udahawe igisubizo mu gihe giteganywa muri iki gika, abitangira ikirego mu rukiko rw'ubucuruzi hakurikijwe ibivugwa muri iyi ngingo mu gihe kitarenze iminsi itanu (5) y'akazi uhereye igihe yamenyeye icyo

gisubizo. » Naho igika cya kane cy'iyo ngingo kikavuga ko «Ibirego bivugwa muri iyi ngingo bitangwa kandi bikaburanishwa mu bihe by'ibirego byihutirwa. »

- [14] Dosiye y'urubanza igaragaza ko ikirego cyatanzwe mu Rukiko rw'Ubucuruzi rwa Nyarugenge ku wa 15/06/2017 kwari «Gutesha agaciro cyamunara yo ku wa 24/02/2017», Nzitonda Kiyengo akaba yaravugaga ko COGEBANQUE Ltd yirengagije ukuri isaba ko inzu ye yo guturamo yari yatije E.C.T.A. nk'ingwate igurishwa muri cyamunara yabaye ku wa 24/02/2017, iyo cyamunara ikorwa hatubahirijwe amategeko n'imigenzo biyigenga, asaba ko iteshwa agaciro.
- [15] Urukiko rusanga nubwo mu bisanzwe ikirego cyihutirwa kiba gishamikiye ku kindi kirego cy'iremezo, ikirego cyerekeye guhagarika cyangwa gutesha agaciro cyamunara nta kindi kirego cy'iremezo kiba gishamikiyeho, kuba umushingamategeko yaravuze mu ngingo ya 260, igika cya kane, y'Itegeko no 22/2018 ryo ku wa 29/04/2018 yibukijwe haruguru, ko icyo kirego gitangwa kandi kikaburanishwa mu bihe by'ibirego byihutirwa si uko yashakaga kucyambura cyangwa kugihindurira kamere yacyo yo kuba ubwacyo cyihagije, ahubwo icyari kigenderewe kwari ukurengera nyir'umutungo wagurishijwe utishimiye uburyo igurisha ryagenze ndetse n'uwawegukanye muri cyamunara kugirango hatagira utezwa igihombo no gutinda kw'imanza mu nkiko.
- [16] Urukiko rurasanga mu gihe ikirego gisaba guhagarika cyangwa gutesha agaciro cyamunara muri kamere yacyo atari ikirego cyihutirwa ahubwo kiregerwa kandi kikaburanishwa mu bihe byashyiriweho ibirego byihutirwa nta kibuza ko gikorerwa ubujurire bwa kabiri, bityo nibyo Me Bikotwa Bruce avuga ko kujurira bwa kabiri ku birego bisaba guhagarika cyangwa gutesha

agaciro cyamunara bibujijwe n'ingingo ya 21, igika cya mbere, agace ka 6, y'Itegeko no 22/2018 ryo ku wa 29/04/2018 yibukijwe haruguru, bikaba nta shingiro bifite kuko ikibujijwe n'iyo ngingo ndetse cyongeye no kugarukwaho mu ngingo ya 188, igika cya 3, y'iryo tegeko¹ ari uko, iyo izo ngingo zisomewe hamwe n'ingingo ya 185 y'iryo tegeko,² zumvikanisha ko ikibujijwe kujuririrwa bwa kabiri ari ikirego cyihutirwa gishamikiye ku kindi kirego cy'iremezo.

II.2. Kumenya niba ubujurire bwaratanzwe impitagihe

[17] Higiro Martin na Me Ndahimana Jean Bosco, umwunganira, bavuga ko urubanza rujuririrwa rwaciwe ku wa 18/09/2018, Nzitonda Kiyengo arujuririra ku wa 15/10/2018, bivuze ko yarujuririye akurikije ibihe bibarwa ku kwezi nyamara hashingiwe ku biteganywa n'ingingo ya 188 n'iya 260, igika cya 4, y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ataragombaga kurenza iminsi itatu y'akazi itangira kubarwa uhereye umunsi urubanza rwasomeweho, ariyo mpamvu basaba uru Rukiko kwemeza ko ubujurire butakiriwe kuko bwatanzwe impitagihe.

[18] Me Bikotwa Bruce, uburanira Gashema Félicien, na Me Nkusi Fred, uburanira Umwanditsi Mukuru, bavuga ko ibyo

¹ Ubujurire bw'ibyemezo byafashwe ku birego byihutirwa bushyikirizwa urukiko rwisumbuyeho kandi bijuririrwa inshuro imwe gusa."

² Iyo hari ikirego cy'iremezo, ariko hagomba kugira icyemezwa by'agateganyo mu buryo bwihuta ku rubanza rwaregewe urukiko rutaraburanishwa, ikirego cyihutirwa gishyikirizwa umucamanza ushinzwe kurangiza impaka zihutirwa w'aho zigomba w'aho zigomba gukemurirwa hakurikijwe uburyo busanzwe bw'ihamagara."

Higiro Martin n'umwunganira bavuga bifite ishingiro, basaba uru Rukiko kwemeza ko ubujurire butakiriwe.

- [19] Me Kayitare Serge, uburanira COGEBANQUE Ltd, avuga ko nubwo ikirego gisaba guhagarika cyangwa gutesha agaciro cyamunara ari ikirego cyihariye kigomba kuregerwa no kujurirwa mu bihe biteganyijwe ku birego byihutirwa, nawe akaba asanga Nzitonda Kiyengo atarubahirije ibihe by'ijurira.
- [20] Me Fonyo Munyamashara Patient na Me Nkaka Kagobora Séraphin, bunganira Nzitonda Kiyengo, bavuga ko mu Rukiko Rukuru rw'Ubucuruzi bajuriye hakurijwe ibihe bisanzwe by'ijurira, bakaba basanga mu gihe ikirego batanze ubwacyo atari ikirego cyihutirwa nta mpamvu y'uko ibihe by'ijurira bibarirwa ku bihe biteganyijwe ku manza zihutirwa.

UKO RUKIKO RUBIBONA

- [21] Ingingo ya 188, igika cya 2, 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 «Igihe cyo kujuririra icyemezo ni iminsi itarenze itatu (3) y'akazi uhereye ku munsi icyemezo cyasomeweho cyangwa ababuranyi bakimenyeyeho. Urubanza narwo rucibwa mu gihe kitarenze iminsi itatu (3) y'akazi. »
- [22] Dosiye y'urubanza igaragaza ko urubanza rujuririrwa rwaciwe ku wa 18/09/2018, nyuma y'uko Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru risohotse, bivuze ko iryo tegeko ariryo ryagombaga gukurikizwa ku rubanza rujuririrwa, kuko rwajuririwe ku wa 15/10/2018.

[23] Urukiko rurasanga hagati yo ku wa 18/09/2018, urwo rubanza rucibwa no ku wa 15/10/2018, rujuririrwa, hari hashize hafi iminsi 27, nyamara ingingo ya 188, igika cya 2, y'Itegeko no 22/2018 ryo ku wa 29/04/2019 yibukijwe haruguru ivuga ko «Igihe cyo kujuririra icyemezo [ari] iminsi itarenze itatu (3) y'akazi uhereye ku munsi icyemezo cyasomeweho...», byumvikanisha ko Nzitonda Kiyengo yakabije gutinda kujurira kandi imbere y'uru Rukiko akaba atagaragaza impamvu itigobotorwa yaba yaramubujije kujurira mu bihe biteganywa n'itegeko, bityo ubujurire bwe bukaba budakwiye kwakirwa kuko bwatanzwe impitagihe.

III. ICYEMEZO CY'URUKIKO

- [24] Rwemeje ko ubujurire bwa Nzitonda Kiyengo, butakiriwe kuko bwatanzwe igihe cy'ubujurire cyararenze;
- [25] Rutegetse ko amagarama y'urubanza angana na 50.000 Frw aherera kuri Nzitonda Kiyengo.

IMANZA ZACIWE MU MIZI

URUBANZA RW'IMBONEZAMUBANO

AKISANTI v. TUYISHIMIRE

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RC 00021/2018/SC (Rugege, P.J., Cyanzayire na Rukundakuvuga, J) 22 Ugushyingo 2019]

Amategeko agenga ibimenyetso — Ikimenyetso gishingiye ku bumenyi (scientific evidence) — Mu nyungu z'ubutabera, Urukiko rwagombye kwifashisha ibimenyetso bishingiye ku bumenyi (science) igihe bishoboka kugira ngo rushobore kugaragaza ukuri.

Amategeko agenga umuryango – Ikirego cy'umwana kigamije gushaka umubyeyi – Ikizamini cya ADN – Ibisubizo bitanzwe n'ikizamini cya ADN bifite agaciro kanini kandi birizewe kuko ari ikimenyetso gishingiye ku bumenyi budashidikanywaho.

Incamake y'ikibazo: Tuyishimire yatanze ikirego mu Rukiko rw'Ibanze rwa Nyamirambo asaba ko yakwemezwa nk'umwana wa Gusenga Innocent witabye Imana muri Jenoside yakorewe Abatutsi mu 1994, bityo akaba yagira uruhare ku mutungo yasize. Urukiko rwemeje ko yabyawe na Gusenga hashingiwe ku bimemyetso rwagaragarijwe, harimo ifishi ya batisimu, icyemezo cya FARG n'ibindi.

Nyuma y'urwo rubanza uwitwa Akisante Ayubu uvuga ko ari umuvandimwe wa Ugusenga yatambamiye urubanza avuga ko atemera ibyemejwe n'Urukiko ko Tuyishimire yabyawe na Gusenga kandi ko atemera ibyashingiweho. Nyuma yo gusuzuma impamvu ashingiraho atambamira urubanza, Urukiko rwasanze zidafite ishingiro, bityo rutegeka ko imikirize y'urubanza yabanje igumanye agaciro kayo. Akisanti ntiyanyuzwe n'imikirize

y'urubanza ajuririra Urukiko rwisumbuye rwa Nyamirambo, narwo rwanzura ko ikirego cye kidafite ishingiro, rugumizaho imikirize y'urubanza rwajuririwe.

Akisante yakomeje kutemeranya n'imyanzuro yagiye ifatwa n'inkiko zitandukanye, yisunga Urwego rw'Umuvunyi asaba ko urubanza rwasubirishwamo ku mpamvu z'akarengane. Urwego rw'Umuvunyi narwo, nyuma yo gusuzuma ikibazo, rwandikiye Perezida w'Urukiko rw'Ikirenga rusaba ko urwo rubanza rusubirwamo ku mpamvu z'akarengane, kuko Urukiko rwanze gukoresha ikizamini cya *ADN* dore kuri Nyirabarera na Akisanti ubwe bombi bahuje ababyeyi na nyakwigendera. Nyuma yo kubisuzuma, Perezida w'Urukiko rw'Ikirenga yemeje ko urwo rubanza rusubirishwamo ku mpamvu z'akarengane.

Mu gihe cy'iburanisha ry'urubanza rw'akarengane, hashingiwe ku mpaka zabaye hagati y'ababuranyi bose, Urukiko rw'Ikirenga rwaciye urubanza rubanziriza urundi, rwemeza ko mbere y'uko urubanza rucibwa mu mizi habanza gupimwa ibizamini bya *AND*, hagereranywa: Tuyishimire n'umubiri wa Gusenga (ushyinguye m'Urwibutso rwa Jenoside yakorewe abatutsi mu mwaka wa 1994 ruherereye I Gisozi); abavugwa ko ari abavandimwe ba nyakwigendera bari mu Rwanda, aribo Akisanti, Nyirabarera n'umubiri wa Gusenga; Abavandimwe ba Gusenga Innocent bamaze kuvugwa na Tuyishimire Yves.

Nyuma yo gusuzuma umubiri wa nyakwigendera n'abavugwa ko bafitanye isano nawe, raporo yashyikirijwe urukiko rw'Ikirenga yagaragaje ko:

Hagati ya Gusenga na Tuyishimire, isano hagati y'umwana na se iri ku kigero cya 99.9999999999983 %, bikaba bigaragaza nta gushidikanya ko Gusenga Innocent ari se wa Tuyishimire;

Hagati ya Gusenga Innocent na Akisanti Ayubu, kuba umwe yaba ari umuvandimwe (brother) w'undi biri ku kigero cya 2.3125452031 %, naho kuba nta sano iri hagati yabo bikaba ku kigero cya 97.6874547968%;

Hagati ya Gusenga Innocent na Nyirabarera Jacqueline, kuba uyu yaba ari mushiki wa Gusenga Innocent, bivuga ko basangiye ababyeyi, biri ku kigero cya 99.999999927 %, naho kuba nta sano bafitanye bikaba ku kigero cya 0.0000000072 %;

Hagati ya Akisanti na Tuyishimire, kuba uyu yaba ari umwana wabo (fraternal nephew) wa Akisanti Ayubu, bivuga ko se wa Tuyishimire Yves yaba ari umuvandimwe wa Akisanti Ayubu, biri ku kigero cya 2.3125452031 %, naho kuba nta sano bafitanye, biri ku kigero cya 97.6874547968 %;

Mbere yo gusubukura iburanisha ngo ababuranye bajye impaka kuri iyo raporo, Akisanti yasabye ko urubanza rwaburanishwa mu muhezo ku mpamvu z'uko asanga hashobora kuvugirwamo ibintu birebana n'ubuzima bwite bwe, uwo baburana asanga kuva batangira kuburana ntabwo yigeze asaba ko rwaburanishwa mu muhezo akaba abona icyo cyifuzo nta shingiro cyahabwa, nyuma yo kwiherera, rwemeza ko icyifuzo cye nta shingiro gifite.

Urubanza rwakomeje mu ruhame, Akisanti agaragaza kutemeranywa nayo avuga ko byatanzwe n'urwego ariko hatariho umukono w'umuyobozi warwo, ko byanditse mu mvugo adashobora gusobanukirwa igenda yivuguruza, bigatuma

hakemangwa ibiyivugwamo, ko abayikoze banditse ibyo babwiwe na Tuyishimire, n'ibindi.

Tuyishimire we avuga ko kuba Akisanti avuga ko batemera ibyavuye mu isuzuma ryakozwe, ari ukurushya ubutabera no gushaka gutinza imanza kuko aribo ubwabo babyisabiye.

Tuyishimire yasabye ko yahabwa indishyi zitandukanye, mukwiregura kuri izo ndishyi Urega avuga ko ibitaravuzwe mbere bidakwiye gusuzumwa, kuko byaba ari bishya nawe yasabye indishyi zitandukanye.

Incamake y'icyemezo:1. Mu nyungu z'ubutabera, Urukiko rwagombye kwifashisha ibimenyetso bishingiye ku bumenyi (science) igihe bishoboka kugira ngo rushobore kugaragaza ukuri.

2. Igisubizo cy'ikizamini cya "ADN" kigomba guhabwa agaciro nk'ikimenyetso cya kamarampaka ku bijyanye no kumenya umubyeyi w'umwana kuko ari ikimenyetso gishingiye ku bumenyi (scientific evidence) budashidikanywaho.

Ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane, nta shingiro gifite; Tuyishimire yabyawe na Gusenga Innocent.

Amategeko yishingiweho:

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 6, 75

Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n'umuryango, ingingo ya 282

Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 76 Itegeko N° 41/2016 ryo ku wa 15/10/2016 rishyiraho laboratwari y'u Rwanda y'ibimenyetso bishingiye ku bumenyi n'ubuhanga bikoreshwa mu butabera (RFL), rikanagena inshingano, imiterere n'imikorere byayo, ingingo ya 26, agace ka 6 n'aka 7

Imanza zifashishijwe:

Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576

Inyandiko zabahanga zifashishijwe

Dr. HIMANSHU Pandey & Ms. ANHITA Tiwari, Evidential value of DNA, Bharati Law Review (on line), Jan. – March, 2017, p. 1[seen the 18th Nov. 2019], published in articles section of www.manupatra.com

Urubanza

I. IMITERERE Y'URUBANZA

[1] Gusenga Innocent yishwe muri Jenoside yakorewe Abatutsi mu 1994. Mu mwaka wa 2014, Tuyishimire Yves yatanze ikirego mu Rukiko rw'Ibanze rwa Nyamirambo arusaba kwemeza ko ari mwene Gusenga Innocent no kugira uruhare ku mutungo we. Ikirego cyanditswe kuri N^O RC 0669/14/TB/NYB, urubanza rucibwa ku wa 08/10/2014. Urwo Rukiko rwemeje ko Tuyishimire Yves ari mwene Gusenga Innocent, kandi ko agomba kumwandikwaho. Rwashingiye ku mvugo z'abatangabuhamya, kw' ifishi ya batisimu, no ku cyemezo cya

FARG, byerekana ko se wa Tuyishimire Yves ari Gusenga Innocent.

- [2] Nyuma y'uko Tuyishimire Yves yemejwe nka mwene Gusenga Innocent, Akisanti Ayubu yatambamiye urubanza avuga ko amakuru yashingiweho atariyo. Yatanze ikirego ku wa rwandikwa N_0 17/03/2016, kuri Urubanza 0162/16/TB/NYB, rucibwa ku wa 29/11/2016. Urukiko rwemeje ko ikirego cyatanzwe na Akisanti Ayubu nta shingiro gifite, ko urubanza rutambamirwa rugumanye agaciro karwo. Urukiko rwashingiye ku kuba abatangabuhamya Akisanti Ayubu yatanze aribo Misago Pascal na Gakire Steven badafite amakuru ajyanye n'ikiburanwa, kuko bavuze ko bazi Gusenga Innocent mu rwego rw'akazi bakaba batarinjiraga mu buzima bwe busanzwe ngo babe bamenya ibye byose.
- [3] Akisanti Ayubu yajuririye urwo rubanza mu Rukiko Rwisumbuye rwa Nyarugenge, rwandikwa kuri N^O RCA 00010/2017/TGI/Nyge, rucibwa ku wa 06/07/2017. Urukiko rwemeje ko ubujurire bwe budafite ishingiro, rwemeza ko hubahirizwa imikirize y' urubanza N^O RC 00162/16/TB/NYB rwaciwe n'Urukiko rw'Ibanze rwa Nyamirambo ku wa 29/11/2016.
- Nyuma y'izo manza zose, Akisanti Ayubu yandikiye [4] N^{O} Urwego rw'Umuvunyi asaba ko urubanza **RCA** 00010/2017/TGI/NYGE rwasubirwamo kubera ko rurimo akarengane. Urwego rw'Umuvunyi, nyuma yo gusuzuma ikibazo rwandikiye Perezida Ayubu, w'Urukiko cva Akisanti N^{O} rw'Ikirenga ko urubanza **RCA** rusaba 00010/2017/TGI/NYGE rusubirwamo ku z'akarengane. Urwego rw'Umuvunyi rwasobanuye ko Urukiko Rwisumbuye rwanze gukora ikizamini cya ADN kuri

Nyirabarera Jacqueline na Akisanti Ayubu ubwe, bombi bahuje ababyeyi na Gusenga Innocent, hitwajwe ko nta kizamini kigeze gikorwa hagati yabo na Gusenga Innocent ngo harebwe niba hari isano y'amaraso bafitanye. Urwego rw'Umuvunyi rwagaragaje ko ibyemejwe n'Urukiko Rwisumbuye ataribyo kuko binyuranyije n'ibyemejwe n'Urukiko rw'Ikirenga mu rubanza N^O RS/REV/INJUST/CIV 0005/15/CS rwaciwe ku wa 19/06/2015.

- [5] Urwego rw'umuvunyi rwagaragaje ko imiburanire ya Tuyishimire Yves isa n'iya Umugire Alphonse mu rubanza N O RS/REV/INJUST/RC 0005/15/CS, kuko bose bavugaga ko bidashoboka ko ikizamini cya ADN cyakorwa hagati y'abavandimwe b'umuntu wapfuye n'umwana uvuga ko yabyawe n'uwo wapfuye, ko rero kunyuranya n'ibyemejwe muri urwo rubanza ari ukwica amategeko kubera ko ibyemezo by'Urukiko rw'Ikirenga bigomba kubahirizwa n'izindi nkiko zose zo mu gihugu nk'uko ingingo ya 47 igika cya 6 y'Itegekongenga NO 03/2012 OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga ryakoreshwaga igihe urubanza rwacibwaga ryabiteganyaga¹¹.
- [6] Perezida w'Urukiko rw'Ikirenga, ashingiye ku isesengura ryakozwe n'Urwego rw'Umuvunyi no kuri raporo yakozwe n'Ubugenzuzi Bukuru bw'Inkiko, yemeje ko urubanza rwandikwa mu bitabo byabugenewe kugira ngo ruzongere ruburanishwe, ruhabwa N^O RS/INJUT/RC 00021/2018/SC, iburanisha ryarwo rishyirwa ku wa 14/05/2019.

manza n'ibyemezo by'Urukiko rw'Ikirenga bigomba

 $^{^{\}rm l}$ Imanza n'ibyemezo by' Urukiko rw' Ikirenga bigomba kubahirizwa n'izindi n
kiko zose zo mu gihugu

- [7] Ku wa 14/05/2019, iburanisha ryabereye mu ruhame Akisanti Ayubu yitabye yunganiwe na Me Mhayimana Isaie afatanyije na Me Abijuru Emmanuel, Tuyishimire Yves nawe yitabye yunganiwe na Me Murindabigwi Mariam afatanyije na Me Muhiganwa Damas. Ababuranyi bagiye impaka ku bimenyetso byashingiweho n'inkiko zibanza, bagaruka no ku kibazo cyo kumenya niba ari ngombwa ko hakoreshwa ikizamini cya ADN kugira ngo hamenyekane niba koko Tuyishimire Yves yarabyawe na Gusenga Innocent.
- [8] Nyuma yo kumva ibisobanuro bya buri ruhande, Urukiko rw'Ikirenga rwafashe icyemezo cy'uko mbere y'uko urubanza rucibwa mu mizi ari ngombwa ko habanza gupimwa ibizamini bya ADN hagereranywa:
 - Tuyishimire Yves n'umubiri wa Gusenga Innocent;
 - Abavugwa ko ari abavandimwe ba Gusenga Innocent bari mu Rwanda aribo Akisanti Ayubu, Nyirabarera Jacqueline n'umubiri wa Gusenga Innocent;
 - Abavandimwe ba Gusenga Innocent bamaze kuvugwa na Tuyishimire Yves.
- [9] Ku wa 03/06/2019, Umwanditsi Mukuru w'Urukiko "Rwanda Forensic Laboratory" ayisaba gukora ikizamini cya ADN mu rwego rwo gushyira mu bikorwa icyemezo cyafashwe n'Urukiko. Igikorwa cyo gufata ADN cyakozwe ku wa 15/10/2019, gikorerwa ku Rwibutso rwa Jenoside yakorewe Abatutsi ku Gisozi. Ibisubizo byashyikirijwe Urukiko rw'Ikirenga impande 06/11/2019, ku wa zombi

zirabimenyeshwa, urubanza rwongera gusubukurwa ku wa 07/11/2019, ababuranyi bose bahari.

- [10] Mbere y'uko iburanisha ritangira, Me Abijuru Emmanuel uburanira Akisanti Ayubu, ashingiye ku ngingo ya 70, igika cya 2 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi², yasabye ko urubanza rwaburanishirizwa mu muhezo ku mpamvu z'uko asanga hashobora kuvugirwamo ibintu birebana n'ubuzima bwite bwa Akisanti Ayubu, bikaba byabangamira imico mbonezabupfura.
- [11] Tuyishimire Yves n'abamwunganira bavuze ko kuva urubanza rwatangira rwabereye mu ruhame ntibyagira uwo bibangamira, kandi kugirango umuhezo wemerwe ababuranyi bose bagomba kuba babyemeranywaho, bo bakaba babona icyo cyifuzo nta shingiro cyahabwa.
- [12] Nyuma yo kwiherera ngo rusuzume icyifuzo cyatanzwe na Me Abijuru Emmanuel, Urukiko rwasanze kuva urubanza rwatangira mu Rukiko rw'Ibanze no mu Rukiko Rwisumbuye rwaraburanishirijwe mu ruhame, Akisanti Ayubu akaba atagaragaza ko hari icyo byamutwaye, kandi urubanza rubereye mu ruhame nta mpagarara byateza, bikaba bitabangamira umuco w'imbonezabupfura, rwemeza ko icyifuzo cye nta shingiro gifite. Urubanza rwarakomeje ruburanishirizwa mu ruhame, ababuranyi bagira icyo bavuga kuri raporo yatanzwe na "Rwanda Forensic

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² Icyakora, iyo urukiko rubyibwirije cyangwa rubisabwe n'ababuranyi bombi cyangwa umwe muri bo, rusanga kuburanisha mu ruhame byatera impagarara cyangwa byabangamira umuco w'imbonezabupfura n'uburenganzira bw'abantu mu mibereho yabo, rufata icyemezo ko iburanisha ribera mu muhezo kandi rugasobanura n'impamvu yabyo".

Laboratory". Umwe mu bahanga bakoze ikizamini cya ADN nawe yari yitabye Urukiko kugirango atange ibisobanuro kuri raporo yakozwe.

[13] Iburanisha ry'urubanza ryarapfundikiwe, ababuranyi bamenyeshwa ko ruzasomwa ku wa 22/11/2019. Ikibazo cy'ingenzi cyagiweho impaka mu rubanza, kikaba ari nacyo cyasuzumwe, ni ukumenya niba hari ibimenyetso bidashidikanywaho byemeza ko Tuyishimire Yves yabyawe na Gusenga Innocent.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

- A. Kumenya niba hari ibimenyetso bihamya ko Tuyishimire Yves yabyawe na Gusenga Innocent
- [14] Me Mhayimana Isaie na Me Abijuru Emmanuel bunganira Akisanti Ayubu bavuga ko akarengane k'uwo bunganira gashingiye ku mpamvu zikurikira:
 - ingingo ya 282 y'Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n'umuryango niyo itanga umurongo mu bijyanye no kwemeza ko umwana ari mwene runaka, igashyigikirwa n'ibindi bimenyetso.
 - Ibiteganywa n'iyo ngingo nta na kimwe cyubahirijwe mu kwemeza ko Tuyishimire Yves ari mwene Gusenga Innocent, harimo ikizamini cya ADN;
 - uwo bunganira yasabye ko hakorwa ikizamini cya ADN kigaragaza ku buryo budashidikanywaho

isano y'umwana n'umubyeyi, kandi ibi bikaba bishoboka mu gihe hari abavandimwe ba Gusenga Innocent bakiriho, Urukiko rurabyanga. Nyamara nk'uko byemejwe n'Urukiko rw'Ikirenga mu rubanza RS/REV/INJUST/CIV 0005/15/CS rwaciwe ku wa 19/6/2015, bene icyo kizamini gishoboka kandi kigakemura impaka ku buryo budasubirwaho;

- Urukiko Rwisumbuye ntirwasuzumye inenge mu mvugo z'abatangabuhamya babajijwe mu Rukiko rw'Ibanze, kuko batashoboye kwemeza ko bazi neza ko Tuyishimire Yves yabyawe na Gusenga Innocent:
- Uwitwa Migambi Déogratias yivugiye ko nta gihamya afite ko ababyeyi ba Tuyishimire Yves ari Gusenga Innocent na Nzitonda Médiatrice; ibi bikaba bitandukanye n'ibigaragara muri kopi y'urubanza ku rupapuro rwa mbere, aho Urukiko rwemeza ko yavuze ko Tuyishimire yabyawe na Gusenga Innocent;
- Umutangabuhamya witwa Nyiribambe Joselyne wavuze ko yiganye na Nzitonda Médiatrice (nyina wa Tuyishimire Yves), imvugo ze ntizari gushingirwaho kuko avuga ko uwahaga Nzitonda Médiatrice amafaranga yo kwita ku mwana ari mushiki wa Gusenga Innocent wabaga muri gare, nyamara nyirubwite yari akiriho;
- Niba Tuyishimire Yves yaravutse mu 1992 cyangwa 1993 kuko ahindura kenshi itariki n'umwaka yavukiyeho, imvugo ya Nyiribambe Joselyne irakemangwa mu gihe avuga ko Nzitonda Médiatrice atigeze ahagarika amasomo, nyamara bikaba bidashoboka kubera ikibazo

cyo gutwita no kubyara, ndetse no gufata igihe cyo konsa umwana; kandi muri icyo gihe iyo bamenyaga ko umukobwa yatwaye inda atagira umugabo, yahitaga ava mu ishuri;

- ifishi ya batisimu yashingiweho nk'ikimenyetso igaragaraho inenge zikomeye zikurikira:
- kuba yarahindaguwe (falsification) ku mwanya w'amazina ya nyina w'umwana, ahari handitse Béatrice bagahinduramo Médiatrice;
- kuba amazina y'ababyeyi yanditswemo (Gusenga na Nzitonda) atariyo agaragara muri "Registre" y'abana babatirijwe muri "Eglise Episcopale au Rwanda" guhera talikiya 11/03/1992 kugeza ku wa 10/04/1993;
- iyo ifishi ya batisimu itaza kuba ari impimbano, amazina y'ababyeyi b'umwana Tuyishimire wabatijwe ku wa 24/12/1992, yari kuba ari Rwabutogo Emmanuel na Nzitonda Béatrice nk'uko bimeze ku bandi bana babatijwe kuri iyo taliki ya 24/12/1992;
- uwitwa Rwabutogo Emmanuel, ugaragara ku ifishi nk'umwishingizi w'umwana, ahubwo agaragara muri "registre" nka se w'umwana. Ibi bikaba ahubwo aribyo byafatwaho ukuri, kuko n'umutangabuhamya wavuzwe witwa Migambi Déogratias yabikomojeho, aho yavuze ko nta gihamya afite ko se wa Tuyishimire Yves ari Gusenga Innocent;
- ikindi kitumvikana ni uburyo Gusenga Innocent wari umugatorika yari kujya kubatirisha umwana muri Angilikani;

- ikarita y'ishuli ya "Ecole Techinique Nyarurema" y'umwaka wa 2012, Urukiko rubanza rwise ko ari icyemezo cya FARG rukagiheraho ruca urubanza, ivugwamo ko umwana wahawe iyo karita yitwa Tuyishime Yves, atari Tuyishimire Yves waregeye Urukiko. Akisanti Ayubu avuga kandi ko iyo karita yanditseho ko Tuyishime Yves yavutse ku wa 25/05/1992 (uwo mwaka ukaba unasibasibye), nyamara ku ifishi y'ibatizwa nayo yashingiweho mu guca urubanza, hakaba handitseho ko Tuyishimire yavutse ku wa 14/05/1992;
- uburyo Tuyishimire Yves ahindura amazina ye, umwaka n'itariki yavukiyeho nk'uko NIDA yabyerekanye, ni ikimenyetso cyerekana ko akora akanakoresha inyandiko uko ashatse bitewe n'icyo agamije. Bavuga kandi ko se wanditse mu bitabo by'irangamimerere uzwi wanamureze kuva akiri muto yitwa Kanyamibwa, akaba ataramwihakana.
- [15] Tuyishimire Yves, Me Murindabigwi Mariam na Me muhiganwa Damas bamwunganira basubiza kuri izo mpamvu Akisanti Ayubu ashingiraho akarengane ke muri aya magambo:
 - Urukiko Rwisumbuye rwafashe icyemezo mu bushishozi bwarwo, kuko rwasobanuye ko Akisanti Ayubu asaba ko hakorwa ikizamini cya ADN hagati ye na Tuyishimire Yves cyangwa hagati ya Tuyishimire Yves na Nyirabarera Jacqueline mushiki we na gusenga Innocent, ariko ntagaragaze ko hari ikizamini cya ADN cyakozwe hagati ye na Gusenga cyangwa hagati ya Gusenga na nyirabarera, cyaba cyaragaragaje ko Gusenga afitanye n'umwe muri bo isano y'amaraso;

- Igihe ikirego cyatangwaga, ikizamini cya ADN nticyateganywaga n'Itegeko ryo kuwa 27 Ukwakira 1988 ryerekeye interuro y'ibanze n'igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano, umucamanza akaba yarashingiye ku bimenyetso binyuranye, birimo ifishi yo kubatizwa igaragaza ko Gusenga yamwiyandikishijeho, n'icyemezo cya FARG cyerekana ko ari mwene Gusenga Innocent;
- uwo baburana yasabaga ko hakorwa ikizamini cya ADN hagati ya Tuyishimire Yves, Akisanti Ayubu na Nyirabarera Jacqueline, kandi nta cyemeza ko bava indimwe na Gusenga Innocent. Tuyishimire Yves n'abamwunganira basaba ko ikizamini cyakorwa hagati ye n'umubiri wa Gusenga Innocent uri ku Rwibutso rwa Jenocide rwa Gisozi, kuko hari abazi aho ashyinguye hakaba hari na "video" yafashwe ashyingurwa;
- Ku bijyanye n'imvugo z'abatangabuhamya, Akisanti Ayubu yirengagiza ko zishimangira ibimenyetso byanditse yatanze mu rukiko, birimo ikarita ya batisimu n'icyemezo cy'umwana wishyurirwa na FARG. Ku bijyanye n'abatangabuhamya batanzwe na Akisanti Ayubu, bavuze ko bazi Gusenga Innocent mu kazi, bakaba batazi uburyo Tuyishimire Yves yavutse;
- Ku bijyanye n'ifishi ya batisimu:
 - kuba harabayeho kwandika nabi amazina si igitangaza, bikaba byarakosowe na "Anglican Church";
 - Ahanditse Rwabutogo bireba undi mwana wabatirijwe rimwe na Tuyishimire Yves;

- Kuba yarabatirijwe muri "Anglican Church" kandi Gusenga Innocent yari umugatorika byatewe n'uko ariryo dini nyina yabarizwagamo;
- Nyuma y'impaka zabaye ku ifishi ya batisimu na "registre" y'ababatijwe yatanzwe mu Rukiko n'uwo baburana, Tuyishimire Yves yahawe icyemezo cy'umukristu, cyemeza ko yabatijwe ari mwene Gusenga Innocent na Nzitonda;
- Ku bijyanye n'icyemezo cya FARG, hari icyemezo cy'umunyeshuri wishyurirwa na FARG cyashyikirijwe Urukiko, n'ikarita y'ishuri itangwa ukwayo. Kuba ikarita y'ishuri yanditse nabi si ikibazo kuko afite "diplôme" iriho amazina ye. Akisanti Ayubu yatanze ikirego muri Polisi aregera inyandiko mpimbano, ikirego gishyikirizwa Ubushinjacyaha, busanga nta shingiro gifite bushyingura dosiye;
- Ku bijyanye n'amazina, ntabwo Tuyishimire Yves ayahindagura nk'uko bivugwa, ahubwo nyina yagiye gushaka ajya kubana na nyirakuru, ayo mazina yombi bayamwandikaho; nyuma amaze gukura ajya guhinduza kugira ngo yitwe izina ababyeyi be bamwise.
- [16] Nyuma y'uko Urukiko rwemeje ko "Rwanda Forensic Laboratory" ikora ikizamini cya ADN, kigakorwa, na raporo ikamenyeshwa ababuranyi, ababuranira Akisanti Ayubu bavuze ko bayibonyemo ibibazo bituma basaba Urukiko kutayishingiraho:
 - ikibazo cya mbere kirebana n'abayikoze ubwabo, kuko uburyo yakozwemo utashobora kumenya uwayikoze;

- Raporo yoherejwe mu Rukiko igaragaraho amazina y'abantu 3 ariko nta kigaragaza ko ibyo bakoze byemejwe Mukuru n'Umuvobozi wa "Rwanda Laboratory". Ntihagaragara inyandiko Umuyobozi Mukuru yandikiye Urukiko rw'Ikirenga arushyikiriza raporo yasabwe nk'uko biteganywa n'ingingo ya 26 y'Itegeko rishyiraho "Rwanda Forensic Laboratory" cyane cyane mu gace ka 6 n'aka 7³, ahateganywa ko Umuyobozi Mukuru ariwe muvugizi w 'Urwego, bivuga ko mu gihe raporo yakozwe n'undi utari we cyangwa ngo abe ariwe wayisinyeho, nta gaciro yagira;
- iyo raporo itatanzwe n'urwego rwayisabwe bivuze ko iba yakozwe n 'utabifitiye ububasha, bityo n'ibiyivugwamo bikaba bitashingirwaho. Ku bijyanye n'abaje gusobanurira Urukiko ibivugwa muri raporo, ntacyo babavugaho kuko ntacyemeza ko ari abakozi ba "Rwanda Forensic Laboratory", kandi n'iyo Umuyobozi Mukuru atakwiyizira mu Rukiko cyangwa ngo abe ariwe usinya kuri raporo, byari gukorwa n'uwo yatumye bikagaragara mu nyandiko yohereza raporo mu Rukiko;
- raporo yagombye kuba iherekejwe n'izindi nyandiko zishobora gutuma uyisoma ayisobanukirwa bitamugoye kuko irimo amagambo ahinnye menshi, ikaba ikoresha imvugo ya gihanga, n'imibare iyigaragaramo ikaba idafitiwe igisobanuro ku buryo byakorohera utari

 $6^{\rm o}$ guhagararira RFL imbere y'amategeko no kumenyekanisha ibikorwa byayo $7^{\rm o}$ kuba umuvugizi wa RFL »

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³ Umuyobozi Mukuru wa RFL ashinzwe ibi Bikurikira:

umuhanga kuyumva. Bavuga ko abahanga bayikoze basabwa kuyuzuza;

- abakoze raporo ntiberekana aho bagiye bakura imibare n'ibyifashishijwe (software), bikaba ari impamvu ituma raporo batanze itafatwa nk'itanga umucyo ku bibazo Urukiko rwari rwibajije;
- raporo igenda yivuguruza, bigatuma hakemangwa ibiyivugwamo, hakanakemangwa ukuri kuyivugwamo. Ibi bikaba bishimangirwa no kuba ku wa 06/11/2019, "Rwanda Forensic Laboratory" yaravugaga ko itari yapima isano iri hagati ya Gusenga Innocent n'abavandimwe be kimwe na tuyishimire Yves n'abavandimwe ba Gusenga Innocent, bitewe n'uko uburyo bwifashishwa (software) butari bwakabonetse, bikaba rero bitumvikana ukuntu iyo "software" yahita iboneka mu gitondo hakurikijwe uburyo imihango ijyanye n'amasoko ya Leta ikorwamo;
- indi mpamvu ituma raporo ishidikanywaho, ni uko imibare yatanzwe igenda itandukana, aho usanga isano iri hagati ya Gusenga Innocent na Tuyishimire Yves itandukanye n'imibare y'ijanisha y'isano iri hagati ya Gusenga Innocent na Nyirabarera Jacqueline. Bavuga kandi ko imibare idahura neza, bakaba batumva uburyo ijanisha rigera kuri 99,999%, ugasanga Gusenga Innocent afite 15/16, Tuyishimire Yves afite 13/16, ahandi Gusenga Innocent afite 7/8, Tuyishimire Yves afite 6/11, naho ku murongo wa 14 Tuyishimire Yves akaba afite 8/11 Gusenga Innocent afite 13/14;

- abahanga berekanye ko Nyirabarera Jacqueline afitanye isano na Tuyishimire Yves ku kigero cya 99.999999927 %, noneho hagati ya gusenga Innocent na Tuyishimire Yves ikaba ku kigero cya 99.9999999999483 %, bigasa n'ibyerekana ko Tuyishimire Yves afitanye isano na Nyirabarera kurusha uko ayifitanye na gusenga Innocent. Bavuga ko niba bitarabaye impurirane cyangwa kwibeshya, ari ukubeshya, ariyo mpamvu basaba ko raporo itahabwa agaciro, hakaba ahubwo hakorwa indi iyivuguruza idakorewe mu Rwanda (*Contre expertise*);
- kuba raporo yakozwe isa n'ishimangira ibyavugwaga na Tuyishimire Yves kuva urubanza rugitangira, ko mu bavandimwe ba Gusenga Innocent hari abo batava indimwe, bivuga ko abayikoze banditse ibyo babwiwe na Tuyishimire Yves, ku buryo hashobora kuba harabayemo kubogama cyangwa ruswa n'ubwo batabyemeza cyangwa ngo babihakane.
- [17] Tuyishimiye Yves n'abamwunganira basubije ku byo urega yanenze raporo mu buryo bukurikira:
 - kuba Akisanti Ayubu n'umwunganira bavuga ko batemera ibyavuye mu isuzuma ryakozwe, ni ukurushya ubutabera no gushaka gutinza imanza kuko aribo ubwabo babyisabiye;
 - ntibyumvikana uburyo abanyamategeko bashobora gushaka kuvuguruza ibyakozwe n'abahanga mu gihe nta bumenyi babifitemo, bityo ibyo abunganira Akisanti Ayubu bavuga bikaba bidakwiye guhabwa agaciro; kandi

kuba hari ibyo batumva, akaba ariyo mpamvu umuhanga yatumijwe ngo abisobanure;

- bashingiye ku ngingo ya 93 y'Itegeko rigenga ibimenyetso n'itangwa ryabyo, basanga raporo yarakozwe mu buryo bwubahirije amategeko kubera ko nta hantu itegeko riteganya ko raporo igomba gusinywaho n'Umuyobozi w'Ikigo cyayikoze;
- Ku bijyanye n'uburyo raporo yakozwemo, nta kibazo babonamo kuko kuri buri kibazo Urukiko rwagiye rwibaza, abahanga bagiye bagikoraho bakanatanga umwanzuro;
- Kuvuga ko abahanga bakoze ibyo Tuyishimire Yves ashaka, ko kandi babogamye, nta bimenyetso babifitiye kandi bikaba bidakwiye ko umunyamategeko apfa kuvuga ibyo yishakiye mu Rukiko, bakaba bakwiye gukuraho iryo jambo bakoresheje;
- Gusaba ko hakorwa ikindi kizamini, gikorewe hanze y'Igihugu, bisa no kutizera inzego n'ubutabera bw'u Rwanda;
- Basoza bavuga ko bitangaje kubona Akisanti Ayubu ariwe wasabye ko hakorwa ikizamini cya ADN, ariko akaba ariwe uhindukira agasaba ko iteshwa agaciro.
- [18] Umwe mu bahanga bakoze ikizamini cya ADN waje kuyisobanura mu Rukiko, akaba ahagarariye agashami ka ADN muri "Rwanda Forensic Laboratory ", yerekanye uburyo ikizamini cyakozwemo, asobanura n'ibyo abunganira Akisanti

Ayubu batumvaga. Yagaragaje ko ikigero cy'isano hagati ya Gusenga Innocent na Tuyishimire Yves (99.9999999999483 %) aricyo kiri hejuru ugereranyije n'ikigero cy'isano hagati ya Nyirabarera Jacqueline na Tuyishimire Yves (99.999999997 %), ibyo bikaba bireberwa ku mibare ya "9" irimo. Yasobanuye ko ubusanzwe umwana agira 50% by'uturemangingo nyina yamuhaye, na 50% by'uturemangingo yahawe na se. Yavuze kandi ko nta soko ryo gushaka "software "ryagombaga gutangwa, ahubwo ari ukongera "licence".

UKO URUKIKO RUBIBONA

- [19] Inenge ikomeye yagaragajwe nk'impamvu yatumye urubanza N° RCA 00010/2017/TGI/NGYE rusabirwa gusubirwamo ku mpamvu y'akarengane, ni ukuba Urukiko Rwisumbuye rwa Nyarugenge rwaremeje ko Gusenga Innocent ari se wa Tuyishimire Yves nta kizamini cya ADN gikozwe nk'uko byari byasabwe na Akisanti Ayubu.
- [20] Ingingo ya 76 y'Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko ubuhamya bw'abahanga ari ubugamije guha urukiko ibisobanuro bishingiye ku bumenyi kimwe n'umwanzuro urenze ubumenyi busanzwe bw'umucamanza mu kazi ke bitewe n'uko ibiburanwa bishingiye ku buhanga bwihariye. Naho ingingo ya 282 y'Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n'umuryango igateganya ibipimo bya ADN cyangwa ibindi bimenyetso bibonetse hakoreshejwe ikoranabuhanga (DNA test

or other scientific evidence) nk'imwe mu mpamvu zituma ikirego cy'umwana ushaka se cyemerwa⁴.

Izi ngingo zumvikanisha ko umucamanza ashobora kwiyambaza abahanga bafite ubumenyi bwihariye bwamufasha gufata umwanzuro ku kibazo yashyikirijwe, by'umwihariko akaba yakwifashisha ikizamini cya ADN mu gukemura ikibazo cy'umwana ushaka se. Nk' uko kandi byemejwe n'Urukiko rw'Ikirenga rwo mu Buhinde mu rubanza Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014)2 SCC 576, Urukiko rwagombye kwifashisha ibimenyetso bishingiye bumenyi(science) igihe bishoboka kugirango rushobore kugaragaza ukuri, mu nyungu z'ubutabera. Rwabyemeje muri aya magambo: "The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left bank upon presumptions, unless science has no answer to the facts in issue".

[22] Muri uru rubanza, Urukiko rwasabye "Rwanda Forensic Laboratory" gukora ikizamini cya ADN nk'urwego rwa Leta rubifitemo ubuhanga n'ubumenyi, kugirango hamenyekane niba Gusenga Innocent ari se wa Tuyishimire Yves. Muri raporo yashyikirijwe Urukiko, abahanga ba "Rwanda Forensic Laboratory" basobanura ko, nyuma yo gukora ikizamini bahereye ku macandwe (saliva samples) y'abagombaga gupimwa, ndetse n'igufa ryavanywe ku mubiri wa Gusenga Innocent, hagaragaye ibi bikurikira:

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⁴ N'ubwo iri tegeko ryatangajwe uru rubanza rwaramaze kuregerwa, ryashingirwaho hakurikijwe ibiteganywa mu ngingo yaryo ya 330, igika cya mbere, igira iti: « Imanza zose zari mu nkiko mbere y'uko iri tegeko ritangira gukurikizwa ziburanishwa hakurikijwe ibiteganywa n'iri tegeko ariko nta gihinduwe ku mihango y'iburanisha yakozwe ».

- Hagati ya Gusenga Innocent na Tuyishimire Yves, isano y'umwana kigero hagati na se iri ku cya 99.999999999483 %. bikaba bigaragaza nta gushidikanya ko Gusenga Innocent ari se wa Tuyishimire Yves (The calculated probability of paternity is 99.99999999483 %. From a forensic point of view there is no doubt about the fatherhood of late Gusenga Innocent and the child Tuyishimire Yves);
- Hagati ya Gusenga Innocent na Akisanti Ayubu, kuba umwe yaba ari umuvandimwe(brother) w'undi biri ku kigero cya 2.3125452031 %, naho kuba nta sano iri hagati yabo bikaba ku kigero cya 97.6874547968%;
- Hagati ya Gusenga Innocent na Nyirabarera Jacqueline, kuba uyu yaba ari mushiki wa Gusenga Innocent, bivuga ko basangiye ababyeyi, biri ku kigero cya 99.9999999927 %, naho kuba nta sano bafitanye bikaba ku kigero cya 0.0000000072 %;
- Hagati ya Akisanti Ayubu na Tuyishimire Yves, kuba uyu yaba ari umwana wabo (fraternal nephew) wa Akisanti Ayubu, bivuga ko se wa Tuyishimire Yves yaba ari umuvandimwe wa Akisanti Ayubu, biri ku kigero cya 2.3125452031 %, naho kuba nta sano bafitanye, biri ku kigero cya 97.6874547968 %;
- Hagati ya Nyirabarera Jacqueline na Tuyishimire Yves, kuba uyu yaba ari umwisengeneza (fraternal nephew) wa Nyirabarera Jacqueline, bivuga ko se wa Tuyishimire Yves ari musaza wa Nyirabarera Jacqueline, biri ku kigero cya 99.999999997 %, naho kuba nta sano bafitanye biri ku kigero cya 0.0000000072 %.

[23] Urukiko rushingiye ku byagaragajwe n'abahanga, bivugwa mu gika kibanza, rurasanga nta gushidikanya ko Tuyishimire Yves ari umwana wa Nyakwigendera Gusenga Innocent, akaba ari umwisengeneza wa Nyirabarera Jacqueline, ariko hakaba nta sano iri hagati ye na Akisanti Ayubu. Ibisubizo bitanzwe n'ikizamini cya ADN bifite agaciro kanini kandi birizewe kuko ari ikimenyetso gishingiye ku bumenyi (scientific evidence) budashidikanywaho. Abahanga bavuga ko ADN y'umuntu igizwe n'uturemangiko tuva ku babyeyi bombi, ibi bikaba aribyo bishimangira ko ikizamini cya ADN kizewe mu kugaragaza isano hagati y'ababyeyi n'ababakomokaho⁵. Bihura kandi n'ibyo abahanga ba "Rwanda Forensic Laboratory" basobanuye mu iburanisha.

[24] Urukiko rurasanga atari ngombwa gusuzuma ibimenyetso byari byashingiweho n'Urukiko Rwisumbuye rwa Nyarugenge mu rubanza rusabirwa gusubirwamo, bikanengwa na Akisanti Ayubu, bigizwe ahanini n'imvugo z'abatangabuhamya, ikarita ya batisimu yatanzwe n'Itorero Anglikani mu Rwanda, hamwe n'ikarita y'umunyeshuri wishyurirwa na FARG, kuko ibisubizo byatanzwe n'ikizamini cya ADN bihagije kugaragaza ukuri. Urukiko rurasanga kandi kuba Tuyishimire Yves yaranditswe ku witwa Kanyamibwa (umugabo wa nyina) mu bitabo by'irangamimerere, ntacyo byahindura ku kuri kwagaragajwe n'ikizamini cya ADN.

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⁵ DNA is made up of one half of our biological mother's DNA and one half of our biological father's DNA. 50 % of our DNA is passed down to our biological children. It is this that ensures DNA is unique, and allows for accurate testing of parentage and direct descendants through a DNA paternity test"; DR. HIMANSHU Pandey & Ms. ANHITA Tiwari, Evidential value of DNA, Bharati Law Review (on line), Jan. – March, 2017, p. 1[seen the 18th Nov. 2019], published in articles section of www.manupatra.com

- [25] Ibyo abunganira Akisanti Ayubu bavuga ko raporo yakozwe n'abahanga ari imfabusa, ngo kuko nta kigaragaza ko ibyo bakoze byemejwe n'ubuyobozi bwa "Rwanda Forensic Laboratory", ngo abe ari nabwo bubishyikiriza Urukiko, Urukiko rurasanga nta shingiro byahabwa kuko ikizamini cyakozwe n'abahanga bagenwe n'icyo Kigo hashingiwe ku bumenyi n'ubuhanga bafite, bamaze kubirahirira nk'uko bisabwa n'ingingo ya 93 y'Itegeko Nº 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, bakora raporo yashyikirijwe Ubwanditsi bw'Urukiko nk'uko bisabwa n'ingingo ya 95 y'Itegeko rimaze kuvugwa.
- [26] Urukiko rusanga ingingo ya 26, agace ka 6 n'aka 7 y'Itegeko N° 41/2016 ryo ku wa 15/10/2016 rishyiraho laboratwari y'u rwanda y'ibimenyetso bishingiye ku bumenyi n'ubuhanga bikoreshwa mu butabera (RFL), rikanagena inshingano, imiterere n'imikorere byayo, Abunganira Akisanti Ayubu baburanisha, ntaho iteganya ko Umuyobozi w'Ikigo agomba kwandikira Urukiko yohereza raporo yakozwe n'abahanga, amaze kuyemeza. Icyo iyo ngingo iteganya, mu gace kayo ka 6 n'aka 7, ni uko Umuyobozi afite ishingano zo guhagararira RFL imbere y'amategeko, kumenyekanisha ibikorwa byayo (to serve as legal representative of RFL and give publicity to its activities), no kuyibera umuvugizi.
- [27] Abunganira Akisanti Ayubu banenga nanone raporo y'abahanga bavuga ko irimo amagambo ahinnye menshi n'imibare idafite ibisobanuro. Ibi nabyo nta shingiro byahabwa kuko, uretse no kuba abahanga barakoze incamake ya raporo yumvikana ku muntu wese udafite ubumenyi mu byerekeye ibizamini bya ADN, bafashe umwanya uhagije wo kuyisobanura mu Rukiko, ndetse basubiza ibibazo byose ku byo ababuranyi

bari bakeneye gusobanukirwa. Ku bijyanye n'impungenge zagaragajwe n'abunganira urega, bavuga ko hari raporo yaje ivuga ko hari "software" itaraboneka, bugacya hatangwa indi raporo irimo ibyagombaga gukorwa n'iyo "software" kandi amasoko ya leta ubusanzwe atwara igihe, abahanga basobanuye ko icyari gikenewe ari ukwongera igihe (renewal) cya "Licence, atari ugutanga isoko kandi ibyo bikaba bishobora gukorwa mu gihe gito. Urukiko rusanga rero iyo nenge kuri raporo nayo nta shingiro ifite.

- [28] Urukiko rurasanga muri rusange inenge zigaragazwa n'abunganira urega, basaba ko raporo itahabwa agaciro, ari inenge zidafite aho zihuriye n'ireme(consistence/substance) ry'ibyagaragajwe n'abahanga. Urukiko rusanga kandi ibyo bavuga, uretse kuba nta shingiro bifite, bitanashobora kwambura raporo y'abahanga agaciro kayo, ndetse n'ibyo basaba ko hakorwa ikindi kizamini kidakorewe mu Rwanda bikaba nta shingiro byahabwa.
- [29] Urukiko rurasanga rero, hashingiwe ku bisobanuro byose byatanzwe, hari ibimenyetso bihamya ko Tuyishimire Yves yabyawe na Gusenga Innocent.

B. Kumenya niba hari indishyi zatangwa muri uru rubanza

i. indishyi zisabwa na Tuyishimire Yves

[30] Tuyishimire Yves avuga ko Akisanti Ayubu yamusiragije ku buryo bukomeye kandi azi neza ko ari mwene Gusenga Innocent, kubera iyo mpamvu akaba akwiye kumuha indishyi ziteye mu buryo bukurikira:

- Indishyi mpozamarira zingana na 10.000.000 Frw kubera kumuhakana kandi azi ukuri, kumusebya akamwita umubeshyi kandi ariwe wakagombye kumurera, no kubera ko yigeze guhagarika akazi afunze bitewe n'izi manza;
- indishyi zingana na 6.000.000 Frw zo kumusiragiza mu nkiko, zirimo:
 - Frw yishyuye Avoka mu Rukiko rw'Ibanze;
 - Frw yishyuye Avoka mu Rukiko Rwisumbuye;
 - 500.000 Frw yatanze dosiye iri muri Police, na 500.000 Frw muri Parike;
 - Frw yatanze ku rwego rw'Urukiko rw'Ikirenga;
- amafaranga yatanze kugira ngo ikizamini cya ADN gishobore gukorwa angana na 493.020 Frw.
- [31] Akisanti Ayubu n'abamwunganira bavuga ko ibitaravuzwe igihe cy'inama ntegurarubanza no mu myanzuro bidakwiye gusuzumwa, kuko byaba ari bishya. Bavuga ko indishyi Tuyishimire Yves asaba z'ibyakorewe mu zindi nkiko no mu Bushinjacyaha nta shingiro zifite kuko zitaburanishwa muri uru Rukiko.

ii. Indishyi zisabwa na Akisanti Ayubu

- [32] Akisanti Ayubu asaba Urukiko kumugenera indishyi zo gukururwa mu manza ku maherere, ziteye mu buryo bukurikira:
 - 3.000.000 Frw yo kumukurura mu manza nta mpamvu;

- 2.500.000 Frw y'igihembo cy'Avoka mu nkiko eshatu uru rubanza rwanyuzemo;
- Amafaranga y'ikurikiranarubanza.

UKO URUKIKO RUBIBONA

Ku bijyanye n'indishyi zisabwa na Tuyishimire Yves

- [33] Ingingo ya 6, 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 ikiburanwa kigenwa n'ibisabwa na buri muburanyi, ibisabwa bikagaragarira mu myanzuro iregera Urukiko n'imyanzuro yo kwiregura, bigashimangirwa burundu mu nama ntegurarubanza mu manza iteganyijwemo.
- Ibiteganywa n'iyi ngingo bigamije gukumira [34] ababuranyi batunguza, mu gihe cy'iburanisha, abo baburana ndetse n'Urukiko ibintu batigeze bagaragaza mbere. Ibi biri no mu murongo umwe (même logique) n'ibiteganyijwe mu ngingo ya 75, igika cya mbere, y'Itegeko ryavuzwe haruguru; icyari kigambiriwe akaba ari ukubahiriza uburenganzira bwo kwiregura (droit de la défence). Iyo ngingo ya 75, igika cya mbere, igira iti "muri rusange nta nyandiko, imyanzuro y'urubanza cyangwa invandiko ikubiyemo ingingo ziburanishwa bishobora kohererezwa urukiko nyuma y'inama ntegurarubanza".
- [35] Dosiye y'urubanza igaragaza ko Tuyishimire Yves atigeze asaba indishyi, haba mu nkiko zabanje, haba mu myanzuro yo kwiregura yashyikirije uru Rukiko, haba no mu nama ntegurarubanza; akaba ahubwo yarazisabye mu iburanisha ryo ku wa 07/11/2019. Urukiko rurasanga ibyo yakoze binyuranyije

n'ibiteganywa n'ingingo ya 6, igika cya mbere, y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru.

Hashingiwe ku bisobanuro bimaze gutangwa, no ku [36] ngingo z'amategeko zavuzwe haruguru, Urukiko rurasanga indishyi mpozamarira n'indishyi mbonezamusaruro zigizwe n'amafaranga Tuyishimire Yves yakoresheje kubera dosiye yari mu Bugenzacyaha mu Bushinjacyaha, no zidashobora gusuzumwa. Urukiko rurasanga icyo yahabwa ari amafaranga y'ikurikiranarubanza n 'ay'igihembo cy'Avoka agenwe mu bushishozi bw'urukiko kuko ayo asaba ari menshi, kandi akaba nta bimenyetso yayatangiye. Urukiko rumugeneye 793.020 Frw y'ikurikiranarubanza akubiyemo 300.000 Frw yakoresheje mu ngendo na 493.020 Frw yishyuye ku kizamini cya ADN, hamwe na 1.500.000 Frw y'igihembo cy'Avoka mu nzego uko ari eshatu vaburanyemo, yose hamwe akaba 2.293.020 Frw

Ku bijyanye n'indishyi zisabwa na Akisanti Ayubu

[37] Urukiko rurasanga indishyi Akisanti Ayubu asaba atazihabwa kuko ntacyo yatsindiye mu rubanza.

III. CYEMEZO CY'URUKIKO

- [38] Rwemeje ko ikirego cyatanzwe na Akisanti Ayubu gisaba gusubirishamo, ku mpamvu z'akarengane, urubanza N° RCA 00010/2017/TGI/NYGE rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 06/07/2017, nta shingiro gifite;
- [39] Rwemeje ko imikirize y'urubanza N° RCA 00010/2017/TGI/NYGE rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 06/07/2017, igumyeho;

- [40] Rwemeje ko Tuyishimire Yves yabyawe na Gusenga Innocent;
- [41] Rwemeje ko indishyi mpozamarira n'indishyi mbonezamusaruro zasabwe na Tuyishimire Yves zitasuzumwa;
- [42] Rutegetse Akisanti Ayubu guha Tuyishimire Yves 2.293.020 Frw y'ikurikiranarubanza n'igihembo cy'Avoka.

URUBANZA RW'UMURIMO

NIWEMUGENI v KCB RWANDA LTD

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RSOC 00001/2019/SC (Mukamulisa, P.J. Nyirinkwaya, Cyanzayire, Rukundakuvuga na Hitiyaremye, J.) 31 Mutarama 2020]

Amategeko agenga amasezerano – Amasezerano y'umurimo – Iseswa ry'amasezerano y'akazi y'igihe kitazwi – Umukozi usezerewe mu kazi nta nteguza, ahabwa amafaranga angana n'amafaranga y'umushahara atahana mu ntoki (net), hamaze kuvanwamo imisoro ku musaruro n'ay'ubwiteganyirize.

Amategeko agenga amasezerano — Gusesa amasezerano y'umurimo — Impamvu yumvikana — Imyitwarire y'umukozi — Imyitwarire y'umukozi, amakosa umukozi yakora mu rwego rw'akazi ashingiye ku myitwarire n'impamvu yumvikana ishobora gutuma amasezerano y'akazi aseswa.

Amategeko agenga amasezerano – Gusesa amasezerano y'umurimo – Inshingano yo gutanga ibimenyetso – Igihe havutse impaka, umukoresha washeshe amasezerano niwe utanga ibimenyetso bigaragaza ko umukozi yakoze ikosa.

Amategeko agenga amasezerano — Amakosa yo mu rwego rw'akazi — Kuba umukozi yagizwe umwere cyangwa atakurikiranywe mu rwego rw'inshinjabyaha, ntibibuza ko afatirwa ibihano mu rwego rw'akazi hashingiwe ku mpamvu z'uko ikirego cy'inshinjabyaha mu nkiko ntaho gihuriye n'ibihano byo mu rwego rw'akazi bikomoka ku ikosa

Incamake y'ikibazo: Niwemugeni yari umukozi wa KCB iza kumwirukana ivuga ko yakoresheje ikarita ye y'ubwishingizi bwo kwivuza ya UAP Insurance Rwanda Ltd, akavuza undi umuntu

utari no mubo yemerewe kuvuza, maze ayirega mu Rukiko Rwisumbuye rwa Nyarugenge avuga ko yamwirukanye mu buryo budakurikije amategeko, abisabira indishyi zitandukanye, urukiko rwemeza ko ikirego cye nta shingiro gifite kuko yirukanywe mu buryo bukurikije amategeko.

Niwemugeni yajuririye urwo rubanza mu Rukiko Rukuru, avuga ko yirukanwe nta bimenyetso bigaragaza ikosa ryashingiweho mu kumwirukana, nta rukiko rubifitiye ububasha rwamuhamije ikosa, ndetse ko nta n'integuza yahawe. Urukiko Rukuru rwemeje ko urubanza rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge rudahindutse, ahubwo rutegeka Niwemugeni kwishyura KCB amafaranga y'ikurikiranarubanza n'ay'igihembo cy'avoka.

Niwemugeni yandikiye Perezida w'Urukiko rw'Ubujurire asaba ko imanza zaciwe n'inkiko zabanje zisubirwamo ku mpamvu z'akarengane. Nyuma yo gusuzuma ikibazo cye, urubanza rwaburanishijwe n'Urukiko rw'Ikirenga.

Mw'iburanisha, urega avuga ko uregwa yamwirukanye mu buryo bunyuranije n'amategeko kubera ko nta nteguza yahawe, ko nta kosa yakoze, kandi ko nta rukiko rubifitiye ububasha rwemeje ko yakoze ikosa rikomeye.

Uregwa asobanura ko urega atirukanywe mu buryo bunyuranyije n'amategeko kubera ko yirukanywe hashingiwe ku mpamvu umuntu wese yagenzura, kuba atarashoboye kuvuguruza ibimenyetso byatanzwe, ko atagombaga gutegereza ko urukiko rubanza kwemeza ikosa, kuko ibyo bikorwa mu gihe umukozi yirukanywe kubera ikosa rikomeye, kandi urega akaba yarirukanywe hashingiwe ku mpamvu yumvikana.

Incamake y'icyemezo: Umukozi usezerewe mu kazi nta nteguza, ahabwa amafaranga angana n'umushahara atahana mu ntoki (net) hamaze kuvanwamo imisoro ku musaruro n'ay'ubwiteganyirize. Uyu murongo ukaba uhindura umurongo wari wafashwe mu manza zaciwe n'Urukiko rw'Ikirenga zirimo, Urubanza No RSOCAA 0003/15/CS, rwaciwe ku wa 05/05/2016, haburana Rugenera Marc na Soras Assurances Générales Ltd (SORAS AG) n'urubanza No RSOCAA 0001&0002/16/CS rwaciwe ku wa 14/10/2016, haburana Ntukamazina Jean Baptiste na Prime Insurance Ltd (PRIME), aho muri izo manza hari hemejwe ko amafaranga ahabwa umukozi igihe asezerewe ku kazi ari amafaranga mbumbe (brut).

- 2. Amakosa umukozi yakora mu rwego rw'akazi ashingiye ku myitwarire n'impamvu yumvikana ishobora gutuma amasezerano y'akazi aseswa.
- 3. Igihe havutse impaka, umukoresha washeshe amasezerano niwe utanga ibimenyetso bigaragaza ko umukozi yakoze ikosa.
- 4. Kuba umukozi yagizwe umwere cyangwa atakurikiranywe mu rwego rw'inshinjabyaha, ntibibuza ko afatirwa ibihano mu rwego rw'akazi hashingiwe ku mpamvu z'uko ikirego cy'inshinjabyaha mu nkiko ntaho gihuriye n'ibihano byo mu rwego rw'akazi bikomoka ku ikosa.

Ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane nta shingiro gifite.

Amategeko yashingiweho:

- Amasezerano y'Umuryango Mpuzamahanga w'Umurimo yerekeye iseswa ry'amasezerano y'akazi ya 1982 (Convention de l'OIT No 158 sur le licenciement)
- Itegeko Nº 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda (ryakoreshwaga icyo gihe), ingingo ya 29, 32.
- Itegeko Nº 16/2005 ryo ku wa 18/08/2005 rigena imisoro itaziguye ku musaruro (ryakoreshwaga icyo gihe), ingingo 4, 13.
- Itegeko Nº 86/2013 ryo ku wa 11/09/2013 rishyiraho sitati rusange igenga abakozi ba Leta (ryakoreshwaga icyo gihe), ingingo ya 78.
- Iteka rya Perezida Nº 65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi

Imanza zifashishijwe:

Leta y'u Rwanda v. Nkongoli John, RADA 0012/07/CS, rwaciwe n'Urukiko rw'Ikirenga ku wa 27/03/2009.

Inyandiko z'Abahanga:

- François GAUDU et Raymonde VATINET, Droit du travail, 5e édition, Dalloz, 2013, p. 213-214.
- Gilles AUZERO et Emmanuel DOCKES; Droit du travail, 30e édition, Dalloz, 2016, p. 610, 619.
- Georges DUPUIS, Marie-Josée GUEDON et Patrice Chrétien, Droit administratif, 10^e édition, Editions SIREY, 2007, page 381.
- N'Deye N'Doye, Le licenciement pour motif personnel en France et au Sénégal: [étude de droit comparé], Droit, Université de Strasbourg, HAL, 2012, p.59, 64.

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Niwemugeni Jeannette yari umukozi wa KCB Bank Rwanda Ltd, guhera ku wa 10/12/2013, akora ku mwanya wa Sales Manager mu Ishami rya Musanze. Nyuma y'igihe cy'amazi 6 y'igeragezwa, yahawe amasezerano y'igihe kitazwi. Yaje kwimurirwa ku cyicaro cy'iyo Banki i Kigali, ashyirwa ku mwanya wa Business Banker ahembwa umushahara ungana na 1.556.775 Frw buri kwezi.
- [2] Avuga ko yaje kwirukanwa ku wa 04/08/2016 azize ikosa bamuhimbiye, bavuga ko yakoresheje ikarita ye y'ubwishingizi bwo kwivuza ya UAP Insurance Rwanda Ltd, akavuza undi umuntu utari no mubo yemerewe kuvuza witwa Mukeshimana Mariam, muri Clinic Bien Naitre.
- [3] Niwemugeni Jeannette yashyikirije ikirego cye Urukiko Rwisumbuye rwa Nyarugenge arega KCB Bank Rwanda Ltd kuba yaramwirukanye mu buryo budakurikije amategeko, asaba indishyi zo kwirukanwa binyuranyije n'amategeko zingana na 9.340.650 Frw, imperekeza ingana na 1.556.775 Frw, na 980.336 Frw avuga ko yakaswe ku buryo butumvikana, amafaranga y'ikurikiranarubanza n'igihembo cy' Avoka.
- [4] Ku wa 13/02/2018, Urukiko Rwisumbuye rwa Nyarugenge rwaciye urubanza N° RSOC 00250/2017/TGI/NYGE rwemeza ko ikirego cya Niwemugeni Jeannette kidafite ishingiro, rwemeza ko yirukanywe ku kazi mu buryo bukurikije amategeko hashingiwe ku mpamvu ikomeye, rwemeza ko yahawe imperekeza akaba atahabwa indi, ko

adakwiye guhabwa 980.336 Frw y'integuza asaba, rumutegeka kwishyura KCB Bank Rwanda Ltd 500.000 Frw y'ikurikiranarubanza na 100.000 Frw y'igihembo cy'Avoka.

- [5] Niwemugeni Jeannette yajuririye urwo rubanza mu Rukiko Rukuru, atanga impamvu zikurikira:
 - a. kuba KCB Bank Rwanda Ltd itarigeze igaragaza ibimenyetso byerekana ko yakoze ikosa ryatumye bamwirukana, ndetse akaba atararihamijwe n'Urukiko rubifitiye ububasha;
 - b. kuba yarirukanywe adahawe integuza;
 - c. kuba umuntu KCB Bank Rwanda Ltd ivuga ko yavuje atarigeze agaragazwa.
- [6] Ku wa 28/06/2018, Urukiko Rukuru rwaciye urubanza N° RSOCA 00056/2018/HC/KIG, rwemeza ko urubanza N° RSOC 00250/2017/TGI/NYGE rwajuririwe rudahindutse mu ngingo zarwo zose, rutegeka Niwemugeni Jeannette guha KCB Bank Rwanda Ltd 100.000 Frw y'ikurikiranarubanza na 250.000 Frw y'igihembo cy'Avoka.
- [7] Niwemugeni Jeannette yandikiye Perezida w'Urukiko rw'Ubujurire asaba gusubirishamo urubanza N° RSOCA 00056/2018/HC/KIG ku mpamvu z'akarengane, nawe amaze gusuzuma ubusabe bwe yandikira Perezida w'Urukiko rw'Ikirenga avuga ko urubanza rumaze kuvugwa rushobora kuba rwarabayemo akarengane, ko byasuzumwa hakemezwa niba rwasubirishwamo ku mpamvu z'akarengane.
- [8] Perezida w'Urukiko rw'Ikirenga mu cyemezo cye N° 080/CJ/2018, yemeje ko urwo rubanza rwoherezwa mu bwanditsi

bw'Urukiko rw'Ikirenga rukandikwa mu bitabo byabugenewe kugira ngo ruzongere ruburanishwe.

- [9] Iburanisha ry'urubanza ryashyizwe ku wa 10/01/2020, ribera mu ruhame, Niwemugeni Jeannette yunganiwe na Me Bagaza Magnifique afatanyije na Me Maguru Amir Ahmed naho KCB Bank Rwanda Ltd iburanirwa na Me Bimenyimana Eric. Urukiko rwapfundikiye iburanisha, rumenyesha ababuranyi ko urubanza ruzasomwa ku wa 31/01/2020.
- [10] Impaka zagiwe n'ababuranyi mu iburanisha, zijyanye no kumenya niba Niwemugeni yarasezerewe ku kazi mu buryo bunyuranyije n'amategeko, akaba ari nacyo kibazo nyamukuru cyasuzumwe muri uru rubanza. Hasuzumwe kandi ibijyanye n'indishyi zasabwe.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

Kumenya niba KCB Bank Rwanda Ltd yarasezereye ku kazi Niwemugeni Jeannette mu buryo bunyuranyije n'amategeko.

- [11] Niwemugeni Jeannette avuga ko KCB Bank Rwanda Ltd yamwirukanye mu buryo bunyuranije n'amategeko kubera impamvu zikurikira:
- a. Kuba yari afite amasezerano y'akazi y'igihe kitazwi (contrat à durée indéterminée), ariko yajya kumwirukana ntimuhe integuza;
- b. Kuba yarirukanwe nta kosa ryaba iryoroheje cyangwa irikomeye akoze, kuko ibyo yarezwe bavuga ko yavuje

- umuntu utabifitiye uburenganzira ku ikarita y'ubwishingizi ya UAP Insurance Rwanda Ltd ataribyo;
- c. Kuba nta rukiko rubifitiye ububasha rwemeje ko yakoze ikosa rikomeye nk'uko byateganywaga n'ingingo ya 32 igika cya 3 y'Itegeko N° 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda ryakoreshwaga igihe yirukanwaga.
- [12] Abunganira Niwemugeni Jeannette mu mategeko bavuga ko mu kumwirukana, ibiteganywa n'amategeko bitubahirijwe, kuko inkiko zagiye zibanda gusa ku ngingo ya 32, igika cya mbere, y'Itegeko N° 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda, aho kureba igika cya kabiri cy'iyo ngingo kivuga uburyo amasezerano y'umurimo ashobora guseswa nta nteguza iyo hakozwe ikosa rikomeye.
- [13] Bavuga kandi ko iryo kosa ryagombaga kwemezwa n'urukiko rubifitiye ububasha mbere y'uko amasezerano aseswa hashingiwe ku gika cya 3 cy'ingingo yavuzwe haruguru, kandi ushaka kuyasesa agatanga integuza y'amasaha 48. Babisobanura bavuga ko hagomba kubanza kugaragazwa ikosa rikomeye, rikamenyeshwa umukozi mu masaha 48, nyuma yo kurimumenyesha umukoresha we akaregera Urukiko rubifitiye ububasha kugira ngo rwemeze iryo kosa, umukozi akabona kwirukanwa
- Bavuga kandi ko KCB Bank Rwanda Ltd yirukanye Niwemugeni 04/08/2016. Jeannette ku wa cy'inshinjabyaha kijyanye n'ikosa ryatumye imwirukana kigatangwa ku wa 01/12/2017 hashize umwaka urenga, ibi kimenyetso bikaba bivuze bamwirukanye nta ko kidashidikanywaho bafite cyemeza ko ikosa ashinjwa yarikoze koko

- [15] KCB Bank Rwanda Ltd ivuga ko Niwemugeni Jeannette atirukanywe mu buryo bunyuranyije n'amategeko kubera impamvu zikurikira:
 - a. Kuba yarirukanywe hashingiwe ku mpamvu umuntu wese yagenzura;
 - b. Kuba atarashoboye kuvuguruza ibyashingiweho mu gufata ibyemezo birimo inyandiko ya UAP Insurance Rwanda LTD yo ku wa 30/06/2016¹, ubuhamya bw'abamubonye ubwo yazaga kwa muganga avuga ko aje kuvuza umuntu utari mubo KCB Bank Rwanda LTD yishingiye;
 - c. Kuba muri dosiye nshinjabyaha harimo ubuhamya bw'abaganga bakiriye Niwemugeni Jeannette, bemeza ko yagerageje kuvuza umuntu utabyemerewe, nk'uko inyandikomvugo zabo zibishimangira. Abo bakaba ari Dr Murindwa Patrick, Diane Mudahogora Rwigirira, na Mukambungo Amerberg.
 - d. Inyandiko yo gushyingura dosiye by'agateganyo Niwemugeni Jeannette ashingiraho yerekana ko nta rukiko rwigeze rumuhamya icyaha, ntigomba

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¹ Iyo nyandiko igira iti: "On 23rd 2016 evening she visited CLINIQUE BIEN NAITRE for medical attention. She used her fingerprint and allowed a bill for 19, 500 Rwf to be deducted from her benefits. In the process of approving the bill, the nurses at the hospital noted that the person who was actually examined and treated by Doctor is not her but somebody else. Hence she was using her card to give service to unauthorized beneficiary. On this noticing this anormaly the hospital questioned her and requested that she pays the bill in full. She paid the bill as requested and but also mentioned to them that she has done this several times before and therefore they shouldn't bother her".

gushingirwaho, hashingiwe ku ihame ry'uko ikurikirana ry'icyaha ridafite aho rihuriye no guhamwa n'ikosa ryo mu kazi, nk'uko byashimangiwe mu rubanza No RADA 0002/16/CS rwaciwe n'Urukiko Rw'Ikirenga ku wa 23/02/2018 (ku rupapuro rwa 5-6). Muri urwo rubanza, Urukiko rwasanze nta cyabuza ko Salimini Saidi akurikiranwa ngo anafatirwe ibihano mu rwego rw'akazi kabone n'ubwo atakurikiranwe mu rwego rw'imanza nshinjabyaha. Ibi ngo bishimangirwa n'umuhanga mu mategeko witwa Jean Rivero, mu gitabo yise "Droit Administratif", aho asobanura ko igikorwa kimwe gishobora gutuma umukozi akurikiranwaho icyarimwe ikosa mu rwego rw'akazi n'icyaha mu rwego rw'imanza nshinjabyaha, kandi ko icyemezo gifashwe mu rwego rw'imanza nshinjabyaha kitabangamira icyemezo gishobora gufatwa mu rwego rw'akazi, keretse ku birebana n'ibikorwa umucamanza uburanisha imanza nshinjabyaha yemeje ko byabaye cyangwa bitabaye mu buryo bwabaye ndakuka.

[16] Me Bimenyimana Eric uburanira KCB Bank Rwanda Ltd avuga ko itagombaga gutegereza ko urukiko rubanza kwemeza ikosa, kuko ibyo bikorwa mu gihe umukozi yirukanywe kubera ikosa rikomeye, Niwemugeni Jeannette akaba yarirukanywe hashingiwe ku mpamvu yumvikana, ariyo mpamvu yahawe integuza kandi nawe akaba adahakana ko yayibonye. Avuga ko ntacyari kubuza ko ikirego gitangwa mu Bugenzacyaha nyuma yo kumwirukana, kuko ku rwego Niwemugeni Jeannette yariho nta kindi cyemezo yari gufatirwa uretse kumwirukana, hanarebwe amakosa yari yakoze.

[17] Ku bijyanye n'ibimenyetso by'ikosa Niwemugeni Jeannette yirukaniwe, Me Bimenyimana Eric avuga ko kugira ngo bimenyekane, umuganga wari mu isuzuma (consultation) yahamagaye uwo kuri "réception", amubwira ko hari umudamu umaze gusuzumwa wambaye nk'umusiramu ugomba gukorerwa fagitire ngo yishyure, uwo kuri "réception"akavuga ko uje kwishyura atari umusilamu. Avuga ko Niwemugeni yabonye bimenyekanye, akishyura akoresheje igikumwe, n'uwo yari yaje kuvuza akishyura akoresheje "cash", akaba ariyo mpamvu habonetse ibyemezo byo kwishyuriraho bibiri.

UKO URUKIKO RUBIBONA

- [18] Ingingo ya 29 y'Itegeko Nº 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda, ryakoreshwaga igihe Niwemugeni Jeannette yasezererwaga ku kazi, igira iti: "amasezerano y'akazi y'igihe kitazwi ashobora guseswa igihe cyose iyo umwe mu bayagiranye abishatse ariko ku mpamvu zumvikana. Iryo seswa ribanzirizwa n'integuza itangwa n'urishaka».
- [19] Itegeko ntirisobanura impamvu zumvikana zishobora gutuma amasezerano y'akazi y'igihe kitazwi aseswa. Mu masezerano y'Umuryango Mpuzamahanga w'Umurimo (OIT) yerekeye iseswa ry'amasezerano y'akazi, basobanura impamvu yumvikana ishobora gutuma amasezerano y'akazi y'igihe kitazwi aseswa. N'ubwo aya masezerano atafatwa nk'itegeko mu Rwanda kuko rutarayashyiraho umukono, ibiyakubiyemo bishobora kwifashishwa. Ingingo ya 4 y'ayo masezerano, iteganya ko umukozi atagomba gusezererwa ku kazi mu gihe hatari impamvu yumvikana, ishingiye ku bushobozi cyangwa ku myitwarire, cyangwa ishingiye ku bikenewe mu mikorere

y'urwego akoramo². Muri Repubulika Iharanira Demokarasi ya Congo (RDC), nabo basobanura mu itegeko ryabo rigenga umurimo ko impamvu yumvikana ishobora gutuma amasezerano y'akazi y'igihe kitazwi aseswa, ari impamvu ishingiye ku bushobozi bw'umukozi, ku myitwarire ye, cyangwa ishingiye ku bikenewe mu mikorere y'urwego akoramo³. Hifashishijwe ibi bisobanuro, birumvikana ko imyitwarire y'umukozi, by'umwihariko amakosa yakora mu rwego rw'akazi, ari imwe mu mpamvu zumvikana zishobora gutuma amasezerano y'akazi aseswa.

[20] Itegeko rigenga umurimo mu Rwanda ntiritanga urutonde rw'ubwoko bw'amakosa ashobora gutuma amasezerano y'akazi aseswa hakurikijwe uburemere bwayo, bitandukanye n'uko bimeze mu mategeko agenga umurimo mu bihugu bimwe na bimwe⁴, cyangwa mu mategeko agenga abakozi ba Leta mu Rwanda⁵. Ikigaragara, ni uko iseswa ry'amasezerano rigomba

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² Article 4 de la Convention de l'OIT n ° 158 sur le licenciement, 1982 : « Un travailleur ne devra pas être licencié sans qu'il existe un motif valable de licenciement lié à l'aptitude ou à la conduite du travailleur ou fondé sur les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service ».

³ Article 62 du Code du travail de la RDC: "Le contrat à durée indéterminée ne peut être résilié à l'initiative de l'employeur que pour motif valable lié à l'aptitude ou à la conduite du travailleur sur les lieux de travail dans l'exercice de ses fonctions ou fondé sur les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service ».

⁴ Muri Senegal, batandukanya" *Faute légère, faute grave, faute lourde*", naho mu Bufaransa bagatandukanya: "*faute sérieuse, faute grave, faute lourde* »., cfr N'Deye N'Doye, Le licenciement pour motif personnel en France et au Sénégal: [étude de droit comparé], Droit, Université de Strasbourg, HAL, 2012, p.59, 64

⁵ Ingingo ya 76 y'Itegeko Nº 86/2013 ryo ku wa 11/09/2013 rishyiraho sitati rusange igenga abakozi ba Leta; n'Iteka rya Perezida Nº 65/01 ryo ku wa

kubanzirizwa n'integuza, cyangwa indishyi ziyisimbura igihe itubahirijwe, keretse iyo ikosa ryakozwe ari ikosa rikomeye (ingingo ya 29 n'iya 32 z'Itegeko Nº 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda).

- [21] Mu gihe habaye impaka ku bijyanye no kumenya niba harakozwe ikosa nk'impamvu yumvikana yatumye amasezerano aseswa, Itegeko No 13/2009 ryo ku wa 27/05/2009 ryavuzwe haruguru ntirisobanura ugomba kubitangira ibimenyetso, ariko hifashishijwe ibiteganyijwe mu mategeko y'ibindi bihugu ndetse n'amasezerano y'Umuryango Mpuzamahanga w'Umurimo yerekeye iseswa ry'amasezerano y'akazi yavuzwe haruguru, umukoresha niwe ugomba gutanga ibimenyetso⁶.
- [22] Ibisobanura bimaze gutangwa mu bika bibanza, byumvikanisha ko:
 - a. Amasezerano y'akazi y'igihe kitazwi ashobora guseswa iyo hari impamvu yumvikana;
 - b. Amakosa akozwe n'umukozi mu rwego rw'akazi ari imwe mu mpamvu zumvikana zishobora gutuma amasezerano y'akazi aseswa;
 - c. Iyo amasezerano asheshwe kubera amakosa, uyasheshe atanga integuza cyangwa indishyi zisimbura integuza;

04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi.

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⁶ Aux termes de l'article L 63 al.3 du nouveau code du travail Sénégalais : "
En cas de contestation, la preuve du motif légitime incombe à l'employeur ».
Aux termes de l'article 9-2-a de la Convention de l'OIT N° 158 sur le licenciement, 1982 : « La charge de prouver l'existence d'un motif valable de licenciement tel que défini à l'article 4 de la présente convention devra incomber à l'employeur".

- keretse iyo ikosa ryakozwe ari ikosa rikomeye nibwo nta nteguza itangwa;
- d. Igihe havutse impaka, umukoresha washeshe amasezerano niwe utanga ibimenyetso bigaragaza ko umukozi yakoze ikosa.
- [23] Mu miburanire ya Niwemugeni Jeannette n'abamwunganira, bashingira ku ngingo eshatu z'ingenzi bagaragaza ko yasezerewe ku kazi mu buryo budakurikije amategeko:
 - a. Kuba yarirukanwe nta kosa ryaba iryoroheje cyangwa irikomeye akoze;
 - b. Kuba Inkiko zibanza zitarubahirije ibiteganywa n'ingingo ya 32 y'Itegeko N° 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda;
 - c. Kuba nta rukiko rubifitiye ububasha rwemeje ko yakoze ikosa rikomeye, no kuba KCB Bank Rwanda Ltd itarategereje ko hafatwa umwanzuro ku kirego nshinjabyaha mbere yo kumusezerera.

Urukiko rurasuzuma izi ngingo, imwe ku yindi.

i. Ku bijyanye no kuvuga ko nta kosa Niwemugeni Jeannette yakoze ryatuma asezererwa ku kazi

[24] Mu ibaruwa yo ku wa 04/08/2016 KCB Bank Rwanda Ltd yandikiye Niwemugeni Jeannette isesa amasezerano y'akazi, yamumenyesheje ko impamvu amasezerano asheshwe ari uko yagize imyitwarire irimo uburiganya (fraudulent conduct), akoresha nabi ubwishingizi mu kwivuza, akishyurira umuntu utari mubo yemerewe kwishingira.

- [25] Ibimenyetso KCB Bank Rwanda Ltd yashyikirije Urukiko byemeza ko Niwemugeni Jeannette yakoze ikosa ryatumye asezererwa bigizwe n'ibi bikikurikira:
 - a. Ibaruwa yo ku wa 30/06/2016 UAP Insurance Rwanda Ltd yandikiye KCB Bank Rwanda Ltd iyimenyesha ikibazo cyabaye kuri «Clinique Bien Naitre», ko Niwemugeni Jeannette yakoresheje igikumwe cye akishyurira umuntu utari mu bishingiwe, amafaranga angana na 19.500 Frw;
 - b. Inyandiko zigaragaza ko fagitire yo kwivuza yishyuwe hakoreshejwe ubwishingizi, byamara kugaragara ko uwivuje atari mu bishingiwe, fagitire ikongera kwishyurwa hadakoreshejwe ubwishingizi;
 - c. Ubuhamya bw'abaganga n'abakozi b'ibitaro byitwa «Clinique Bien Naitre» bamubonye ubwo yajyaga kuvuza umuntu utari mu bishingiwe, barimo:
 - i. Dr Mulindwa Patrick wakiriye Niwemugeni Jeannette;
 - ii. Mudahogora Diane Rwigirira;
 - iii. Mukambungo Amerberg.

[26] Ibaruwa ya UAP Insurance Rwanda Ltd isobanura ko ku wa 23/06/2016, Niwemugeni Jeannette yagiye ku bitaro byitwa «Clinique Bien Naitre», agakoresha igikumwe cye yishyurira umuntu utari mu bishingiwe amafaranga angana na 19.500 Frw, abakozi b'Ibitaro bakabibona bakamusaba ko fagitire yishyurwa hadakoreshejwe ubwishingizi. Muri iyo baruwa, UAP Insurance Rwanda Ltd isaba KCB Bank Rwanda LTD kugira icyo ibikoraho, inayimenyesha ko yahise ihagarika ikarita Niwemugeni Jeannette yivurizagaho kugirango adakomeza

kuyikoresha nabi (we have since desactivated her medical card to prevent further abuse).

- Urukiko rurasanga ibivugwa muri iyi baruwa, bihujwe n'inyandiko zo kwishyuriraho zashyikirijwe Urukiko, bigaragara ko koko ku itariki ya 23/06/2016, Niwemugeni Jeannette Bien Naitre» hakoreshejwe vishvuve «Clinique bw'ikoranabuhanga, amafaranga 19.500 agomba gutangwa na UAP Insurance Rwanda LTD. Kuri iyo tariki nanone hishyuwe 19.500 Frw, hakoreshejwe fagitire isanzwe (yuzuzwa n'intoki), yishyuwe na Mukeshimana Mariam ari nawe uvugwa ko yavujwe na Niwemugeni Jeannette. Mukeshimana Mariam avuga ko atigeze yivuriza kuri «Clinique Bien Naitre», na Niwemugeni Jeannette akavuga ko ku itariki ya 23/06/2016 ariwe wivuje, ariko ibyo bikavuguruzwa na fagitire imaze kuvugwa yishyuriweho na Mukeshimana Mariam, hamwe n'imvugo z'abakozi b'ibitaro babakiriye akaba ari nabo bagaragaza ikibazo.
- [28] Uwitwa Mukambungo Amerberg, umuforomokazi kuri «Clinique Bien Naitre», abazwa n'Ubushinjacyaha yasobanuye ko Mariam yazanye na Jeannette byitwa ko uyu ariwe uje kwivuza, Mariam akaba ariwe usuzumwa. Avuga ko avuye kureba muganga, yahaye rendez-vous Jeannette azi ko ariwe wivuje, naho hivuje Mariam wagendaga yiyita Jeannette. Asobanura ko yahamagaye kuri «réception», akababwira ngo bafatire uwo muyisiramukazi ibizamini, bakamusubiza ko atariwe wivuje ahubwo hivuje Jeannette, bigatuma ahita ahamagara muganga amumenyesha ko umudamu yavuye atari nyiri ikarita; na rendez-vous igahita ipfa.
- [29] Uwitwa Mudahogora Dianne Rwigirira wari «caissière», abazwa n'Ubushinjacyaha yasobanuye ko Niwemugeni Jeannette yaje kwivuza ari kumwe n'undi muntu witwa Mukeshimana

Mariam, bamara kumukorera ibyangombwa agasiga ikarita ye, akajya kureba Muganga. Nyuma yo kwivuza, ngo Niwemugeni Jeannette yagarutse gufata ikarita ye. Hagati aho Mukambungo Amerberg ngo yarahamagaye abasaba gufatira uwo muyisilamu ibizamini, ashaka kuvuga Mukeshimana Mariam, bamubwira ko atariwe wivuje ahubwo hivuje Niwemugeni Jeannette. Yasobanuye ko kubera ko bari hafi, bahise bababaza uwivuje, Jeannette ababwira ko yavuje Mariam ku ikarita ye kuko ari ibintu bibaho bakora n'ahandi. Mudahogora Dianne Rwigirira yabwiye kandi Ubushinjacyaha ko babasabye kwiyishyurira, bagahita banabimenyesha UAP Insurance Rwanda Ltd kubera ko Jeannette yari yamaze gukora fingerprint, kugira ngo itazishyura ayo mafaranga.

[30] Ibivugwa n'aba batangabuhamya, bihujwe n'ibaruwa UAP Insurance Rwanda Ltd yandikiye KCB Bank Rwanda Ltd imaze kugezwaho ikibazo cyabaye kuri «Clinique Bien Naitre», bikanahuzwa n'inyandiko zigaragaza ko ku itariki 23/06/2016 Niwemugeni Jeannette yishyuye akoresheje ubwishingizi bwa UAP Insurance Rwanda Ltd 19.500 Frw, uwo mubare w'amafaranga ukanishyurwa kuri iyo tariki hakoreshejwe fagitire isanzwe na mukeshimana Mariam, bigaragaza ko Niwemugeni Jeannette yakoze ikosa ryo kuvuza umuntu utabyemerewe akoresheje ubwishingizi buhabwa abakozi ba KCB Bank Rwanda Ltd. Urukiko rurasanga iryo kosa Niwemugeni Jeannette yakoze ryo kuvuza umuntu utari mubo yemerewe kuvuza, akoresheje ubwishingizi bwa UAP Insurance Rwanda Ltd, ari impamvu yumvikana yatumye amasezerano y'akazi yari afitanye na KCB Bank Rwanda Lt aseswa.

ii. Ku bijyanye no kuvuga ko Inkiko zibanza zitubahirije ibiteganywa n'ingingo ya 32 y'Itegeko N° 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda

Ingingo ya 32 y'Itegeko No 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda, yakoreshwaga igihe Niwemugeni Jeannette yasezererwaga, iteganya ibi bikurikira: «Iseswa ryose ry'amasezerano y'akazi y'igihe kitazwi, nta nteguza cyangwa se igihe cy'integuza kitarubahirijwe cyose, bituma uyasheshe aha undi indishyi y'amafaranga angana n'umushahara n'andi mashimwe yagombaga kubona mu gihe cy'integuza kitubahirijwe. Icyakora amasezerano y'akazi ashobora guseswa nta nteguza iyo habaye ikosa rikomeye ry'umwe mu bayagiranye. Icyo gihe umwe mu basezeranye abimenyesha undi mu masaha mirongo ine n'umunani (48). Ikosa rikomeye ryemezwa n'urukiko rubifitiye ububasha».

- [31] Muri iyi ngingo, humvikanamo ibitekerezo 4 by'ingenzi:
 - a. Icya mbere ni uko ikoreshwa iyo nta gihe cy'integuza (kivugwa mu ngingo ya 29 y'Itegeko N° 13/2009 ryo ku wa 27/05/2009 yavuzwe haruguru) cyatanzwe, cyangwa igihe cy'integuza kitubahirijwe cyose;
 - b. Icya kabiri ni uko, muri icyo gihe amasezerano asheshwe nta nteguza cyangwa igihe cy'integuza kitubahirijwe cyose, uyasheje abitangira indishyi zihwanye n'amafaranga y'umushahara n'andi mashimwe umukozi yagombaga kubona mu gihe cy'integuza;
 - c. Icya gatatu ni uko, igihe amasezerano asheshwe kubera amakosa akomeye, nta nteguza itangwa, hakaba nta n'indishyi zisimbura integuza zateganyijwe, ahubwo

- uyasheshe akaba asabwa kubimenyesha undi mu gihe kitarenze amasaha 48;
- d. Icya kane ni uko Urukiko rubifitiye ububasha rwemeza ko ikosa ryakozwe ari ikosa rikomeye (ibi bikaba biza gusesengurwa hasuzumwa ingingo ya gatatu y'imiburanire).
- Ibaruwa KCB Bank Rwanda Lt yandikiye Niwemugeni [32] wa 04/08/2016, imumenyesha ko isheshe Jeannette ku amasezerano y'akazi bari bafitanye, inamumenyesha ko bigomba guhita bishyirwa mu bikorwa (with immediate effect), bivuga ko nta gihe cy'integuza cyatanzwe. Nk'uko byagaragajwe haruguru, iyo nta nteguza yatanzwe, hatangwa indishyi n'amafaranga y'umushahara n'andi mashimwe umukozi yagombaga kubona mu gihe cy'integuza. Ibi bikaba atari w'Itegeko rigenga umurimo umwihariko Rwanda, mu hakurikijwe ibivugwa n'abahanga mu mategeko François Gaudu na Raymonde Vatinet, kimwe na Gilles Auzero na Emmanuel Dockes⁷

⁷ Le préavis est en principe une période de travail, le salarié devant rester à la disposition de l'employeur. L'employeur peut cependant dispenser le salarié de l'exécution du préavis, en lui versant alors l'équivalent du salaire sous forme d'une indemnité de préavis ; François GAUDU et Raymonde VATINET, Droit du travail, 5° édition, Dalloz, 2013, p. 213-214.

[&]quot;Le délai—congé ou préavis n'existe en principe que dans les cas où la rupture du contrat de travail résulte de la volonté unilatérale d'une des parties au contrat : licenciement, L'employeur a droit de dispenser unilatéralement le salarié d'exécuter son travail pendant le délai-congé à condition de lui verser toutes les sommes que celui-ci aurait perçues s'il avait fourni sa prestation de travail jusqu'à l'expiration du préavis"; Gilles AUZERO et Emmanuel DOCKES; Droit du travail, 30° édition, Dalloz, 2016, p. 610, 619.

- [33] Mu ibaruwa yo ku wa 04/08/2016 isezerera Niwemugeni Jeannette ku kazi, KCB Bank Rwanda Ltd yamumenyesheje ibyo afiteho uburenganzira, birimo amafaranga y'ukwezi kumwe k'umushahara mu mwanya w'integuza (one month salary in lieu of notice). Mu ibaruwa nanone KCB Bank Rwanda Lt yandikiye Niwemugeni Jeannette ku wa 12/08/2016 agasinyira ko ayibonye. imugaragariza ibyo vemerewe guhabwa, hagaragaramo amafaranga y'integuza angana n'umushahara w'ukwezi kumwe (1.556.775 Frw). Niwemugeni Jeannette yemeye mu gihe cy'iburanisha ko ayo mafaranga yayabonye, ikibazo afite kikaba ari amafaranga yakaswe angana na 980.336 Frw, KCB Bank Rwanda Lt yo ikaba yarasobanuye ko ari amafaranga y'umusoro.
- [34] Itegeko Nº 16/2005 ryo ku wa 18/08/2005 rigena imisoro itaziguye ku musaruro, ryakoreshwaga igihe Niwemugeni Jeannette yasezererwaga ku kazi, risobanura inkomoko y'umusaruro usoreshwa. Ingingo ya 4 y'iryo Tegeko, iteganya mu gace kayo ka 1º, ko mu musaruro usoreshwa harimo umusaruro uva mu mirimo yakorewe mu Rwanda, harimo n'ukomoka ku kazi. Ingingo ya 13 y'iryo Tegeko, isobanura ibigize umusaruro ukomoka ku kazi, mu gace kayo ka 5º hakavugwamo "imperekeza ihabwa umukozi igihe yirukanywe ku kazi cyangwa akazi ke karangiye cyangwa amasezerano y'akazi asheshwe/payments for redundancy or loss or termination"). Izi ngingo zigaragaza ko mu bigomba gusoreshwa harimo ibigenerwa umukozi igihe amasezerano y'akazi asheshwe, muri ibyo hakaba harimo n'amafaranga asimbura integuza igihe itatanzwe.
- [35] Urukiko rurasanga ibimaze kuvugwa mu gika kibanza, bigaragaza ko amafaranga umukozi ahabwa igihe asezerewe mu

kazi, atari amafaranga mbumbe (brut) nk'uko Niwemugeni Jeannette n'abamwunganira babivuga, ahubwo ari amafaranga atahana mu ntoki (net) hamaze kuvanwamo imisoro ku musaruro. Ni nako bigenda ku bijyanye n'amafaranga y'ubwiteganyirize n'ubwo yo ataburanyweho. Ibi byagiye binagarukwaho na bamwe mu bahanga mu mategeko⁸. Uyu murongo urahindura umurongo wari wafashwe mu manza zaciwe mbere n'uru Rukiko, zirimo:

- a. Urubanza N^O RSOCAA 0003/15/CS rwaciwe ku wa 05/05/2016, haburana Rugenera Marc na Soras Assurances Générales Ltd (SORAS AG) ;
- b. Urubanza N^o RSOCAA 0001&0002/16/CS rwaciwe ku wa 14/10/2016, haburana Ntukamazina Jean Baptiste na Prime Insurance Ltd (PRIME). Muri izo manza hari hemejwe ko amafaranga ahabwa umukozi igihe asezerewe ku kazi ari amafaranga mbumbe (brut), ariko nta bisobanuro bishingiye ku mategeko byatanzwe.

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⁸ " Bien que le salarié ne fournisse pas de prestation de travail, il a droit à une rémunération et à des avantages identiques à ceux qu'il aurait obtenus s'il avait travaillé jusqu'à l'expiration du préavis.L'indemnité compensatrice de préavis est assimilée juridiquement à un salaire ; elle est soumise au régime juridique du salaire aussi bien au regard des garanties de salaire qu'au regard des cotisations sociales"; Gilles AUZERO et Emmanuel DOCKES, Ibidem, p. 620.

[&]quot;Le montant de l'indemnité compensatrice de préavis est égal au montant du salaire qu'aurait perçu le salarié s'il avait pu travailler pendant la durée de son préavis Cette indemnité est versée à la date de rupture du contrat de travail et est considérée comme un salaire. A ce titre, elle est soumise à l'impôt sur le revenu et aux cotisations sociales"; Article publié par jurifiable.com, https://www.jurifiable.com/consel-juridique/droit-du-travail/indemnité-compensatrice-de-préavis, consulté le 27/01/2020

- [36] Ku bijyanye n'ibyaburanishijwe n'abunganira Niwemugeni Jeannette, bavuga ko Inkiko zibanze ku gika cya mbere cy'ingingo ya 32 kivuga ibijyanye n'integuza, kandi zaragombaga gushingira ku gika cya 2 n'icya 3 bivuga ikosa rikomeye, Urukiko rurasanga KCB Bank Rwanda Ltd itarafashe ikosa ryatumye isezerera ku kazi Niwemugeni Jeannette nk'ikosa rikomeye, igahitamo kumuha ibisimbura bikaba bitumvikana abunganira cy'integuza; impamvu Niwemugeni Jeannette bashaka ko hakoreshwa igika cy'ingingo ya 32 kirebana n'igihe umukozi yirukaniwe ikosa rikomeye.
- [37] Hashingiwe ku bisobanuro byatanzwe, Urukiko rurasanga ingingo ya 32 y'Itegeko No 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda yarubahirijwe.
 - iii. Ku bijyanye no kuvuga ko nta rukiko rubifitiye ububasha rwemeje ko Niwemugeni Jeannette yakoze ikosa rikomeye, kandi ko KCB Bank Rwanda Ltd itategereje ko hafatwa umwanzuro ku kirego nshinjabyaha mbere yo kumusezerera

Ku bijyanye no kuvuga ko nta rukiko rubifitiye ububasha rwemeje ko Niwemugeni Jeannette yakoze ikosa rikomeye mbere y'uko asezererwa ku kazi

Igika cya 3 cy'ingingo ya 32 y'Itegeko Nº 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda, giteganya ko ikosa rikomeye ryemezwa n'urukiko rubifitiye ububasha. N'ubwo ikosa rikomeye rivugwa muri iyi ngingo atariryo KCB Bank Rwanda Ltd yashingiyeho yirukana Niwemugeni Jeannette byasobanuwe, Urukiko nk'uko rurasanga ari ngombwa gusobanura uko ikwiye kumvikana. Kubera Umushingamategeko atakoze urutonde rw'imyitwarire cyangwa ibikorwa bikwiye gufatwa nk'ikosa rikomeye ryatuma umukozi

asezererwa ku kazi nta nteguza, yasanze ari ngombwa gusobanura uwemeza ko hakozwe ikosa rikomeye mu gihe umukozi wasezerewe atabyemeranyaho n'umukoresha. Bikaba byumvikana rero ko ubwo bubasha bwahawe Urukiko rubifitiye ububasha, rwaregewe igihe havutse impaka.

bitashoboka [39] Urukiko rurasanga ko igitekerezo cy'umushingamategeko cyaba ko urukiko rubanza kwemeza ko hakozwe ikosa rikomeye mbere y'uko umukoresha arishingiraho asezerera umukozi, ngo abe yarateganyije mu gika kibanza ko ikosa rikomeye rituma amasezerano aseswa nta nteguza, kandi rikamenyeshwa umukozi mu masaha 48 (kuva umukoresha arimenye). Impamvu nta nteguza itangwa, ni uko ikosa rikomeye ari ikosa rituma umukoresha adashobora gukomeza gukoresha umukozi⁹. Ntibyabaye ngombwa ko mu gika cya gatatu cy'ingingo ya 32 hongerwamo ko ikosa rikomeye ryemezwa n'urukiko rubifitiye ububasha igihe havutse impaka, nk'uko bigaragara mu mategeko ya bimwe mu bihugu nk'ubufaransa 10, kuko uburyo ingingo yanditse yumvikana neza.

⁹ Article 11 de la Convention de l'OIT N° 158 sur le licenciement, 1982: " Un travailleur qui va faire l'objet d'une mesure de licenciement aura droit à un préavis d'une durée raisonnable ou à une indemnité en tenant lieu, à moins qu'il ne se soit rendu coupable d'une faute grave, c'est-à-dire une faute de nature telle que l'on ne peut raisonnablement exiger de l'employeur qu'il continue à occuper ce travailleur pendant la période de préavis".

[&]quot;La faute grave est toute faute qui rend impossible le maintien du salarié dans l'entreprise durant le préavis "; Cass. Soc., 16 juin 1998, Dr. Soc.1998, p.949 (NB: La faute grave est assimilable à la faute lourde dans certaines législations dont la nôtre)

¹⁰ Ingingo ya L1235-1 y'itegeko rigenga umurimo: "En cas de litige,le juge, à qui il appartient d'apprécier la régularité de la procédure suivie et le caractère réel et sérieux des motifs invoqués par l'employeur, forme sa conviction au vu des éléments fournis par les parties après avoir ordonné, au besoin, toutes les mesures d'instruction qu'il estime utiles»; legifrance .gov.fr

[40] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga ikosa ritaragombaga kubanza kwemezwa n'Urukiko mbere y'uko Niwemugeni Jeannette asezererwa ku kazi.

Ku bijyanye no kuvuga ko KCB Bank Rwanda Ltd yagombaga gutegereza ko hafatwa umwanzuro ku kirego nshinjabyaha mbere yo gusezerera Niwemugeni Jeannette.

- [41] Nta ngingo iteganyijwe mu Itegeko N° 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda, itanga ibisobanuro kuri iki kibazo nk'uko bimeze mu Itegeko N° 86/2013 ryo ku wa 11/09/2013 rishyiraho sitati rusange igenga abakozi ba Leta. Urukiko rukaba rusanga nta cyabuza ko ibiteganyijwe muri iri Tegeko byifashishwa no ku bakozi bagengwa n'Itegeko ry'umurimo, mu gihe ntacyo ryo ryateganyije.
- [42] Ingingo ya 78 y'Itegeko Nº 86/2013 ryo ku wa 11/09/2013 rimaze kuvugwa, igira iti: «igihano cy'umukozi wa Leta mu rwego rw'akazi ntikibangamira uburyozwe bw'icyaha n'igihano giteganywa n'amategeko ahana, ku buryo ikosa ry'umukozi wa Leta rishobora gukurikiranwa mu kazi no mu nkiko». Ibivugwa muri iyi ngingo byagiye binashimangirwa n'ibyemezo by'inkiko, haba ku bireba abakozi bagengwa na sitati rusange igenga abakozi ba Leta, haba no ku bireba abakozi bagengwa n'amasezerano.
- [43] Mu rubanza N° RADA 0012/07/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 27/03/2009, haburana Leta y'u Rwanda na Nkongoli John, hemejwe ko «kuba Nkongoli John yaragizwe umwere bitavuga ko atashoboraga gufatirwa ibihano mu rwego rw'akazi hashingiwe ku mpamvu z'uko ikirego cy'inshinjabyaha mu nkiko ntaho gihuriye n'ibihano byo mu rwego rw'akazi bikomoka ku ikosa kandi ko bitagomba kuvangwa». Urukiko

rwabyemeje rwifashishije ibitekerezo by'abahanga mu mategeko barimo Georges DUPUIS, Marie Josée Guedon na Patrice Chretien¹¹. Urukiko, rwifashishije nanone ibitekerezo by'aba bahanga¹², rugaragaza ko habaho irengayobora igihe umucamanza wo mu rwego rw'imanza z'inshinjabyaha yafashe icyemezo gihamya ko ibikorwa bikurikiranywe ku mukozi byabayeho cyangwa bitabayeho nta gushidikanya. Ibi bigarukwaho n'umuhanga mu mategeko Emilie MAIGNAN, ahereye ku byemezo byafashwe n'inkiko¹³.

[44] Mu rubanza N° 2622 rwo ku wa 13/12/2017 rwaciwe n'Urukiko Rusesa imanza rwo mu Bufaransa, hemejwe ko

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^{11 &}quot;Une faute professionnelle d'un fonctionnaire peut entraîner, à la fois, une répression disciplinaire et une répression pénale. Dans les deux cas, il s'agit d'édicter une sanction en réponse à une faute. Il existe toutefois une réelle indépendance des deux procédures. L'autonomie de la répression disciplinaire tient à son lien avec l'exercice d'une fonction: la faute est fonctionnelle et la peine l'est aussi, alors que la répression pénale concerne tous les individus pour des faits qui ne sont pas liés à une fonction, et que la sanction pénale ne vise pas le coupable dans sa fonction mais dans sa liberté ou sa propriété. Pratiquement, la décision de l'autorité disciplinaire ne lie jamais le juge pénal: de nombreux agissements sont des fautes disciplinaires sans être, pour autant, des délits"; Georges DUPUIS, Marie-Josée GUEDON et Patrice Chrétien, Droit administratif, 10e édition, Editions SIREY, 2007, page 381.

¹² « De même, l'autorité disciplinaire n'est pas liée par la décision du juge pénal, sauf lorsque ce dernier s'est prononcé sur l'existence ou l'inexistence de certains faits : ses constatations matérielles s'imposent à l'autorité administrative"; Georges DUPUIS, Marie-Josée GUEDON et Patrice Chrétien, ibidem.

^{13 &}quot; ... Ce n'est en effet que lorsque la relaxe repose sur l'inexistence de la matérialité des faits que le juge disciplinaire sera soumis à l'autorité de la chose jugée; " Emilie MAIGNAN (Master II Droit des affaires), article publié dans la RJOI numéro 16, p.61, consulté le 27/01/2020. L'Auteur cite l'arrêt de la Cour de cassation française, chambre Sociale, 12/7/1989, D.1990.132

ibihano byo mu rwego rw'akazi bitandukanye n'ibihano byo mu rwego rw'inshinjabyaha, ku buryo umukoresha ashobora guhanira, mu rwego rw'akazi, amakosa umukozi yarezwe no mu rwego rw'inshinjabyaha, bitabangamiye ihame ry'uko umuntu ari umwere mu gihe atarahamywa icyaha n'urukiko¹⁴.

- [45] Ibisobanuro bimaze gutangwa byumvikanisha ko:
 - a. Kuba umukozi yagizwe umwere cyangwa atakurikiranywe mu rwego rw'inshinjabyaha, bitabuza ko afatirwa ibihano mu rwego rw'akazi hashingiwe ku mpamvu z'uko ikirego cy'inshinjabyaha mu nkiko ntaho gihuriye n'ibihano byo mu rwego rw'akazi bikomoka ku ikosa;
 - b. Habaho irengayobora igihe umucamanza wo mu rwego rw'imanza z'inshinjabyaha yafashe icyemezo gihamya ko ibikorwa bikurikiranywe ku mukozi byabayeho cyangwa bitabayeho nta gushidikanya.
- [46] Muri uru rubanza, bigaragara ko hari ikirego KCB Bank Rwanda Ltd yatanze mu rwego rw'inshinjabyaha irega Niwemugeni Jeannette na Mukeshimana Mariam, dosiye ikaza gushyingurwa n'Ubushinjacyaha ku mpamvu z'uko nta bimenyetso simusiga bishinja abaregwa. Nk'uko byasobanuwe mu bika bibanza, kuba umukozi atakurikiranywe mu rwego rw'inshinjabyaha, ntibibuza umukoresha kumufatira ibihano mu rwego rw'akazi mu gihe we abona hari ibimenyetso ko yakoze

14 "La procédure disciplinaire est indépendante de la procédure pénale, de sorte que l'exercice par l'employeur de son pouvoir disciplinaire ne

sorte que l'exercice par l'employeur de son pouvoir disciplinaire ne méconnait pas le principe de la présomption d'innocence lorsque l'employeur prononce une sanction pour des faits identiques à ceux visés par la procédure pénal " e;

ikosa. Bivuga rero ko, kuba Ubushinjacyaha bwarashyinguye dosiye Niwemugeni Jeannette yari yarezwemo, bitabuzaga KCB Bank Rwanda Ltd kumuhanira ikosa yari ifitiye ibimenyetso ko ryakozwe. Irengayobora ryavuzwe mu gika kibanza ntirishobora gukoreshwa muri uru rubanza, kuko nta mucamanza wafashe icyemezo ntakuka ko ibikorwa Niwemugeni Jeannette yari akurikiranyweho muri dosiye y'inshinjabyaha bitabayeho.

[47] Hashingiwe rero ku bisobanuro bimaze gutangwa, Urukiko rurasanga KCB Bank Rwanda Ltd itaragombaga gutegereza ko hafatwa umwanzuro ku kirego nshinjabyaha mbere yo gusezerera Niwemugeni Jeannette

Umwanzuro rusange

[48] Hashingiwe ku bisobanuro byose byatanzwe, no kw' Itegeko No 13/2009 ryo ku wa 27/05/2009 rigenga umurimo mu Rwanda, ryakoreshwaga igihe Niwemugeni Jeannette yasezererwaga ku kazi, Urukiko rurasanga KCB Bank Rwanda Ltd yarasezereye ku kazi Niwemugeni Jeannette mu buryo bukurikije amategeko.

Gusuzuma indishyi zasabwe na KCB Bank Rwanda Ltd mu kirego kigamije kwiregura

- [49] KCB Bank Rwanda Ltd isaba ko Niwemugeni Jeannette ategekwa kuyiha 1.000.000 Frw y'igihembo cy'Avoka.
- [50] Ababuranira Niwemugeni Jeannette bavuga ko indishyi KCB Bank Rwanda Ltd isaba nta shingiro zifite, kuko iyo itaza kumwirukanira ubusa, nta manza ziba zarageze mu nkiko.

UKO URUKIKO RUBIBONA

[51] Urukiko rurasanga amafaranga y'igihembo cy'Avoka KCB Bank Rwanda Ltd isaba yayahabwa, ariko igahabwa agenwe n'Urukiko mu bushishozi bwarwo kuko ayo isaba ari menshi kandi ikaba itarayatangiye igisobanuro, ikaba igenewe 500.000 Frw kuri uru rwego.

III. ICYEMEZO CY'URUKIKO

- [52] Rwemeje ko ikirego cya Niwemugeni Jeannette gisubirishamo, ku mpamvu z'akarengane, urubanza N° RSOCA 00056/2018/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 28/06/2018, nta shingiro gifite;
- [53] Rwemeje ko ikirego cya KCB Bank Rwanda Ltd kigamije kwiregura gifite ishingiro;
- [54] Rwemeje ko imikirize y'urubanza N° RSOCA 00056/2018/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 28/06/2018, idahindutse;
- [55] Rutegetse Niwemugeni Jeannette guha KCB Bank Rwanda Ltd 500.000 Frw y'igihembo cy'Avoka.

URUBANZA RW'UBUCURUZI

STRONG CONSTRUCTIONS LTD v. RADIANT INSURANCE COMPANY LTD

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RCOM 00002/2019/SC (Rugege, P.J., Kayitesi, Hitiyaremye, Cyanzayire na Rukundakuvuga, J.) 15 Ugushyingo 2019]

Amategeko agenga amasezerano — Ubwishingire magirirane (Caution solidaire) — Iyo uwafashe umwenda ananiwe kwishyura, uwatanze umwenda afite burenganzira bwo gusaba umwishingizi kwishyura umwenda hatabanje gushakishwa ubwishyu mu mutungo w'uwishingiwe — Umwishingizi utubahirije inshingano zikubiye mu masezerano y'ubwishingizi bikaza gutera igihombo uwishingiwe, umwishingizi agomba kubitangira indishyi.

Incamake y'ikibazo: Strong Constructions Ltd yagiranye amasezerano y'ubwishingizi na Radiant Insurance Company Ltd yo kwishingira kuzishyura amafaranga y'inguzanyo yatse muri Bank of Kigali kugira ngo ibashe kurangiza isoko yari yatsindiye mu bitaro bya Gisirikare bya Kanombe. Muri ubwo bwishingizi, Radiant Insurance Company Ltd yari yishingiye kwishyura ari uko bigaragaye ko nta mafaranga ahagije Strong yishyuwe aturutse ku isoko ryari ryishingiwe.

Strong Constructions Ltd ntiyubahirije igihe cyo kwishyura bituma Banki ya Kigali isaba Radiant Insurance Company Ltd kwishyura umwenda yari yishingiye. Radiant Insurance Company Ltd mbere yo kwishyura, yabanje gusaba Banki ya Kigali kuyiha amakuru kuri konti ya Strong Construction Ltd,

maze imaze kubona ko konti yayo yanyujijweho amafaranga menshi kandi ko yanze kwishyura bituma Strong Construction Ltd iregera urukiko rw'Ubucuruzi.

Urukiko rwasuzumye urubanza maze rwemeza ko ikirego cya Strong Construction Ltd nta shingiro gifite ngo kuko ariyo yari kwishyura umwenda yafashe.

Strong Construction yajuririye Urukiko Rukuru rw'Ubucuruzi, maze rwemeza ko ikirego cyayo gifite ishingiro kuko Radiant Insurance Company Ltd itubahirije amasezerano y'ubwishingire bitewe n'uko iterekanye ibimenyetso bigaragaraza ko Strong Construction Ltd yishyuwe amafaranga aturutse ku isoko yari yishingiye, maze Urukiko Rukuru rw'Ubucuruzi rutegeka Radiant Insurance Company Ltd gusubiza Strong Construction Ltd indishyi yishyuye Banki ya Kigali kubera kutishyurira igihe ndetse no gusubiza amafaranga yari yafatiriwe na Banki ya Kigali.

Ibi byatumye Radiant Insurance Company Ltd ijuririra Urukiko rw'Ikirenga, maze rwemeza ko ikirego cyayo gifite ishingiro kuko Strong Construction Ltd itigeze ibura ubwishyu bitewe n'uko kuri konti yayo hanyuzeho amafaranga ahagije yakwishyura umwenda yahawe na Banki ya Kigali.

Nyuma yaho, Strong Constructions Ltd yandikiye Ibiro by'Umuvunyi isaba ko urubanza rwasubirwamo ku mpamvu z'akarengane. Nyuma yo gusesengura urubanza, Umuvunyi yandikiye Perezida w'Urukiko rw'Ikirenga asaba ko urwo rubanza rusubirwamo. Perezida w'Urukiko rw'Ikirenga yemeje ko urubanza rusubirwamo ku mpamvu z'akarengane.

Mu iburanisha, Strong Constructions Ltd ivuga ko Urukiko rw'Ikirenga rwirengagije ko ubwishingire bwa Radiant Insurance Company Ltd ari ubwishingire magirirane "Caution Solidaire", kuko yemeye ko izahita yishyura uwo mwenda ikibisabwa, rwirengagiza ndetse ibimenyetso byerekana ko Strong itashoboye kwishyura inguzanyo kubera ko nyir'isoko atashoboye kubona amafaranga, bigatuma inanirwa kuyishyura ku gihe.

Ku kibazo cyo kunanirwa kubona amafaranga «finance», Radiant Insurance Company Ltd yaburanye ivuga ko Strong Constructions Ltd ariyo yafashe umwenda, bityo ko yo yagombaga kwishyura ari uko yananiwe kwishyura, ariko ko yari ifite amafaranga yo kwishyura nk'uko *historique* ya konti ya banki yabyerekanye.

Ku kibazo cy'uko yemeye kuba ubwishingire bwe ari magirirane "Caution solidaire" no kwishyura umwenda uwo mwenda ikibiyisaba, ivuga ko atari ko bimeze, kubera ko amasezerano yagaragazaga ibigomba kubanza kuzuzwa mbere yo kwishyura, harimo no kubanza kwerekana ko amafaranga yanyujijwe kuri konte ya Strong Constructions Ltd atari ahagije kugira ngo yishyure iyo nguzanyo.

Incamake y'icyemezo: 1. Mu masezerano y'ubwishingire magirirane (Caution solidaire), iyo uwafashe umwenda ananiwe kwishyura, uwatanze umwenda afite burenganzira bwo gusaba umwishingizi kwishyura umwenda hatabanje gushakishwa ubwishyu mu mutungo w'uwishingiwe.

2. Umwishingizi utubahirije inshingano zikubiye mu masezerano y'ubwishingizi magirirane bikaza gutera igihombo uwishingiwe, umwishingizi agomba kubitangira indishyi.

Ikirego cyo gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro;

Urubanza rwaciwe n'Urukiko rw'Ikirenga rurahindutse Amagarama aherereye k'uregwa.

Amategeko yashingiweho:

Itegeko Nº 45/2011 ryo kuwa 25/11/2011 rigenga amasezerano, ingingo ya 64 na 137.

Nta manza zifashishijwe.

Inyandiko z'abahanga:

Denis Philippe, Delphine Dehasse, Code Civil, 5 ème edition, Bruylant, 2007, page 287.

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Martin Imbleau, William A. Schabas, Introduction au droit rwandais, Les éditions Ivon Blais Inc, 1999, page 83.

Pierre Voirin, Gilles Goubeaux, Droit civil, Personnes-Famille-Incapacité-Biens-Obligations-Sûretés, Tome 1, 30^{ème} édition, LGDJ, Paris, page 635.

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Strong Constructions Ltd yahawe na Banki ya Kigali inguzanyo ku wa 14/04/2014, ingana na 272,000,000 Frw yo kubaka VIP WING mu Bitaro bya Gisirikare bya Kanombe. Strong Constructions Ltd yahise igirana amasezerano tariki ya 15/04/2014, na Radiant Insurance Company Ltd viswe "Contrat de Cautionnement N° RD 0010CRI1403488" yo kwishingira iyo nguzanyo. Kuri iyo tariki na none, mu nyandiko yiswe "Acte de Cautionnement N° RD 0010CRI1401759/02645". Company Ltd yemeye kwishyurira Insurance Constructions Ltd ivo nguzanyo, mu gihe bizagaragara ko nta mafaranga ahagije yishyuwe aturutse kuri iryo soko yanyujijwe kuri konti vavo N° 010-0323102-28 iri muri Banki ya Kigali kuburyo avamo ubwishyu.
- [2] Strong Constructions Ltd ntiyishyuye umwenda yafashe muri Banki ya Kigali ku gihe cyari giteganyijwe, maze ku wa 13/04/2015 Banki ya Kigali yandikira Radiant Insurance Company Ltd iyimenyesha ko Strong Constructions Ltd itubahirije inshingano zayo zo kwishyura inguzanyo yahawe ingana na 272,000,000 Frw, isaba Radiant Insurance Company Ltd kwishyura ayo mafaranga hashingiwe ku masezerano y'ubwishingire (contrat de cautionnement) yagiranye na Strong Construction Ltd
- [3] Radiant Insurance Company Ltd imaze kubona ubwo busabe, yasabye Banki ya Kigali amakuru ku nguzanyo yahawe Strong Constructions Ltd igamije kureba niba nta mafaranga yishyuwe aturutse ku isoko yari yishingiye ryo kubaka VIP

WING mu Bitaro bya Kanombe, maze ishingiye kuri « historique » ya konti ya Strong Constructions Company Ltd iri muri iyo Banki , isanga haranyujijweho 354.681.513 Frw akomoka kuri iryo soko yiswe « avance de démarrage », yishyuwe mu byiciro bibiri, 300.000.000 Frw yishyuwe ku wa 21/11/2013 na 54.681.513 Frw yishyuwe tariki ya 16/06/2014.

- [4] Imaze kubona ko iyo Konti ya Strong Constructions Ltd yanyujijweho amafaranga, Radiant Insurance Company Ltd yanze kwishyura Banki ya Kigali. Strong Constructions Ltd yahise iregera Urukiko rw'Ubucuruzi rwa Nyarugenge ivuga ko Radiant Insurance Company Ltd itubahirije amasezerano y'ubwishingire bagiranye yo ku wa 15/04/2014.
- [5] Mu rubanza N^o RCOM 00011/2016/TC/NYGE rwaciwe ku wa 05/05/2016, Urukiko rwasanze ibyo Strong Constructions Ltd ivuga ko Radiant Insurance Company Ltd itubahirije amasezerano nta shingiro bifite, kuko ari yo mbere na mbere yagombaga kwishyura umwenda yari yarafashe, kandi ikaba itagaragaza ko yabuze ubwishyu cyangwa indi mpamvu yatumye itishyura, runayitegeka kwishyura Radiant Insurance Company indishyi z'igihembo cy'Avoka n'iz'ikurikiranarubanza zingana na 1.000.000 Frw.
- [6] Strong Constructions Ltd yajuririye Urukiko Rukuru rw'Ubucuruzi, mu rubanza N^O RCOMA 00312/2016/CHC/HCC rwaciwe ku wa 14/10/2016, urwo Rukiko rwemeza ko ubujurire bwayo bufite ishingiro, kuko Radiant Insurance Company Ltd idafite ibimenyetso bifatika bigaragaza ko Strong Constructions Ltd yishyuwe amafaranga y'isoko yishingiye ryo kubaka VIP WING mu Bitaro bya Kanombe, ariko ntiyishyure Banki ya Kigali umwenda wayo, bityo rwemeza ko Radiant Insurance

Company Ltd itubahirije inshingano zayo zikubiye mu masezerano y'ubwishingire. Rwayitegetse kandi gusubiza Strong Constructions Ltd indishyi yishyuye Banki ya Kigali kubera kutishyurira igihe zingana na 84.271.004 Frw, kuyisubiza amafaranga yayo 83.103.377 Frw yafatiriwe na Banki ya Kigali, gutanga 126.000 Frw y'amagarama yatanze ku rwego rwa mbere n'urwa kabiri, no kuyiha 3.000.000 Frw y'ikurikiranarubanza n'igihembo cy'Avoka kuri izo nzego.

- [7] Radiant Insurance Company Ltd yajuririye Urukiko rw'Ikirenga, mu rubanza N^O RCOMAA 00065/2016/SC-RCOMAA 0071/16/CS rwaciwe ku wa 21/06/2017, urwo Rukiko rwemeza ko ubujurire bwa Radiant Insurance Company Ltd bufite ishingiro, ko itagomba kwishyurira Strong Constructions Ltd, kuko itigeze ibura ubwishyu kubera ko byagaragaye ko kuri konti yayo hanyuzeho amafaranga ahagije yakwishyura umwenda yahawe na Banki ya Kigali ariko ntibikore, ruyitegeka guha Radiant Insurance Company Ltd 1.000.000FRW y'ikurikiranarubanza n'igihembo cy'Avoka, ndetse no kuyisubiza amafaranga y'amagarama yatanze mu rubanza angana na 100 000 Frw
- [8] Ku wa 11/09/2017 Strong Constructions Ltd yandikiye Urwego rw'Umuvunyi Mukuru isaba ko urubanza RCOMAA 00065/2016/SC-RCOMAA 0071/16/CS rusubirishwamo ku mpamvu z'akarengane. Nyuma y'isesengura ry'akarengane kavugwa na Strong Constructions Ltd, Umuvunyi Mukuru yasanze Radiant Insurance Company Ltd itarubahirije amasezerano y'ubwishingire yagiranye na Strong Construction Ltd, yandikira Nyakubahwa Perezida w'Urukiko rw'Ikirenga asaba ko urubanza rusubirwamo.

- [9] Perezida w'Urukiko rw'Ikirenga nawe, nyuma y'isesengura ry'urubanza, mu cyemezo cye cyo ku wa 27/06/2019, yemeje ko ikirego cyoherezwa mu Bwanditsi bw'Urukiko kikandikwa mu bitabo byabugenewe, kugira ngo urubanza ruzongere ruburanishwe.
- [10] Urubanza rwaburanishijwe mu ruhame ku wa 8/10/2019, Strong Constructions Ltd ihagarariwe na Me Idahemuka Tharcisse, naho Radiant Insurance Company Ltd iburanirwa na Me Kazungu Jean Bosco, Me RUZINDANA Ignace na Me Twiringiyemungu Joseph, rurapfundikirwa, isomwa ryarwo rishyirwa ku wa 15/11/2019.
- Mu myanzuro yayo ndetse inaburana mu Rukiko, Strong Constructions Ltd ishingira akarengane kayo ku kuba mu rubanza RCOMAA 00065/2016/CS-RCOMAA 0071/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/06/2017, uru Rukiko rwaremeje ko itabuze ubushobozi bwo kwishyura umwenda yahawe na Banki ya Kigali, rwirengagije ibimenyetso bigaragarira buri wese byerekana ko itari ishoboye kwishyura. Kimwe muri ibyo bimenyetso akaba ari uko uwo bagiranye amasezerano yo kubaka VIP WING mu Bitaro bya Gisirikare bya Kanombe, ariwe MINADEF/ RMH, yabuze "financement", bityo imirimo ntiyakorwa uko yari yateguwe bituma nayo idashobora gukora imirimo ku gihe no kwishyurwa ku gihe, ariyo mpamvu Radiant Insurance Company Ltd, nk'umwishingizi wayo yagombaga kuvishvurira. Kuba Radiant Insurance Company Ltd itarishyuriye Strong Construction Ltd, ikaba itarubahiriie amasezerano y'ubwishingire bagiranye, ariyo mpamvu igomba kwirengera indishyi z'igihombo byayiteje.
- [12] Radiant Insurance Company Ltd yo yireguye ivuga ko kuri Konti ya Strong Constructions Ltd hanyuzeho amafaranga

ahagije yakwishyura umwenda yahawe na Banki ya Kigali ariko ntiyishyura, bityo ko itari kuyishyurira itabuze ubushobozi. Ikibazo kiri mu rubanza akaba ari ukumenya niba Radiant Insurance Company Ltd itarubahirije inshingano zayo zikubiye mu masezerano y'ubwishingire yagiranye na Strong Contructions Ltd, byagaragara ko itazubahirije hagasuzumwa niba indishyi z'igihombo Strong Constructions Ltd ivuga ikwiye kuzihabwa.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

- a. Kumenya niba Radiant Insurance Company Ltd itarubahirije amasezerano y'ubwishingire (Acte de cautionnement) yagiranye na Strong Constructions Ltd.
- [13] Me Idahemuka Tharcisse uburanira Strong Constructions Ltd avuga ko akarengane yagiriwe mu rubanza RCOMAA 00065/2016/SC-RCOMAA0071/16/CS kagaragara mu buryo bukurikira :
 - Kuba muri urwo rubanza Urukiko rw'Ikirenga rwaremeje ko Radiant Insurance Company Ltd itagombaga kuyishyurira umwenda wa 272,000,000 Frw yahawe na Banki ya Kigali yishingiye, kuko itari yarabuze ubushobozi bwo kwishyura kubera ko kuri konti yayo hanyujijweho amafaranga ahagije yakwishyura uwo mwenda, rwirengagije ibimenyetso bigaragarira buri wese byemeza ko itari ishoboye kuwishyura, birimo kuba MINADEF/ RMH yarabuze "financement" bikayiviramo kutishyurirwa ku gihe, binatuma imirimo idakorwa uko yari yateguwe.

Kuba Urukiko rw'Ikirenga rwarirengagije ko ingingo ya mbere y'amasezerano (Contrat de cautionnement No RD0010CRI1403488) bagiranye na Radiant Insurance Company Ltd yateganyaga ko yiyemeje kuba "Caution Solidaire", no kwishyura nta yandi mananiza (assumer la garantie irrévocable du payement), naho mu nyandiko yiswe "Acte de cautionnement No RD0010CRI1401759/02645" mu gika cyayo cya 5, ikiyemeza kwishyura Banki ya Kigali ikibisabwa bwa mbere mu nyandiko.

- Kuba Urukiko rwarirengagije inkomoko y'ubwishyu bw'inguzanyo ya 272,000,000 Frw, rukemeza ko kuri Strong Constructions Ltd hanvuzeho va amafaranga ahagije kandi igika cya 5 cy'amasezerano (Acte de Cautionnement) cyarateganyaga ko ubwishyu buzaturuka ku mafaranga azishyurwa kuri fagitire z'isoko rvishingiwe rvo kubaka VIP WING mu Bitaro bya Kanombe, no kuba iyo nguzanyo yaritiranyijwe na "avance de démarrage" kandi yari ifite amasezerano yihariye yiswe "Advance payment guarantee No RD001RC0A1305281" vo ku wa 04/10/2013. yaranayihawe mbere y'uko amasezerano aburanwa abaho, kuko yabayeho tariki ya 15/04/2014, "avance" varatanzwe tariki va 30/10/2013.
- [14] Me Idahemuka Tharcisse avuga ko akarengane kandi gashingiye ku kuba Urukiko rwarirengagije ingingo z'amategeko zikurikira:
 - Ingingo ya 170 CPCCSA yabuzaga umucamanza kurenga imbibi z'icyajuririwe, kuko rwasuzumye amafaranga yose yanyuze kuri Konti ya Strong Construction Ltd

harimo nayo yishyuwe ku yandi masoko, rwirengagije ko icyagibwagaho impaka ari ubwishyu bwa Kanombe Military Hospital bujyanye n'isoko ryo kubaka VIP WING, kandi rwirengagiza ko urubanza rw'ubucuruzi cyangwa rw'imbonezamubano ruba ari urw'ababuranyi ubwabo.

- Ingingo ya 110 y'Itegeko No 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso n'itangwa ryabyo mu manza, iteganya ko kwiyemerera mu rubanza ari amagambo umuburanyi cyangwa umuhagarariye avugira mu rukiko agira ibyo yemera kandi ko ayo magambo atsindisha uyavuze, bityo ko kuba mu masezerano Radiant Insurance Company Ltd yariyemereye kuba « Caution solidaire » igatanga na « garantie irrévocable » yo kwishyura, bitari kwirengagizwa n'Urukiko.
- [15] Me Kazungu Jean Bosco, Me Ruzindana Ignace na Me Twiringiyemungu Joseph baburanira Radiant Insurance Company Ltd basubiza ku ngingo zitangwa na Strong Constructions Ltd mu buryo bukurikira:
 - Constructions Ltd ariyo yafashe inguzanyo muri Banki ya Kigali, akaba ariyo yari "Débuteur Principal", ko Radiant Insurance Company Ltd yagombaga kwishyura ari uko Strong Constructions Ltd yananiwe kwishyura, ariko ko itabuze ubushobozi bwo kwishyura, kuko Banki ya Kigali yagaragaje ko kuri konti yayo hanyuzeho amafaranga arenze kure umwenda yishingiye, kandi ko Banki ya Kigali yiyishyuye umwenda wayo kubera ko Strong Constructions Ltd yari ifite ubwishyu.

- Ku bijyanye no kuba Radiant Insurance Company Ltd yari yaremeye kuba "Caution solidaire" no kwishyura ikibisabwa nta yandi mananiza abayeho, bavuga ko ibyo atari byo, kuko muri ayo masezerano hagaragaramo ibigomba kubanza kubahirizwa mbere y'uko yishyura, harimo kubanza kugaragaza ko konti ya Strong Constructions Ltd iri muri ivo banki vanyuzeho amafaranga adashobora kwishyura inguzanyo yatanzwe. Basobanura ko ibikubiye muri "acte de cautionnement" Strong Constructions Ltd ishingiraho bitayireba, kuko ayo masezerano yakozwe hagati ya Banki ya Kigali na Radiant Insurance Company Ltd, bityo nta wundi muburanyi wayashingiraho arega hashingiwe ku ihame ry'uko amasezerano agira ingaruka ku bayagiranye, akaba rero atareba Strong Construction Ltd, kuko atari bénéficiaire wayo.
- Ku kuba Radiant Insurance Company Ltd yarirengagije inkomoko y'ubwishyu, bavuga ko amafaranga Strong Contructions Ltd yishyuwe, yaba "avance de demarrage", yaba n'andi mafaranga y'ubwishyu yahawe nyuma, yose yagombaga kuvamo ubwishyu, ariyo mpamvu Banki ya Kigali yiyishyuye ku mafaranga yasanze kuri konti ya Strong Construction Ltd.
- [16] Bavuga ko mu ibaruwa ya Banki ya Kigali yo ku wa 14/04/2014 yemerera Strong Construction Ltd umwenda hagaragaramo ibintu byatanzweho ingwate, ari naho Banki ya Kigali yashingiye yiyishyura umwenda wayo. Izo ngwate akaba ari:
 - Hypothèque inscrite de 599.000.000 Frw en 1er rang sur la parcelle No 2276 à Gisozi-Gasabo,

- Assurance incendie couvrant l'immeuble donné en garantie avec avenant transfert d'intérêts en notre faveur et dont l'échéance est fixée au 17/06/2014,
- Caution des associés de 807.800.000Frw na Domiciliation des paiements des divers contrats.
- [17] Bavuga ko hashingiwe kuri izo ngwate cyane cyane kuri "domiciliation des paiements des divers contrats", bigaragara ko Banki ya Kigali yagombaga kwiyishyura ku mafaranga avuye kuri fagitire zishyuwe, yaba adahagije, igasaba Radiant Insurance Company Ltd kwishyura abura hagendewe kuri "Acte de cautionnement", cyangwa igashingira ku biteganywa mu masezerano y'umwenda ikiyishyura ku mafaranga yose anyuze kuri konti hatitawe ku nkomoko yayo, ari nabyo yakoze, bityo ko mu gihe ibikoze ikiyishyura nta nshingano zindi Radiant Insurance Company Ltd yari kuba ifite.
- [18] Ku bijyanye n'ingingo z'amategeko Strong Constructions Ltd ivuga ko zitubahirijwe ababuranira Radiant Insurance Company Ltd basubiza mu buryo bukurikira:
 - Ku ngingo ya 170 CPCCSA iteganya ko umucamanza aca urubanza gusa ku cyajuririwe, bavuga ko mu gika cya 20 cy'urubanza rusabirwa gusubirwamo ku mpamvu z'akarengane, bigaragara ko Urukiko rwasuzumye ubujurire bwa Radiant Insurance Company Ltd rusanga kuri Konti ya Strong Constructions Ltd haranyuzeho amafaranga ahagije yavamo ubwishyu, bityo rukaba rutararenze imbibi z'icyajuririwe kuko yagombaga kwishyura ari uko bigaragaye ko kuri konti ya Strong Constructions Ltd nta mafaranga ahagije yanyuzeho yavamo ubwishyu. Bongeraho ko n'ihame ry'uko mu

manza mbonezamubano n'ubucuruzi urubanza ari urw'ababuranyi, uhagarariye Strong Constructions Ltd avuga, naryo ritakiba mu mategeko, uhubwo ko hakurikijwe amategeko mashya, urubanza rwabaye urw'ababuranyi n'Urukiko; batanga urugero rw'inama ntegurarubanza ikorwa n'Urukiko, n'urw'uko Urukiko rubyibwirije rushobora kujya aho ikiburanwa kiri.

- Ku ngingo ya 110 y'Itegeko N^O 15/2004 yo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, aho Strong Constructions Ltd ivuga ko Radiant Insurance Company Ltd yemeye umwenda, bavuga ko itigeze yemera umwenda, kuko hashingiwe ku ngingo ya 5 n'iya 8 y'amasezerano y'ubwishingire (contrat de cautionnement), Strong Constructions Ltd ariyo yahawe umwenda ikaba ari nayo yagombaga kuwishyura, waramuka wishyuwe na Radiant Insurance Company Ltd ikazayisubiza ibyo yayishyuriye, kandi ko kuba Banki ya Kigali yarishyuwe basanga urubanza ruburanwa nta shingiro (fondement) rufite.

UKO URUKIKO RUBIBONA

[19] Strong Constructions Ltd igaragaza ko yananiwe kwishyura inguzanyo ya 272.000.000 Frw yahawe na Banki ya Kigali kubera kubura ubwishyu ibitewe nuko umushinga wo kubaka VIP WING mu Bitaro bya Kanombe waburiwe "financement", hari n'ibimenyetso bibigaragaza, ariko Radiant Insurance Company Ltd yanga kuyishyurira nkuko yabyemeye mu masezerano y'ubwishingire bagiranye yo ku wa 15/04/2014 (Contrat de Cautionnement no RD0010CRI1403488).

[20] Ku bijyanye no kubura ubwishyu kubera kubura "financement", ibimenyetso biri muri dosiye kandi bigarukwaho n'impande zombi, bigaragaza ko amasezerano yo kubaka VIP WING mu Bitaro bya Kanombe yakozwe hagati ya Strong Constructions Ltd na Rwanda Military Hospital in partnership with Ministry of Health, atashyizwe mu bikorwa mu gihe cyagenwe kubera kubura "financement" ibyo bikaba byaragize ingaruka ku kwishyurirwa imirimo Strong Constructions Ltd yabaga yarangije gukora, akaba ari nabyo byabaye intandaro yo kutubahiriza amasezerano yagiranye na Banki ya Kigali yo kwishyura inguzanyo yayihaye ingana na 272.000.000 Frw.

[21] Muri ibyo bimenyetso harimo ibi bikurikira:

- "Extrait de compte" yatanzwe na Banki ya Kigali igaragaza ko fagitire ya mbere ifite n^o 04/01/023/2013/T/NCB/RHM/MOH yishyuza amafaranga 143.864.240 Frw yatanzwe na Strong Construction Ltd tariki ya 23/05/2014 ndetse na fagitire ya kabiri ifite n^o 05/02/023/2013/T/NCB/RMH/MOH yishyuza 60.751.920 Frw, yatanzwe tariki ya 07/07/2014 zitishyuwe na Kanombe Military Hospital;
- "Extrait de compte" yatanzwe na Banki ya Kigali igaragaza ko kuva amasezerano y'ubwishingire yashyizweho umukono tariki ya 15/04/2014, Ibitaro bya Kanombe byari bimaze kwishyura amafaranga angana na 54.681.513 Frw yishyuwe tariki ya 16/06/2014, 51.484.678 Frw yishyuwe tariki ya 20/03/2015, na 136.123.194 Frw yishyuwe tariki ya 10/12/2015. Usibye 54.681.513 Frw yishyuwe tariki ya 16/06/2014, bigaragara ko andi mafaranga yose yishyuwe igihe

giteganyijwe mu masezerano y'isoko ryo kubaka VIP WING cyararenze, kuko ingingo ya 5 y'ayo masezerano yateganyaga ko imirimo izakorwa mu gihe cy'amezi 15, ayo mezi akaba yaragombaga kurangira tariki ya 15/01/2015, uhereye igihe yashyiriweho umukono n'impande zombi tariki ya 15/10/2013;

- Ibaruwa yo ku wa 16/10/2014 Strong Constructions Ltd yandikiye Umuyobozi w'Ibitaro rya Kanombe yibutsa kwishyura fagitire izo zombi (ifite no 04/01/023/2013/T/NCB/RHM/MOH yishyuza amafaranga angana 143.864.240 Frw na fagitire no 05/02/023/2013/T/NCB/RMH/MOH vishvuza 60.751.920 Frw). Iyo baruwa ikaba igaragaza ko kugeza kuri iyo tariki ya 16/10/2014 yandikiweho, nta fagitire n'imwe ya Strong Constructions Ltd yari yishyuwe;
- Ibaruwa ebyiri, iyo ku wa 20/01/2016 n'iyo ku wa 30/03/2016, zanditswe n'Ubuyobozi bwa Military Hospital busaba Minisitiri w'Ubuzima gukomeza gutera inkunga umushinga wo kubaka VIP WING mu Bitaro bya Kanombe. Birumvikana ko ibyo bitaro byandika izo baruwa byari bifite ikibazo cya "financement" nk'uko bivugwa na Strong Constructions Ltd;
- Ibaruwa yo ku wa 19/02/2015 yanditswe n'Umuyobozi wa Military Hospital asubiza iyanditswe na Strong Constructions Ltd ku wa 18/02/2015 yasabaga kongererwa igihe cyo kurangiza imirimo.
- Muri dosiye nta baruwa n'imwe yigeze yandikwa na Military Hospital igaragaza ko Strong Constructions Ltd ariyo yaba yaradindije imirimo.

- [22] Amasezerano impande zombi zishingiraho muri uru rubanza ari mu byiciro bibiri: amasezerano y'ubwishingire bagiranye yo ku wa 15/04/2014 (Contrat de Cautionnement no RD0010CRI1403488) Radiant Insurance Company Ltd yiyemeza kuzishyurira Strong Constructions Ltd mu gihe izaba yabuze ubwishyu , ndetse n'amasezerano yo ku wa 15/04/2014 yiswe "Acte de Cautionnement RD0010CRI1401759/02645" yakozwe na Radiant Insurance Company Ltd yemerera Banki ya Kigali kuzishyura umwenda wa Strong Constructions Ltd igihe izaba itashoboye kuwishyura.
- [23] Ku byerekeye ibyo Radiant Insurance Company Ltd ivuga ko Strong Constructions Ltd itakwitwaza amasezerano ya "Acte de Cautionnement RD0010CRI1401759/02645" yakozwe na Radiant Insurance Company Ltd yonyine, kubera ko atayireba, Urukiko rurasanga avo masezerano ubwayo atari kubaho mu gihe nta masezerano y'ibanze y'inguzanyo ari hagati ya Banki ya Kigali na Strong Construtions Ltd, ari nayo amasezerano y'ubwishingire (Contrat de Cautionnement) ashingiyeho. Aya masezerano "Acte de cautionnement" ubwayo ntiyihagije, kuba varabaveho masezerano y'ibanze ashingive ku Constructions Ltd ifitemo inyungu, Radiant Insurance Company Ltd ntaho yahera iyuga ko Strong Constructions Ltd itayafitemo inyungu cyangwa atayireba, kuko byose bishingiye ku nguzanyo yahawe na Banki ya Kigali. Naho ibyo ivuga ko Banki ya Kigali ariyo yagombaga kurega kuko ariyo irebwa bwa mbere na "Acte de Cautionnement", Urukiko rurasanga kuba itarareze cyangwa yarareze ikaza kureka ikirego, nk'uko bivugwa n'abahagarariye Radiant Insurance Company Ltd, ibyo bitavanaho uburenganzira bwa Strong Constructions Ltd bwo kuregera inkiko mu gihe ibona ko amasezerano yagiranye na Radiant Insurance Company Ltd atubahirijwe.

[24] Ku bijyanye n'amasezerano y'ubwishingire muri rusange, Abahanga mu mategeko bavuga ko umuntu wese wemeye kwishingira undi aba yemeye kumusimbura mu nshingano ze afitiye abandi mu gihe we adashoboye kuzubahiriza [...celui qui se rend caution d'une obligation, se soumet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui même...]¹.

Abahanga mategeko batandukanya mu ubwishingire busanzwe (cautionnement simple) n'ubwishingire magirirane (cautionnement solidaire) kandi bakavuga ko ingaruka zabwo zitandukanye. Bemeza ko mu bwishingire busanzwe. Umwishingizi aba afite uburenganzira bwo kubanza gukurikirana ubwishyu mu mutungo w'uwafashe umwenda, byagaragara ko atabishoboye akaba aribwo amwishyurira [...le cautionnement est simple, lorsque la caution dispose d'un bénéfice de discussion. Elle peut contraindre, à certaines conditions, le créancier à discuter d'abord les biens du débiteur, c'est-à-dire à établir son insolvabilité...]. Naho ku bwishingire magirirane bakavuga ko nta burenganzira Umwishingizi aba afite bwo kubanza gusaba ko ubwishyu bubanza gushakwa mu mutungo w'uwishingiwe ... [la caution solidaire, en effet, ne dispose pas de bénéfice de discussion,...la caution est exposée au paiement de la dette principale lorsque, celle-ci, est exigible...]².

[26] Urukiko rurasanga mu ngingo ya mbere y'amasezerano Radiant Insurance Company Ltd yagiranye na Stong Constructions Ltd (contrat de cautionnement no

¹ Denis Philippe, Delphine Dehasse, Code Civil, 5 ème edition, Bruylant, 2007, page 287.

² Jérôme François, Droit civil, les sûretés personnelles, Tome VIII, Economica, Paris, 2004, page 33[51]

RD0010CRI1403488 yo ku wa 15/04/2014), Radiant Insurance Company Ltd yaremeye ku buryo bweruye kuba Umwishingizi magirirane (Caution solidaire) wa Strong Constructions Ltd , muri aya magambo [....déclare se porter caution solidaire de Strong Construction Ltd envers Bank of Kigali Ltd, et assumer la garantie irrévocable du paiement d'un montant de 272.000.000 Frw (deux cent soixante-douze millions de Francs Rwandais) représentant la garantie de bonne exécution du contrat ci-haut cité ..]. Hakurikijwe iyi ngingo n'ibisobanuro by'Abahanga, Urukiko rurasanga kugirango umwenda wa Banki ya Kigali wishyurwe, hataragombaga kubanza gushakirwa ubwishyu mu mutungo bwite wa Strong Construction Ltd.

Urukiko rurasanga kandi muri "Acte de cautionnement" [27] yakozwe na Radiant Insurance Company Ltd yonyine, n'ubwo ari amasezerano ruhanderumwe (contrat unilatéral)3, yarihaye inshingano zitaziguye zo kwishyurira Strong Constructions Ltd umwenda yahawe na Banki ya Kigali, ibi bikaba byari bigamije kuyongerera icyizere n'amahirwe byo kwishyura mu gihe Strong Constructions Ltd izaba yananiwe kwishyura, kubera ko yemereye Banki ya Kigali ko mu gihe izaba itagishoboye kuyishyura, izahita yishyura uwo mwenda ikibiyisaba. Ibi ni nabyo byemezwa n'Abahanga mu mategeko bavuga ko kwiyemeza kwishyura bwa mbere ukibisabwa, ari uburyo bworohereza uberewemo umwenda kwishyurwa bitamugoye kuko asa n'uba afite abagomba kumwishyura babiri, kandi ko uwemeye muri ubwo buryo aba yihaye inshingano zitaziguye k'uberewemo umwenda [..., la garantie à première demande renforce la situation du créancier en lui donnant deux débiteurs au lieu d'un seul. Tandis que le cautionnement est une obligation

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³ Martin Imbleau, William A. Schabas, Introduction au droit rwandais, Les éditions Ivon Blais Inc, 1999, page 83.

accessoire, la garantie à première demande est une obligation autonome, le garant s'engageant, non pas pour autrui, mais à l'occasion des relations contractuelles d'autrui, (...) il promet non pas d'exécuter l'obligation du débiteur principal défaillant, mais de verser sur simple réclamation du créancier une somme déterminée...]⁴.

Ku biyanye n'inkomoko y'ubwishyu, amasezerano yiswe "Acte de Cautionnement" agaragaza ko inkomoko y'ubwishyu ari amafaranga akomoka ku isoko ryo kubaka VIP WING ya Kanombe Military Hospital, ahavuga ko Radiant Insurance Company Ltd izishyura Banki ya Kigali nyuma yo kugaragaza ko amafaranga ya fagitiri yishyuwe yageze kuri konti ya Strong Constructions Ltd iri muri Banki ya Kigali kuri iryo soko ryavuzwe, adahagije mu kwishyura umwenda. Aya masezerano abivuga muri aya magambo : « Et nous nous engageons à rembourser BANK OF KIGALI, dès réception de sa demande écrite, montrant que le Contractant (Strong Construction Ltd) ne se conforme pas aux stipulations du contrat signé entre lui et Bank of Kigali, la somme ci- dessus stipulée (272.000.000 FRW) après avoir prouvé que le(s) paiement (s) au compte 040-0323102-28 ouvert à la BANK OF KIGALI au nom de Strong Construction Ltd, pour le marché ci-haut mentionné, n'a pas été suffisant pour le remboursement du crédit contracté ».

[29] Ibyerekeye inkomoko y'ubwishyu ubisanga no mu ibaruwa yo ku wa 14/05/2015 Banki ya Kigali yanditse isubiza iyo Radiant Insurance Company Ltd yanditse isaba amakuru kuri konti ya Strong Constructions Ltd, aho Banki ya Kigali yari yarayimenyesheje ko kuri konti ya Strong Constructions Ltd

⁴ Pierre Voirin, Gilles Goubeaux, Droit civil, Personnes-Famille-Incapacité-Biens-Obligations-Sûretés, Tome 1, 30^{ème} édition, LGDJ, Paris, page 635.

hanyuzeho amafaranga, ariko ko adakomoka ku isoko yishingiye; no mu ibaruwa yo ku wa 13/09/2018 yandikiye Umuvunyi Mukuru isobanura ko ubwishyu bw'inguzanyo yahawe Strong Constructions Ltd bwagombaga kuva gusa ku bwishyu bw'isoko ryo kubaka VIP WING mu Bitaro bya Kanombe.

Urukiko rurasanga ibyo ababuranira Radiant Insurance [30] Company Ltd bavuga ko hagombaga kurebwa izindi ngwate yatanze ifata inguzanyo bitahabwa agaciro kubera ko hashingiwe kuri "Acte de Cautionnement RD0010CRI1401759/02645" cyane cyane mu gika cyayo cya 5, Radiant Insurance Company Ltd yagombaga kwishyurira Strong Constructions Ltd ikibisabwa na Banki ya Kigali hatabanje kurebwa inzindi ngwate, kandi n'Abahanga mu by'amategeko bakaba bavuga ko iyo ari amasezerano y'ubwishingire magirirane (caution solidaire) ari nayo Radiant Insurance Company yakoreye Strong Constructions Ltd, nta burenganzira Umwishingizi aba afite bwo kubanza gusaba ko ubwishyu bubanza gushakwa mu mutungo w'uwishingiwe ... [la caution solidaire, en effet, ne dispose pas de bénéfice de discussion,...la caution est exposée au paiement de la dette principale lorsque, celle-ci, est exigible...]⁵.

[31] Urukiko rurasanga kandi ukurikije imiterere y'ubwishingizi ubwayo "garantie de bonne exécution", mu gihe ikibazo cyateye ukutishyura ari umushinga utarakozwe uko biteganijwe kubera ukubura "financement" impamvu idaturutse kuri Strong Constructions Ltd, ndetse akaba ari n'impamvu itabujijwe mu ngingo ya 4 y'amasezerano y'ubwishingizi N° RD0010CRI1403488, abahagarariye Radiant Insurance Company Ltd ntaho bahera bavuga ko hagombaga guherwa ku zindi ngwate.

⁵ Jérôme François, Droit civil, Ibidem, page 33

- [32] Ku bijyanye no kuba harabayeho kwitiranya inguzanyo ya" avance de démarrage" n'inguzanyo ya 272.000.000 Frw zahawe Strong Constructions Ltd, Urukiko rurasanga muri dosiye hagaragaramo amasezerano y'ubwishingire abiri yakozwe na Radiant Insurance Company ku bw'inyungu za Strong Constructions Ltd, ariyo: Amasezerano yo ku wa 04/10/2013 viswe "Advance Payement Security/Advance payment guarantee RD001RCOA1305281"; n'Amasezerano yo viswe "Contrat cautionnement 15/04/2014 de No RD0010CRI1403488". N'ubwo ayo masezerano yombi arebana no kubaka VIP WING mu Bitaro bya Kanombe, Urukiko rurasanga atandukanye mu miterere yayo, ku gihe yakorewe, ku cyo yari agamije, no ku ngano y'amafaranga yishingiwe, bivuze ko inguzanyo ashingiyeho zigomba gutandukanywa, bityo ibyo abahagarariye Radiant Insurance Company Ltd bavuga ko yagombaga kubanza kuvamo ubwishyu bikaba bitahabwa ishingiro.
- Urukiko rurasanga kandi, nk'uko bigaragara mu gika cya [33] "Acte Cautionnement gatanu cya de RD0010CRI1401759/02645", kimwe mu byo Radiant Insurance Company Ltd yagombaga gushingiraho mbere yo kwishyurira Strong Constructions Ltd ari uko bigaragaye ko kuri konti yayo yafunguwe muri Banki ya Kigali, nta mafaranga ahagije yayinyujijweho yakwishyura inguzanyo ya 272.000.000 Frw aturutse ku bwishyu bw'isoko yishingiye. Rukaba rusanga nta bundi buryo Radiant Insurance Company Ltd yari kumenya niba Strong Constructions Ltd yarishyuwe amafaranga ahagije yavamo ubwishyu aturutse ku isoko yishingiye ryo kubaka VIP WING mu Bitaro bya Kanombe, hadasuzumwe amafaranga yose yanyujijwe kuri konti yayo, kuba Urukiko rwarabisuzumye rukaba nta makosa rwakoze ryo kurenga imbibi z'icyajuririwe.

- Urukiko rurasanga rero kuba Radiant Insurance Company Ltd mu masezerano y'ubwishingire yo ku wa 15/04/2014 (Contrat de Cautionnement no RD0010CRI1403488), varemeve kuba umwishingizi magirirane "Caution Solidaire" ku mwenda yari ifitiye Banki ya Kigali , ndetse no mu masezerano (Acte de Cautionnement RD0010CRI1401759/02645) ikemerera Banki ya Kigali ko mu gihe Strong Constructions Ltd itagishoboye kuvishvura, izahita vishvura uwo mwenda ikibivisaba, Radiant kuyishyurira Company Ltd yaragombaga Insurance nk'umwishingizi wayo, cyane cyane ko mu ibaruwa yayo yo ku wa 4/05/2015 yabwiye Strong Constructions Ltd ko niramuka iyishyuriye amafaranga yose azahita asubizwa Radiant Insurance Company Ltd.
- [35] Urukiko rurasanga kandi, kuba mu rubanza RCOMAA 00065/2016/SC-RCOMAA 0071/16/CS haremejwe ko Radiant Insurance Company Ltd itishyurira Strong Constructions Ltd, kubera ko ifite ubwishyu kuko Historique ya Banki yagaragazaga ko hanyuzeho amafaranga menshi arenze kure ay'umwenda, harabayeho ikosa ryo kwitiranya inkomoko y'ubwishyu, kuko amafaranga yandi Strong Constructions Ltd yishyuwe aturutse ku yandi masoko atarebwaga n'ubwo bwishyu, kuko buri soko riba rifite uko ricungwa kubera ko bidakozwe gutyo, imirimo ikadindira cyangwa se ntikorwe, byateza ikindi gihombo.
- [36] Urukiko rurasanga na none kuba mu rubanza RCOMAA 00065/2016/SC-RCOMAA 0071/16/CS rusabirwa gusubirishwamo ku mpamvu z'akarengane, Urukiko rwaremeje ko umwenda wishyurwa ku mafaranga ayariyo yose yanyuze kuri konti ya Strong Constructions Ltd, habaye gushakira ubwishyu ku mutungo bwite wayo, aho kubushakira ku mafaranga akomoka ku isoko ryo kubaka VIP Wing mu Bitaro bya Kanombe

iyo amasezerano y'ubwishingire ari magirirane, iri rikaba ari ikosa ryateye Strong Constructions Ltd akarengane.

[37] Urukiko rw'Ikirenga rushingiye ku bisobanuro byatanzwe no ku ngingo ya 64 y' Itegeko n°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano iteganya ko amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayagiranye, rurasanga kuba Radiant Insurance Company Ltd yaranze kwishyurira Strong Constructions Ltd itarubahirije amasezerano y'ubwishingire bagiranye tariki ya 15/04/2014, Urubanza No RCOMAA 00065/2016/CS-RCOMAAA0071/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa rugaragaramo akarengane, rugomba 21/06/2017 rukaba guhinduka.

b. Kumenya niba indishyi zisabwa na Strong Construction Ltd zifite ishingiro

- [38] Me IDAHEMUKA avuga ko Strong Constructions Ltd ari mu manza zabanje ndetse no muri uru rubanza itaregera ubwishyu bw'umwenda kuko Banki ya Kigali yishyuwe; ahubwo iregera inyungu n'ibihano by'ubukererwe bingana na 84.271.004 Frw yaciwe biturutse ku kwishyura ikererewe, nyuma y'uko Radiant Insurance Company Ltd yanze kwishyura, ndetse no gusubizwa amafaranga yayo yafatiriwe agizwe na 52.598.296 Frw aturutse ku masezerano y'isoko rya "mechanization RADA" na 30.505.081 Frw yafatiriwe yishyuwe na OT, yose hamwe angana 83.103.337 Frw, iryo fatira rikaba ryaratumye itubahiriza andi masezerano yari ifite ku yandi masoko.
- [39] Avuga ko amasezerano Strong Constructions Ltd yagiranye na Kanombe Military Hospital yagiye yongerwa ariko bidaturutse kuri yo, ahubwo ari ikibazo cyaturutse ku rwego rwa

Leta rwabuze "financement", kandi ko amasezerano hagati yayo na Radiant Insurance Company Ltd, n'amasezerano hagati ya Banki ya Kigali na Radiant Insurance Company Ltd yo atigeze ahinduka. Avuga ko ayo masezerano yose yari afite igihe cy'umwaka, kandi ko muri uwo mwaka w'ubwishingire Banki ya Kigali itigeze yishyurwa, ariyo mpamvu Strong Constructions Ltd yaciwe ibihano by'ubukererwe.

- [40] Ku bijyanye n'inyungu n'ibihano by'ubukererwe Strong Constructions Ltd iregera, Me Kazungu Jean Bosco, Me Twiringiyemungu Joseph na Me RUZINDANA Ignace bahagarariye Radiant Insurance Company Ltd, bavuga ko izo nyungu n'ibihano by'ubukererwe bitareba Radiant Insurance Company Ltd, kuko iyo Banki ya Kigali isanga itarubahirije amasezerano y'ubwishingire bagiranye (Acte de cautionnement) ariyo yari kurega, kuko hashingiwe ku ihame ry'uko amasezerano agira ingaruka ku bayagiranye, nta wundi muntu washoboraga kuyitwaza ngo arege usibye yo, kandi ko Banki ya Kigali yareze Radiant Insurance Company Ltd mu Rukiko rw'Ubucuruzi rwa Nyarugenge, ariko imaze kubona Strong Constructions Ltd yishyuye ireka icyo kirego.
- [41] Bavuga ko basanga uwagombaga kuregwa inyungu n'ibihano by'ubukererwe ari Banki ya Kigali kuko yemeye ko amafaranga abyara inyungu z'ubukererwe kandi yari ifite ubwishyu, kandi ko kugeza ubu Banki ya Kigali nta kibazo ifite kubera ko yishyuwe, ko na Strong Constructions Ltd nta kibazo yagombye kugira kuko yivanyeho inshingano yishyura. Basoza bavuga ko amasezerano hagati ya Strong Constructions Ltd na Kanombe Military Hospital yahindutse, kandi ko impinduka zabaye muri ayo masezerano Radiant Insurance Company Ltd itazimenyeshejwe, ndetse ko itagombaga kuzishingira.

UKO URUKIKO RUBIBONA

[42] Ingingo ya 137 y' Itegeko n°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano iteganya ko uruhande rwarenganyijwe rufite uburenganzira bwo kubona indishyi zitanzwe n'urundi ruhande rutubahirije ibisabwa mu masezerano, keretse iyo ikirego kigamije kubona indishyi cyahagaritswe cyangwa cyavuyeho.

[43] Urukiko rurasanga ibyo abahagarariye Radiant Insurance Company Ltd bavuga ko Strong Constructions Ltd itashingira ku masezerano yakozwe hagati ya Radiant Insurance Company Ltd na Banki ya Kigali ngo iregere indishyi bitahabwa agaciro, kuko uretse n'uko ayo masezerano "Acte de Cautionnement noRD0010CRI1401759/02645" ari amasezerano ruhanderumwe (unilatéral), yashyizweho umukono na Radiant Insurance Company Ltd yonyine yiyemeza kuzishyura Banki ya Kigali umwenda wa Strong Constructions Ltd mu izina ryayo, 6 ayo masezerano yabayeho ashingiye ku masezerano yandi yakozwe hagati ya Strong Constructions Ltd na Radiant Insurance Company Ltd , kandi akorwa mu nyungu zayo nk'uko byasobanuwe haruguru.

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^{6 ...«} Et nous nous engageons à rembourser BANK OF KIGALI, dès réception de sa demande écrite, montrant que le Contractant (Strong Construction Ltd) ne se conforme pas aux stipulations du contrat signé entre lui et BANK OF KIGALI, la somme ci-dessus stipulée (272.000.000 FRW) après avoir prouvé que le(s) paiement au compte 040-0323102-28 ouvert à la BANK OF KIGALI au nom de Strong Construction Ltd, pour le marché ci-haut mentionné, n'a pas été suffisant pour le remboursement du crédit contracté ».

- [44] Urukiko rurasanga kandi niba Strong Constructions Ltd yarishyuye inyungu z'ubukererwe itagombaga kwishyura iyo Radiant Insurance Company Ltd yubahiriza amasezerano bagiranye, ikaba arizo isaba gusubizwa, ntaho Radiant Insurance Company Ltd yahera ivuga ko idafite uburenganzira bwo kuziregera.
- Urukiko rurasanga kuba Radiant Insurance Company Ltd [45] itarubarije inshingano zavo zikubiye mu masezerano y'ubwishingizi yagiranye na Strong Constructions Ltd nk'uko byagaragajwe mu bika bibanza, hari igihombo byayiteye harimo kuba hari inyungu z'ubukererwe zingana na 84.271.004 Frw yaciwe, kuzishyura bikaba byaratumye itubahiriza inshingano zayo zikubiye mu yandi masezerano yari ifitanye n'abandi bantu, nk'uko bisobanurwa na Me Idahemuka Tharcisse uyihagarariye, bityo Radiant Insurance Company Ltd ikaba igomba kubitangira indishyi.
- [46] Urukiko rurasanga rero, rushingiye ku ngingo ya 137 y'Itegeko n°45/2011 ryo ku wa 25/11/2011 ryavuzwe haruguru, Radiant Insurance Company Ltd igomba guha Strong Constructions Ltd amafaranga y'indishyi ahwanye n'inyungu z'ubukererwe yaciwe na Banki ya Kigali angana na 84.271.004 Frw
- [47] Ku bijyanye n'amafaranga 83.103.337Frw Strong Constructions Ltd ivuga ko yafatiriwe na Banki ya Kigali, ikaba isaba kuyasubizwa na Radiant Insurance Company Ltd, kubera ko iryo fatira ryatumye itubahiriza andi masezerano yari ifite ku yandi masoko, Urukiko rurasanga itayasubizwa, kuko itashoboye kugaragariza Urukiko ko atari mu yagabanyije umwenda yari ifitiye iyo Banki.

III. ICYEMEZO CY'URUKIKO

- [48] Rwemeye kwakira ikirego cyo gusubirishamo ku mpamvu z'akarengane urubanza No RCOMAA 00065/2016/CS-RCOMAAA0071/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/06/2017, rugisuzumye rusanga gifite ishingiro;
- [49] Rwemeje ko Radiant Insurance Company Ltd itubahije amasezerano y'ubwishingire yagiranye na Strong Constructions Ltd ku wa 15/04/2014;
- [50] Rwemeje ko urubanza N° RCOMAA 00065/2016/CS-RCOMAA0071/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/06/2017 ruhindutse;
- [51] Rutegetse Radiant Insurance Company Ltd guha Strong Constructions Ltd 84.271.004 Frw y'indishyi ahwanye n'inyungu z'ubukererwe yaciwe na Banki ya Kigali;
- [52] Rutegetse Radiant Insurance Company Ltd guha Strong Constructions Ltd amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka angana na 3.000.000 Frw na 126.000 Frw y'ingwate y'amagarama yari yagenewe n'Urukiko Rukuru rw'Ubucuruzi.

IMANZA NSHINJACYAHA

UBUSHINJACYAHA v. GATABAZI

[Rwanda URUKIKO RW'IKIRENGA – RPA 0263/12/CS (Hatangimbabazi, P.J., Gakwaya na Karimunda) 20 Gicurasi 2016]

Amategeko agenga ibimenyetso — Ibimenyetso mu manza nshinjabyaha — Icyaha cy'ubwicanyi — Mu manza z'ubwicanyi, gutera urupfu "to cause the death" bisobanuye kurutera ku gihe n'ahantu nyakwigendera yapfiriye — Ntawugomba guhamwa n'icyaha hashingiwe ku gukeka gusa ko ariwe wari ufite inyungu mu rupfu ariko nta kimenyetso kimuhamya ko ariwe wishe — Uregwa ntabwo yahamwa n'icyaha hashingiye gusa ku kuba byari gushoboka ko agikora, ahubwo icyo gihe, uko gukekeranya kuramurengera akagirwa umwere.

Incamake y'ikibazo: Ubushinjacyaha bwareze Gatabazi n'undi mu Rukiko Rukuru bakurikiranyweho icyaha cyo guhotora Mukakabera, umugore wa Gatabazi. Mu kuburana kwabo abaregwa baburanye bahakana icyaha. Urwo Rukiko rwasanze Gatabazi ahamwa n'icyaha rumuhanisha igifungo cya burundu, naho mugenzi we, rusanga hari ugushidikanya maze rwemeza ko ari umwere.

Gatabazi Félicien ntiyishimiye icyo cyemezo ajuririra mu Rukiko rw'Ikirenga.avuga ko yahamijwe icyaha cyo kwica umugore we urukiko rushingiye ku kuba yarasabye umugore we gutaha kare ava mu kabari, nyamara icyo atari ikimenyetso cy'uko yamwishe ahubwo ari ikigaragaza ko yagiraga ngo atagira icyo aba, kandi ko ibyo bene Se bamushinja ko yabasabye kugenzura ubusambanyi bw'umugore we n'uwo baregwanaga n'uko yashyinguye nyakwigendera hutihuti yanga ko apimwa

hakamenyekana icya mwishe ari ibinyoma, asoza avuga ko nta sano riri hagati y'urupfu rw'umugorewe na we.

Ubushinjacyaha buvuga ko nyakwigendera yishwe n'umugabo we wamufuhiye ubwo uwo bareganaga yamusomeje ku nzoga kandi ko adahakana ko yafuhiye umugore we kuko yabiganirije bakuru be bamushinja ko yabasabye kumucungira umugore we ngo barebe ko adasambana n'uwo mugabo naho iby'uko muganga atagaragaje icyamwishe nta gitangaza kirimo mu gihe umurambo wapimwe nyuma y'iminsi itandatu ushyinguwe. Busoza buvuga ko nubwo ntawamubonnye amwica ariko kuba nyakwidendera yarasomejwe ku nzoga n'umugabo uwajuriye yakekaga ko amusambanya, bugacya yapfuye bihagije kumukeka kuko ariwe wari ufite inyungu muri urwo rupfu.

Incamake y'icyemezo: 1. Ntawugomba guhamwa n'icyaha hashingiwe ku gukeka gusa ko ariwe wari ufite inyungu mu rupfu mu gihe nta kimenyetso kimuhamya ko ariwe wishe.

- 2. Mu manza z'ubwicyanyi, gutera urupfu "to cause the death" bisobanuye kurutera ku gihe n'ahantu nyakwigendera yapfiriye. Nubwo uwajuriye yagaragaje imyitwarire igayitse nyuma y'urupfu rwa nyakwigendera yukwanga kumenya amakuru y'uwamutelefonye bwa nyuma cyangwa akavuga ko nta mafaranga afite yo gupimisha umurambo mbere y'uko ushyingurwa, si ikimenyetso kimuhamya icyaha kuko itagaragaza ko afite uruhare mu rupfu rwa nyakwigendera.
- 3. Uregwa tabwo yahamwa n'icyaha hashingiye gusa ku kuba byari gushoboka ko agikora, ahubwo icyo gihe, uko gukekeranya kuramurengera akagirwa umwere, bityo Uwajuriye ntabwo yahamwa n'icyaha hashingiwe gusa ku kuba yarashoboraga kugikora.

Uwajuriye n'umwere ku cyaha cy'ubuhotozi yari akurikiranweho.

Amategeko yashingiweho:

Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo 119 Itegeko N° 30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha (ryakoreshwaga icyo gihe), ingingo ya 165

Inyandiko z'abahanga:

CR Snyman, Criminal Law, Durban, Lexis-Nexis, 2002, P. 75. Nyabirungu mwene Songa, Traité de droit pénal Congolais, Kinshasa, Editions Universitaires, 2007, P. 321.

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Uru rubanza rwatangiriye mu Rukiko Rukuru, Urugereko rwa Rusizi, Gatabazi Félicien na Kanyarukiga Jean-Pierre baregwa kuba mu mugoroba wo ku wa 26/05/2011 barahotoye Mukakabera Donata umugore wa Gatabazi Félicien basangiraga mu kabari ariko akabatanga gutaha, akaboneka mu gitondo cyo ku wa 26/05/2011 yishwe, umutwe we ucuramye mu mugezi wa Kadasomwa. Gatabazi Félicien na Kanyarukiga Jean-Pierre baburanye bahakana icyaha.
- [2] Mu rubanza no RP 0015/12/HC/RSZK rwaciwe ku wa 31/05/2012, Urukiko rwasanze hari ibimenyetso bihamya GatabazI Félicien icyaha akurikiranweho, rwemeza ko ari we

wiyiciye umugore amuziza kumukekaho ubusambanyi, rumuhanisha igifungo cya burundu, rumutegeka no kwishyura amagarama y'urubanza. Naho kuri Kanyarukiga Jean-Pierre, Urukiko rwasanze hari ugushidikanya ku bimenyetso Ubushinjacyaha bushingiraho, rwemeza ko ari umwere.

- [3] Gatabazi Félicien ntiyishimiye icyo cyemezo ajuririra mu Rukiko rw'Ikirenga.
- [4] Iburanisha mu ruhame ryashizwe ku wa 07/03/2016, uwo munsi Gatabazi Félicien yitaba yunganiwe na Me Hakizimana martin na me Rwigema Vincent naho ubushinjacyaha buhagarariwe na Munyaneza Nkwaya Eric, Umushinjacyaha ku rwego rw'Igihugu. Abunganira Gatabazi Félicien bamenyesheje Urukiko ko batabonye umwanya wo gusoma dosiye no kuganira n'uwo bunganira basaba ko urubanza rwimurwa kugirango babone igihe cyo kwitegura. Iburanisha ryimuriwe ku wa 18/04/2016.
- [5] Uwo munsi ugeze, iburanisha ryabereye mu ruhame, Gatabazi Félicien yunganiwe na Me Hakizimana Martin naho Ubushinjacyaha buhagarariwe na Munyaneza Nkwaya Eric, Umushinjacyaha ku rwego rw'Igihugu.

II. IKIBAZO KIGIZE URU RUBANZA N'ISESENGURWA RYACYO

Kumenya niba hari ibimenyetso bihamya Gatabazi Félicien icyaha akurikiranweho.

[6] Gatabazi Félicien avuga ko yajurijwe n'uko Urukiko Rukuru rwamuhamije icyaha ku mpamvu z'akarengane, ko

ntacyo yapfaga n'umugore we kuburyo yamuhotora kandi ko iyo aba yarabikoze yari kubyemera, akabisabira imbabazi. Asobanura ko we yabaga ku kabari, nyakwigendera apfa we yagiye kurangura inzoga kuko ariyo gahunda yari yararanye, bamuhuruje asanga Mukakabera Donata yaguye mu mugezi acuramye, inzoga zamuciye mu kanwa no mu mazuru, bigaragaza ko yishwe n'inzoga kuko muganga yamusuzumye akemeza ko nta kintu bamukubise. Asobanura ko bamushyinguye umuryango we uhari, babiherewe uburenganzira n'Ubuyobozi ndetse hari n'icyemezo cyatanzwe na Polisi, ariko ko icyo cyemezo cyaje guhira muri Gereza ya Muhanga.

- Avuga kandi ko ibyo bene Se bitwa Riberakurora na [7] Bavugirije bamushinja ko yabasabye kugenzura ubusambanyi bw'umugore we na Kanyarukiga Jean-Pierre, yabacecekesheje bagive kumubwira amakuru y'umuntu telefonye wa nyakwigendera bwa nyuma cyangwa se ko yashinguye nyakwigendera hutihuti yanga ko apimwa hakamenyekana icya mwishe ari ibinyoma bahimbye bagamije kumuheza mu munyororo kugirango bigarurire amasambu basanzwe bapfa. Asoza asaba uru Rukiko kumurenganura akagirwa umwere kuko yahamijwe icyaha atakoze.
- [8] Me Hakizimana Martin avuga ko Urukiko rwahamije Gatabazi Félicien kwica umugore we rushingiye ku kuba yarasabye umugore we gutaha kare ava mu kabari, nyamara icyo atari ikimenyetso cy'uko yamwishe ahubwo ari ikigaragaza ko yagiraga ngo atagira icyo aba, rwongera gushingira ku kuba bwarakeye akajya kurangura inzoga kandi umugore we yapfuye, rwirengagiza ko akabari katabaga mu rugo aricyo cyatumaga ataha rimwe na rimwe, uwo munsi azinduka mu rukerera ajya kurangura atazi ko umugore we yapfuye kuko iyo aba afite icyo

yishinja yari kuba hafi ndetse agatabara mu ba mbere kugirango asibanganye ibimenyetso, ahandi rushingira ku kuba yarashyinguye nyakwigendera atamupimishije ngo hamenyekane icyamwishe nyamara byaratangiwe uburengenzira n'Ubuyobozi bw'Inzego z'Ibanze hamwe na Polisi yari yabimuhereye icyemezo cyahiriye muri Gereza ya Muhanga, ibyo bikaba bitari gukorwa iyo haba hari ugukeka ko urupfu rukomoka ku cyaha.

- Me Hakizimana Martin avuga kandi ko Urukiko rwongeve gushingira ku kuba Riberakurora na Bavugirije baravuze ko bashatse kubwira Gatabazi Félicien uwatelefonye umugore we bwa nyuma akabacecekesha no kuba ariwe wabatelefonye muri iryo joro umugore we apfamo, nyamara ayo ari amagambo adafite ikindi kimenyetso kiyashimangira cyane cyane ko nta mpamvu yari gutuma abacecekesha mu gihe Ubuyobozi na Polisi bari aho, byose bigaragaza ko Gatabazi Félicien yahamijwe icyaha hashingiwe ku kinyoma cya Kanvarukiga Jean-Pierre ubundi utaragombaga kubazwa muri uru rubanza kuko nawe yakekwagaho icyaha ariko naho abarijwe ntiyasobanura aho yagejeje nyakwigendera kandi ari we baherukanaga bwa nyuma, no ku kagambane ka bene Se bashaka kumuhuguza isambu ye ari nacyo cyatumye bataburura umurambo ngo upimwe kandi warashinguwe bahari ariko naho upimiwe muganga kwerekana icvishe nta shobore nyakwigendera.
- [10] Asoza avuga ko nta sano riri hagati y'urupfu rwa Mukakabera Donata na Gatabazi Félicien kandi ko iyo uyu aba yarakoze icyaha ntacyari kumubuza kucyemera kuko imyaka irindwi amaze muri gereza yari gutuma amenya ububi bwacyo, ariko ko yanze kwigerekaho amaraso atamennye, akaba asaba uru

Rukiko kwemeza ko nta bimenyetso bihamya Gatabazi Félicien icyaha akurikiranweho akagirwa umwere.

- [11] Uhagarariye Ubushinjacyaha avuga ko Mukakabera Donata yishwe n'umugabo we Gatabazi Félicien wamufuhiye Kanyarukiga Jean Pierre amusomeje ku nzoga. Asobanura ko Gatabazi Félicien adahakana ko yafuhiye umugore we kuko yabiganirije bakuru be bamushinja ko yabasabye kumucungira umugore we ngo barebe ko adasambana na Kanyarukiga Jean-Pierre kandi ko kugeza ubu nta kimenyetso atanga cy'ibyo apfa nabo, bigaragaza ko nubwo Kanyarukiga Jean-Pierre ari we ntandaro y'urupfu rwa nyakwigendera atari we wamwishe, ndetse n'ibyo gatabazi Félicien aburanisha ko yahawe uburengenzira bwo gushingura nyakwigendera huti huti ariko icyemezo kigahira muri Gereza ya Muhanga nta shingiro bifite kuko ari indirimo imenyerewe mu bagororwa iyo babuze ibimenyetso by'ibyo bavuga naho iby'uko muganga atagaragaje icyishe Mukakabera Donata, ko nta gitangaza kirimo mu gihe umurambo wapimwe nyuma y'iminsi itandatu ushinguwe.
- [12] Asoza avuga ko nubwo ntawabonye Gatabazi Félicien yica Mukakabera Donata, kuba yarasomejwe ku nzoga n'umugabo gatabazi Félicien yakekaga ko amusambanya, bugacya yapfuye bihagije kumukeka kuko ariwe wari ufite inyungu muri urwo rupfu, icyo kimenyetso gisesenguwe hamwe n'imvugo z'abatangabuhamya bikaba byari bihagije ndetse nubu bihagije kugira ngo Gatabazi Félicien ahamwe n'icyaha akurikiranweho, bityo akaba asaba ko imikirize y'urubanza rwajuririwe igumaho.

UKO URUKIKO RUBIBONA

- [13] Ingingo ya 119 y'Itegeko Nº 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko "Mu manza nshinjabyaha, ibimenyetso bishingira ku mpamvu zose z'ibyabaye n'ibyemejwe n'amategeko, ababuranyi bapfa kuba barahawe uburyo bwo kuhaba ngo banyomozanye. Urukiko ruhamya ku buryo butavuguruzwa ko ibimenyetso byose birega cyangwa biregura ari byo kandi ko bishobora kwemerwa."
- [14] Ingingo ya 165 y'Itegeko N° 30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha iteganya ko "Gushidikanya birengera ushinjwa. Iyo urubanza rwakurikiranywe mu buryo bwose, ntihagire ibimenyetso nyakuri biboneka byemeza nta shiti abacamanza ko ushinjwa yakoze icyaha koko, bagomba kwemeza ko atsinze."
- [15] Dosiye y'urubanza igaragaza ko Gatabazi Félicien yavugiye mu Bugenzacyaha no mu Bushinjacyaha ko Mukakabera Donata atari yasinze cyane ubwo yatahanaga na Kanyarukiga Jean-Pierre, ko mu gitondo abana bagiye kuvoma aribo bamusanze mu mazi, igikanu cyatabwe mu cyondo, amaguru ari hejuru, Se wabo bana witwa Busenyi Jean-Pierre ahita amuhamagara kuri telefone, ahageze ahasanga abapolisi, anahita ahamagara bene wabo wa nyakwigendera, nyuma yo kumushingura aza kumenya ko yakomeje guhamagarana na Kanyarukiga Jean-Pierre kuri telefoni mbere y'uko apfa. Asobanura ko icyatumye amushingura atabanje kumupimisha ari uko nta mafaranga yari afite, ariko ko musaza we witwa Gahima yari ahari ndetse anasinya ku nyandiko yo kumushingura ibitswe na Polisi y'Umurenge (cotes 22-25 na 67-70). Uwitwa Busenyi Jean-Pierre we yavuze ko ari mu barohoye umurambo wa

nyakwigendera, bamubwirwa nuko abana bari aho bamubonye bakarira bavuga ko ari nyina ariko ko atazi abamwishe (cotes 52).

- Dosiye y'urubanza igaragaza kandi ko Kanyarukiga Jean-[16] Pierre yavugiye mu Bugenzacyaha no mu Bushinjacyaha ko yari mu kabari kwa Gatabazi Félicien, uyu atongana n'umugore we amubaza icyo agikora mu kabari hamwe n'abagabo, abibonye atyo kandi umugore ariwe wamusomyaga aritahira, umugore aza amukurikiye, barajyana, uwo mugore aza kumusaba kumufasha gushaka umwuzukuru we wari wabuze, ariko ko bageze imbere Mukakabera Donata abanza guca kwa Riberakurora, undi aramanuka, abonye atinze kandi bafitanye gahunda yo gushaka umwuzukuru aramutelefona, abonye ataje arigendera, mu gitondo yumva inkuru ko Mukakabera Donata yapfuye ariko ko atazi uwamukurikiye ngo amwice uretse ko yumvise amakuru y'uko Gatabazi Félicien yari yasabye Riberakurora na bayugirije kubagenda inyuma ngo barebe ko badasambana, kandi ko Riberakurora atamushira amakenga kubera ko yigeze gutaburura urwibutso rwa Jenoside yakorewe Abatutsi yibamo ibiringiti (cotes 12-15, 62 na 63).
- [17] Naho Riberakurora Théodor yabwiye Umugenzacyaha ko Mukakabera Donata yari asanzwe abana n'umugabo we neza, ko uwo munsi apfa yanyuze iwe, Kanyarukiga Jean-Pierre akomeza kumuhamagara amubwira ko amutinza, ku nshuro ya gatatu amubwira ko agiye, aribumusange ku mugezi, uwo mugezi akaba ariwo basanzemo Mukakabera Donata, umutwe winjiye mu isayo, bamukuramo ariko mbere yo kumushingura babikorera inyandiko, abwiye Gatabazi Félicien ko hari uwahamagaraga umugore we mbere y'uko apfa, amusaba guceceka kugirango babone uko bamushingura (cotes 26-32).

- [18] Dosiye y'urubanza igaragaza kandi ko Bavugirije Vedaste yavugiye mu Bugenzacyaha ko Gatabazi Félicien yamusabye kumucungira umugore kuko yari yasinze, undi akamusubiza ko atacunga umugore badasangiye, bukeye yumva inkuru y'uko Mukakabera Donata yapfuye (cotes 34-38). Naho Ngarukiye Damien na Ntawugayumugabo Phénias bari ku irondo bavuga ko Kanyarukiga Jean-Pierre yabanyuzeho ari kumwe n'umugore batamenye, kandi ko bari bataragera kwa Riberakurora, ariko ko muri iryo joro batigeze babona Gatabazi Félicien (cotes 46 na 49).
- Mujawamaliya Donatila, umuvandimwe wa Mukakabera [19] Donata, yavugiye mu Bugenzacyaha ko akeka ko ari Kanyarukiga Jean-Pierre na Gatabazi Félicien bishe Mukakabera Donata kubera ko Riberakurora yamubwiye ko mbere y'uko apfa Kanyarukiga JeanPierre yamuhamagaye kuri telefone, ubwa mbere amusaba kumusanga k'uwitwa Fidèle, ubwa kabiri amusaba kumusanga kuri Kadasobwa, umugezi bamusanzemo yapfuye, Gatabazi Félicien we akaba yarasanze umugore we vaguye ku gasozi aho kugirango amupimishe amenye icya mwishe akajijisha Polisi ko ari impanuka bigatuma ashyingurwa batamenye icyo yazize, ariko ko bashyingura musaza we witwa Munyandamutsa n'abandi bo mu muryango bari bahari kandi ko yumvise ko mbere yo gushyingura hakozwe inyandiko nubwo ntayo yabonye (cotes 8-9). Naho Ntawiragira Théogène we yavugiye mu Bugenzacyaha ko Gatabazi Félicien atari abanye neza n'umugore we kuko yigeze kumuvuna akaboko, ariko ko vamenye ko imiryango yanditse ngo nyakwigendera ashingurwe ariko atamenye impamvu yashyinguwe adapimwe n'icyatumye Gatabazi Félicien yarabanje kujya kurangura inzoga kandi yagize ibyago (cotes 4142).

- [20] Urukiko rurasanga, nk'uko bigaragara mu bika bya 11 na 12 by'urubanza rujuririrwa, Gatabazi Félicien yarahamijwe icyaha hashingiwe ku kuba yarasabye Mukakabera Donata kuva mu kabari kare, no gusaba Bavugirije Vedaste na Riberakurora Théodore kumurebera ko umugore we adasambana na Kanyarukiga Jean-Pierre, byagera mu gitondo bagasanga yapfuye, bituma Urukiko rwanzura ko ari we wamwishe kuko yari yamufuhiye, byumvikanisha ko ariwe wari ufite unyungu mu rupfu rwe, nyamara abatangabuhamya bose babajijwe harimo n'abari ku irondo ijoro Mukakabera Donata apfamo ndetse na Kanyarukiga Jean-Pierre watahanye na nyakwigendera kandi bari bafitanye gahunda yo kujya gushaka umwuzukuru we wari wazimiye, nta numwe uvuga ko yabonye Gatabazi Félicien akurikira Mukakabera Donata na Kanyarukiga Jean-Pierre cyangwa se ngo avuge ko na nyuma y'uko bagiye bamubonye aca mu nzira banyuzemo bataha, bigaragaza ko kuri iyi ngingo Gatabazi Félicien yahamijwe icyaha hashingiwe ku gukeka gusa ko ari we wari ufite inyungu mu rupfu ariko nta kimenyetso cy'uko ariwe wamwishe.
- [21] Urukiko rurasanga kandi mu gihe nta kindi kimenyetso gihamya Gatabazi Félicien urupfu rwa Mukakabera Donata, imyitwarire ye yabaye nyuma y'urupfu rwa nyakwigendera y'uko yanze kumenya amakuru y'uwamutelefonye bwa nyuma cyangwa yavuze ko nta mafaranga afite yo gupimisha umurambo mbere y'uko ushyingurwa, sibyo byafatwa nk'ikimenyetso gihamya Gatabazi Félicien icyaha akurikiranweho kuko iyo myitwarire, kabone nubwo igayitse, itagaragaza ko afite uruhare mu rupfu rwa nyakwigendera. Uyu murongo kandi uhura n'ibyemezwa n'umuhanga mu mategeko Snyman uvuga ko

gutera urupfu bisobanuye kurutera ku gihe n'ahantu nyakwigendera yapfiriye. ¹

[22] Urukiko rurasanga kandi abatangabuhamya babajijwe bemeza ko umurambo wavanywe mu mazi na Polisi, imvugo zabo zikaba zishimangirwa n'inyandiko yitwa "P.V. de descente" yakozwe na OPJ Nzaramba Remy, ikemezwa n'Umukuru w'Umudugudu wa Kazizi, witwa Ahishakiye Célestin ndetse n'abaturage bitwa Mbarubukeye Théogène na Nyabyenda Boniface (cote 58), kandi abagize umuryango wa nyakwigendera barimo basaza be bitwa Gahima na Munyandamutsa bakaba baremeranyijwe n'umuryango wa Gatabazi Félicien ko Mukakabera Donata ashingurwa ndetse babanza kubikorera inyandiko bashikirije Abayobozi b'Umurenge, ashingurwa abaturage n'Abayobozi b'Inzego z'ibanze barimo Kanyarukiga Jean-Pierre, ushinzwe umutekano mu Mudugudu wa Kazizi, bahari, byumvikanisha ko iyo haba hari ugukeka ko Makakabera Donata yishwe, izo nzego zose, basaza be ndetse n'abaturage bari aho ntibari kwemera ko Mukakabera Donata ashingurwa hamenyakane icyamwishe, bityo adapimwe ngo Ubushinjacyaha buburanisha ko Gatabazi Félicien yashinguye gusibanganya nyakwigendera hutihuti ntawubizi agamije ibimenyetso bimuhamya icyaha bikaba nta shingiro bifite.

[23] Urukiko rurasanga hashingiwe ku byasobanuwe no kumategeko yibukijwe hejuru, nta kimenyetso Urukiko rwagaragarijwe gihamya Gatabazi Félicien urupfu rwa Mukakabera Donata, bityo amakosa yakozwe n'Urukiko Rukuru,

¹ « ... in cases of murder or culpable homicide it must be remembered that « to cause the death » actually means to cause the death at the time when, and the place where, Y died. » CR Snyman, *Criminal Law*, Durban, Lexis-Nexis, 2002, P. 75.

Urugereko rwa Rusizi rukorera i Karongi rwo guhamya Gatabazi Félicien icyaha rushingiye gusa ku kuba yarashoboraga kugikora, akaba akwiye gukosorwa, Gatabazi Félicien akagirwa umwere. Ibi kandi bihura n'ibyemezwa n'abahanga mu mategeko ko Urukiko rudakwiye guhamya uregwa icyaha rushingiye gusa ku kuba byari gushoboka ko agikora, ahubwo icyo gihe, uko gukekeranya gukwiye kumurengera akagirwa umwere,² nabyo bishimangira ko Gatabazi Félicien akwiye kugirwa umwere ku cyaha akurikiranweho cyo kwica Mukakabera Donata.

III. ICYEMEZO CY'URUKIKO

- [24] Rwemeje ko ubujurire bwa Gatabazi Félicien bufite ishingiro;
- [25] Rwemeje ko Gatabazi Félicien ari umwere ku cyaha cyo guhotora Mukakabera Donata yari akurikiranweho;
- [26] Rwemeje ko imikirize y'urubanza Nº RP 0015/11/HC/RSZK rwaciwe n'Urukiko Rukuru, Urugereko rwa Rusizi rukorera i Karongi ruhindutse kuri byose;
- [27] Rutegetse ko amagarama y'urubanza aherera ku Isanduku ya Leta.

² "Le juge ne saurait se contenter d'un lien probable ou possible. Il s'abstient de déduire la causalité de la simple succession des faits, et le moindre doute devra béneficier au prévenu. Le lien de causalité manque si la possibilité d'autres causes n'est pas exclue. » Nyabirungu mwene Songa, Traité de droit pénal Congolais, Kinshasa, Editions Universitaires, 2007, P. 321.

RWANDA LAW REPORTS

ENGLISH VERSION



Re. GLIHD

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00002/2019/SC – (Rugege, P.J., Nyirinkwaya, Cyanzayire, Rukundakuvuga and Hitiyaremye, J.) October 4, 2019]

Constitution — Property right — Property right for those cohabitating as concubines — The rationale for sharing the property between those who have been cohabitating as concubines is because they acquired and owned it together — Those cohabitating as concubines when they separate, they share among themselves immovable and movable property they acquired together.

Court practice and procedures – The doctrine of precedent (stare decisis) – The Supreme Court as the highest court with its unique nature which makes it have jurisdiction on all types of cases that are heard by all courts so that it can set precedents for other courts to follow – The doctrine of precedent (stare decisis) requires each court to follow the precedent it set or set by a superior court when making a ruling on a case with similar facts.

Facts: GLIHD, petitioned the Supreme Court seeking to declare paragraph 2 of article 39 of Law N° 59/2008 of 10/09/2008 2008 on prevention and punishment of gender-based violence be inconsistent with articles 15,16 and 34 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015.

In its submission, GLIHD explains that paragraph 2 of article 39 of the law mentioned above provides that it sharing of the properties of those who have been cohabiting as a husband and wife takes place only if one of them is going to get married to

another person; thus those who are cohabiting are not treated equally because there is no other ground or reason which was provided. It also argues that in case one of them want to have his or her share can't get it without first proving that the reason for their separation is to get married to another person, thus he/she cannot enjoy that property he/she acquired with the other partner they separated with.

The State Attorney argues that the claims of the are groundless because when paragraph 2 of Article 39 of the aforementioned law is repealed those who have been cohabiting as a husband and wife would be completely deprived of the right to property they acquired and that the clause itself would be meanless because all 4 paragraphs are complementary. She further stated that instead, it would be better if paragraph 2 of that article is amended, so that the sharing of the property takes place in case one of the partners is getting married, or if there is another reason why they should stop living together.

The Faculty of Law of the University of Rwanda, which intervened as Amicus Curiae states that paragraph 2 of the article mentioned above is not unconstitutional because there is no category which this law prevented from having their right on the property even the precedents set by the Supreme Court protects those who have been cohabitating as a husband and wife equally when they separate regardless of the reason for their separation.

As to whether that issue was settled by the precedents set by the Supreme Court in the cases it decided, the applicant argues that the issue was not settled by those precedents because there is no case in which that issue was examined in that specific manner and that the current law, there is no mandate that the precedents of the Supreme Court bind the lower courts, which causes worry that the lower courts may prejudice those who separate for other

reasons other than marrying another person in case its petition is found without merit.

The State of Rwanda, as well as the University of Rwanda (the amicus curiae), find that those cases settled the issue because they decided that those who live as husband and wife, when they separate, they are entitled to the property they acquired together and those case laws do not discriminate those who separate for other reasons other than getting married.

- **Held:** 1. The issue concerning the property of those who cease cohabitating as a husband and wife for other reasons other than getting married was settled by the Supreme Court in its various case laws.
- 2. The basis for the sharing of the property of those who have been living as husband and wife is that they jointly own that property or they acquired it together.
- 3. Those living as a wife and husband, even if they are not legally married, they share the property, whether immovable or movable, they acquired together when they separate.
- 4. The Supreme Court as the highest court with its unique nature which makes it have jurisdiction on all types of cases that are heard by all courts so that it can set precedents for other courts to follow
- 5. The doctrine of precedent (stare decisis) requires each court to follow the precedent it set or set by a superior court when making a ruling on a case with similar facts.

Petition without merit.

Paragraph 2 of article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence is not inconsistent with articles 15, 16, and 34 of the Constitution of the Republic of Rwanda.

Statutes and statutory instruments referred to:

- The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 15,16 and 34
- Law Nº 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, article
- Law N°30/2018 of 02/06/2018 determining the jurisdiction of Courts, article 65, 73
- Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, article 39.

Cases referred to:

- Uwiragiye Charles v Uwamahoro Jeanine, RCAA 00043/2016/CS rendered by the Supreme Court on 15/09/2019.
- Gatera Johnson v Kabalisa Teddy RS/INCONST/Pén.0003/10/CS rendered by the Supreme Court on 07/01/2011.
- Mpangare Hope, RS/INCONST/Pén.0001/11/CS rendered by the Supreme Court on 29/04/2011.

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] Based on article 72 of Law N°30/2018 of 02/06/2018 determining the jurisdiction of Courts¹ GLIHD petitioned the Supreme Court requesting that paragraph 2 of article 39 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence be repealed for the rights of those who are entertaining unlawful marriages be equally respected in accordance with the principle enshrined in the Constitution of the Republic of Rwanda and other international human rights conventions ratified by Rwanda.
- [2] GLIHD adduces the following principles:
 - a. Equality before the law;
 - b. Equal protection of the law;
 - c. Non-discrimination;
 - d. Right to property.
- [3] It is in this context that he petitioned the Supreme Court requesting that the second paragraph of article 39^2 of Law N $^\circ$

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¹ That article provides that the Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare unconstitutional a law if they have any interest.

²Those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of the previous paragraph of this Article was living with many husbands/wives, he shall first of all share the commonly owned belongings with those

59/2008 of 10/09/2008 on prevention and punishment of gender-based violence be repealed.

- [4] The petition was registered on RS / INCONST / SPEC 00002/2019 / SC, the State was summoned and the University of Rwanda requested to intervene as amicus curie. The hearing was scheduled for 08/11/2019, on that day both parties were present, GLIHD represented by Umulisa Vestine (its Deputy Chairperson) represented by Counsel Sezirahiga Yves and Counsel Gumisiriza Hillary, the State represented by Gahongayire Miriam while the University of 'Rwanda was represented by Lecturer Shenge Laurent and Uwineza Odette.
- [5] On elaborating on their petition, GLIDH Deputy Chairperson Umulisa Vestine, Counsel Sezirahiga Yves, and Counsel Gumisiriza Hillary state that paragraph 2 of Article 39 of the GBV Law was written was contrary to the provisions of 'Articles 15, 16 and 34 of the Constitution, as follows:

a. Whether it infringes on article 15 of the Constitution of the Republic of Rwanda.

[6] This article states that all people are equal before the law. The law protects them in the same way. GLIHD argues that when this article is read together with the provisions of paragraph 2 of article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence mentioned above, the sharing of the commonly owned belongings for those entertaining unlawful marriages is only provided when one of them decides to marry someone other than the one they are

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husbands/wives equally. The property distribution referred to in paragraph 2 of this Article shall not entrench on the children's legally recognized rights.

already living with; the legislator did not give equal opportunity or equal protection to those who have been entertaining unlawful marriages but decides to separate for a different reason other than one of them getting married because for them sharing of the property which they co-own was not provided for.

b. Whether it infringes on article 16 of the Constitution of the Republic of Rwanda.

- [7] GLIHD argues that article 16 of the Constitution of the Republic of Rwanda provides that all Rwandans are born equal and continue to enjoy equal rights and freedoms. It also provides that discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law.
- [8] GLIHD argues that when that article is read together with paragraph 2 of article 39 of Law N ° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, that paragraph discriminates against some of those who live in unlawful marriages because it puts them in two (2) different categories: some have the right to share the property they owned or that they accumulated together, others do not have that right while all of them are in the same conditions: living as husband and wife. Therefore, it finds that this infringes on the principle enshrined in this article of the Constitution which provides that all persons are equal before the law. They are entitled to equal protection of the law and it also infringes on the principle that prohibits any discrimination or its propaganda based on.

c. Whether it infringes on article 34 of the Constitution of the Republic of Rwanda.

- [9] Article 34 of the Constitution of the Republic of Rwanda provides that "Everyone has the right to private property, whether individually or collectively owned. Private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and accordance with the provisions of the law".
- [10] GLIHD argues that when this article is read together with the provisions of paragraph 2 of article 39 of Law N ° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, the impugned in paragraph prevents and deprives some category of those who were consummating unlawful marriage the right to property when the reason for their separation is not that one of them is going to be lawfully married to another person because in case one of them seeks to be given his or her share of that property, for any other reason cannot get it without first proving that the reason for the separation was to marry another person. Thus, he/she is deprived of the right to the property s/he acquired with the former partner.
- [11] The State attorney argues that the grounds for the petition seeking the Supreme Court to declare paragraph 2 of article 39 of Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence invalid because it is unconstitutional without merit, because if that paragraph is repealed even those who were allowed the right to share the property when one decides to get married to another person will completely lose it, and that article will have no meaning because all the four (4) paragraphs complement each other. If one paragraph is repealed

the whole article would be worthless since it would not be protecting anyone.

- [12] The State also argues that in the Judgment no RS / INCONST / Pén 0003/10 / CS³, the Supreme Court found that article 39 was not unconstitutional rather the legislator wanted to eliminate the injustice carried out on the property commonly owned by those who have been living in unlawful marriage and one of them chooses to get lawfully married.
- [13] The State argues that it would be better if paragraph 2 of the impugned article 39, be amended, and the sharing of the property takes place in case one of the partners is going to be married, or for any other reason they have separated. It recommends that it would be more clear if the following paragraph is added after paragraph 2 that "the common property is shared whenever there is any other ground for the separation of those who have been living in unlawful marriage".
- [14] The Faculty of Law of the University of Rwanda which intervened as an amicus curie objects to the petition of GLIHD, which seeks to declare paragraph 2 of article 39 mentioned above unconstitutional because as held in the in cases decided by the Supreme Court, there is no category of spouses prejudiced by this

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³ In this case, Gatera Johnson and Kabarisa Teddy were requesting the Supreme Court to declare invalid the provision of article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence because it was inconsistent with article 26 of the Constitution of the Republic of Rwanda which provides that A civil monogamous marriage between a man and a woman is the only recognized marital union (...). The state that the other marital union or unlawful marriages cannot have the same effects as those for lawful marriage.

law because the legal precedent set in those cases protects those who separated while living as a wife and husband illegally in the same regardless of the reason for their separation.

- [15] The University of Rwanda cited the following case laws:
 - a. Judgment RCAA 00043/2016 / CS, Uwiragiye Charles and Uwamahoro Jeanine rendered on 15/09/2019 by the Supreme Court;
 - b. Judgment RS / INCONST / Pén.0003 / 10 / CS, Gatera Johnson v Kabalisa Teddy rendered on 07/01/2011 by the Supreme Court;
 - c. Judgment RS / INCONST / Pén.0001 / 11 / CS, of Mpangare Hope rendered by the Supreme Court
- [16] The University of Rwanda explains that in all these cases, the parties cohabited and separated without the intention of marrying again. However, the Supreme Court, regardless of the reason for their separation, and pursuant to article 39 of the aforementioned Law, held that they should equally share the property they acquired together.
- [17] After hearing the amicus brief, the State of Rwanda also concurs that the concerns of the GLIHD were indeed resolved, however, GLIHD insisted that article 39 of the above mentioned Law in its paragraph two is unconstitutional and that the aforementioned case laws did not solve that issue as it was not examined in its specificity.
- [18] The Supreme Court, therefore finds that the issues to be examined are the following:

- To determine whether the second paragraph of Article 39 of Law N ° 59/2008 of 10/09/2008 infringes on the right to property of those who have been cohabitating as husband and wife when they separated without the intention of marrying another person;
- Whether the precedents set by the Supreme Court in its various rulings on the issue regarding those who were cohabitating as a husband and wife did not solve the question of GLIDH regarding the infringement of the rights of those who separate without the intention of marrying another person.

II. ANALYSIS OF THE LEGAL ISSUES

- A. To determine whether the second paragraph of Article 39 of Law N $^{\circ}$ 59/2008 of 10/09/2008 infringes on the right to property of those who have been cohabitating as husband and wife when they separated without the intention of marrying another person;
- [19] GLIHD states that article 39 of Law N ° 59/2008 of 10/09/2008 prevents and punishes any form of sexual violence that does not protect equally those cohabitating as a husband and wife because paragraph 2 of that article defines the right they have on the property when they decide to separate and marry someone else, but that article does not apply to those whose purpose of separation is not to get married to another person. As explained in paragraphs 6-10, GLIHD finds it discriminatory against those in the latter category because it deprives them of their right on the property they acquired as a husband and wife, and this is a violation of the fundamental rights enshrined in the

Constitution of the Republic of Rwanda and other International Human Rights treaties ratified by Rwanda

[20] Before supporting the Amicus curiae briefs demonstrating that issue was settled by the cases decided by the Supreme Court, even though the State does not concur with GLIHD that article 39, paragraph two is unconstitutional, it had also requested that it should be amended and written clearly, and another paragraph be added preceding paragraph 2 as follows "the property is also shared whenever those cohabitating as a wife and husband cease to live together".

DETERMINATION OF THE COURT

- [21] In its entirety, article 39 of the Law N ° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, reads as follows: Those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of the previous paragraph of this Article was living with many husbands/wives, he shall, first of all, share the commonly owned belongings with those husbands/wives equally. The property distribution referred to in paragraph 2 of this Article shall not entrench on the children's legally recognized rights.
- [22] From the analysis of that article, it was aimed for the following three purposes:
 - a. Providing the procedure on how those who have been cohabitating as a husband and wife can get legally married but also reminding them that whenever they do so they should keep in mind that it is done through the

monogamous principle. This is contained in the first paragraph of this article and it is clear that the legislator wanted to indicate to those cohabitating, that even if a man/woman has more than one wife/husband and loves them equally, it is not allowed to marry all of them.

- b. Demonstrate the rights of those who have been living as husband and wife (who did not get the chance to be chosen as a husband/wife) on the property they shared when one of them has decided to get legally married. This is what is provided for in the second paragraph of this article. Apparently, in complying with the provisions of the first paragraph only, issues regarding the rights of the remaining women/men on the property could have arisen, when the husband/wife chooses, as required by law, to marry only one of them or another one who they have not been cohabitating with.
- c. Demonstrate the rights of the child in the event one of them marries in the procedure provided for in this article (this is provided in paragraph three).
- [23] In general, as explained in the preceding paragraph, this article deals with the specific issue of couples cohabitating as husband and wife who wish to get legally married with one of the spouses they were cohabitating with, in case he/she has been cohabitating with more that one. This article is not intended to deprive the right to property of those who separated for other reasons, nor is it intended to give special rights or discriminate against anyone in such a way that it is construed as being inconsistent with the mentioned provisions of the Constitution (articles 15, 16 and 34), rather it is purpose is to guide those who have been cohabitating as a wife and husband who wish to get

legally married. For the other categories which were not mentioned, that is, those who cohabitated and separated without the intention of getting legally married were not the intended target. So instead of being treated as if it discriminated against those categories, it should be construed as being silent.

[24] The Supreme Court, therefore, finds that in the event an issue arises and the law is silent, it does not imply that those concerned were deprived of certain rights granted to them by the Constitution, or that there is a law that deprives them of that right which must be repealed. Instead, such an issue is settled through the ordinary analysis of the courts as provided for in article 9 of Law N°·22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure. That article provides that: ".... In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine."

[25] The Supreme Court finds that the provisions cited in the preceding paragraph were applied in the various cases regarding the issue of the right of those who have been cohabitating as a husband and a wife whose reason for separation is not getting legally married, therefore the petition filed by GLIHD on the ground that they were deprived of their constitutional rights and they rely on it to request that the second paragraph of article 39 of the above-mentioned article be declared invalid, is without merit

- B. Whether the cases decided by the Supreme Court did not settle the issue regarding the rights of those who have been cohabitating as a husband and wife and separates because of other reasons apart from getting married
- [26] GLIHD argues that the cases decided by the Supreme Court regarding those who have been cohabitating but separate for different reasons other than getting legally married did not settle the issue that paragraph two of article 39 of the above-mentioned law deprive them of their constitutional rights because there is no specific case where that issue was examined in that perspective. GLIHD also adds that in the current law the judgments of the Supreme Court no longer bind lower courts, which is also another cause of concern that those courts can be unjust to those who separate because of other reasons other than that of getting married to another man/woman in case this Court finds its petition without merit.
- [27] The State as well as the Amicus curiae, the University of Rwanda are of the view that GLIHD should not worry because the rights enshrined under articles 15, 16, and 34 of the Constitution which it seeks to be accessible to those who cohabited as a husband and a wife and they separate because of other reasons other than getting married is not trampled upon, because as explained in the cases cited in paragraph 15, the Court held that they had this right because those in those cases it was held that those who cohabited as husband and wife, when they separate, each is entitled to the property they acquired together and they do not discriminate those who separate for different reasons other than getting married.

DETERMINATION OF THE COURT

[28] The Court finds that the legal precedent set by the Supreme Court in the previous cases should have cleared the doubt of GLIDH on the issue regarding those it alleges that were deprived of their rights on the property rights as demonstrated in the following paragraphs.

In Case No. RS / INCONST / Pén 0003/10 / CS between Gatera and Kabalisa rendered on 07/01/2011, the Court examined the issue of "whether article 39 of the Law on the on prevention and punishment of gender-based violence regarding the sharing of the property of those who were cohabiting as a husband and wife is unconstitutional because it would be treating those who were cohabitating without being legally married as those who are legally married. The court, after motivating that those who have been cohabitating as a husband and wife have the right on the property they acquired together and also demonstrating that that right differs from that of those who are legally married, held that "....in order for the separated couples who have been cohabitating as a husband and a wife to share the property, they should be jointly owning it and they acquired it together⁴." It also clearly explained that the property right is not only based on the fact that they cohabitated as a husband and a wife, but it should be evident that they jointly own or acquired it.5

[30] As it can be demonstrated in this case, although the Court did not specifically examine the issue of the rights on the property of those who separate for other reasons other than getting married, be the case it was not the subject matter, it did explain

⁴ See paragraph 14 of that judgment

⁵ Idem

that the <u>basis for the sharing of that property between those</u> who were cohabitating is that they jointly own that property or they acquired it together. This should have shown GLIHD that even those who separate for other reasons other than getting married to another person, this judgment gave them the right to that property as long as they can prove that they jointly own it or acquired it together.

[31] Also, the right to property of those who cease cohabitating as a husband and wife for other reasons other than getting married was further directly emphasized in case No. RCAA 00043/2016 / SC between Uwiragiye Charles and Uwamahoro Jeanine. In this case, the parties were litigating "the sharing of the property they acquired while they cohabited as a husband and wife which consists of a house located on parcel n° 367, a parcel of land no 0139, and two vehicles", the Supreme Court ruled that "... those living as a wife and husband, even if they are not legally married, they share the property, whether immovable or movable, they acquired together when they separate⁶". It should be recalled that in this case, the reason for the separation of Uwiragiye and Uwamahoro was not to get married to another person as indicated in cases no RCA 00239/2016 / HC / KIG and n° RC 0281/15 / TGI / GSBO. nevertheless, it did not prevent the Supreme Court from dividing amongst them the property they owned before separating.

[32] For the arguments of GLIHD that since article 47 of the Organic Law No 03/2012 / OL of 13/06/2012 determining the structure, functioning and jurisdiction of the Supreme Court⁷ was

⁷ Par. 6 of that article provides that:" Judgements and decisions of the Supreme Court are binding on all courts in the country."

⁶ See paragraph 16 of that Judgment.

repealed the precedents of the Supreme Court judgments are no longer binding on other courts are baseless because the use of precedents has been reinforced in the new law on the jurisdiction of Courts.⁸ That law gave special competence of hearing cases which make precedents and give guidance to other courts. This is emphasized in the second paragraph of the explanatory note of the Organic Law instituting the Court of Appeal, whereby it explains that the special nature of the Supreme Court is to be a separate Court, which oversees other courts and to reconcile the judgments of the cases with similar issues, and provide a legal position or precedents for lower courts9. This position was reinforced by article 65 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of the courts whereby it is mandatory to comply with the existing precedents in settling a similar issue because to overturn that precedent it requires to petition the Supreme Court and the Supreme Court also to overturn it has to first demonstrate the issue with the existing precedent before setting a new one as demonstrated in the last paragraph of article 73 of that Law

[33] The jurisdictions which follow the doctrine of precedent (stare decisis), each court is obligated to follow the precedent it set or set by a superior court when making a ruling on a case with similar facts (The basis of the system of precedent is the principle of stare decisis and this requires a later court to use the same reasoning as an earlier court where the two cases raise

 $^{^8}$ Article n°30/2018 of 02/06/2018 determining the jurisdiction of Courts.

⁹ See the Senate's report (The Committee on Political and Good Governance) of 21 March 2017.

the same legal issues)¹⁰, therefore the higher up a court is in the hierarchy, the more authoritative its decisions: decisions of the higher courts will bind lower courts to apply the same decided principle¹¹. In particular, the Supreme Court as the highest court, it is obvious that it is also the main source of precedents which are followed by other courts, which is the reason for its unique nature as explained in the preceding paragraph, its nature makes it have jurisdiction on all types of cases which are filed to courts so that it can set precedent others courts to follow.

III. DECISION OF THE COURT

[34] Admits the petition lodged by GLIHDbut upon its examination, it finds it without merit;

[35] Decides that paragraph two of article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence do not infringe on the provisions of articles 15, 16, and 34 of the Constitution of the Republic of Rwanda.

¹⁰ The Open University, OpenLearn, Judges and the law, available at https://www.open.edu/openlearn/society-politics-law/judges-and-the-law/content-section-3.4

¹¹ Idem. There are two exceptions to this principle: Overruling (the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case) and distinguishing (the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent, so it will not find itself bound to follow that precedent).

PROCEDURAL CASES

CASE RELATING TO CIVIL, COMMERCIAL, LABOUR AND ADMINISTRATIVE PROCEDURE

TUYISENGE ET AI v. RWANDA MOTOR S.A

[Rwanda SUPREME COURT-RS/REV/INJUST/RC 00041/2017/SC (Rugege, P.J., Mutashya and Kayitesi E.J.) February 22, 2020]

Civil procedure – Execution of a judgment when an object is no longer in existence – Judgment enforcement is conducted on the subject matter of the litigation or another thing of the similar nature, if it's not possible its compensated in its current monitary value.

Facts: This case started before the Court of First Instance of Kigali in 1995 whereby Tuyisenge and Uzamukunda sued Rwanda Motor for having failed to deliver the car bought in 1993 or compensating them for it. The Court rendered the judgment holding that their case is with merit and ordered Rwanda Motor to offer a car of the same type.

Rwanda Motor appealed to the Court of Appeal of Kigali, and that Court sustained the rulings of the Court of First Instance of Kigali. Rwanda Motor was not again contented with the rulings of the judgment, consequently, It applied for quashing of a judgment, but after the judicial reform, the case was transferred to the High Court and the case was removed from the court register because Rwanda Motor did not follow up on its case.

Thereafter, Tuyisenge and Uzamukunda filed different cases before the High Court, first, they wanted the Court to interpret the judgment rendered by the Court of Appeal of Kigali, they prayed to the Court to handle issues of the execution of that judgment, the High Court hold that there is no ground of the interpretation and decided that the judgment be executed as it was rendered.

The execution of the judgment was not performed because the type of car which was bought was no longer on the market, and also, Rwanda Motor refused to offer a similar car. Hence, Tuyisenge and Uzamukunda applied for the review of the case on grounds of injustice, then, the President of the Supreme Court ordered that the case be reviewed. In the hearing, Tuyisenge and Uzamukunda requested to be given the money equivalent to the current value of the car.

Rwanda Motor stated that their claim lacks merit because the judgment was not executed because that type is no longer on the market.

Held: Judgment enforcement is conducted on the subject matter of the litigation or another thing of the similar nature, if it's not possible its compensated in its current monitary value.

The claim has merit;
The judgment RCA 0081/HC/KIG is quashed;
The accused has to compensate for the car which was bought but not delivered;
Court fees to the public treasury.

Statute and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 9 and 10 Law N° 22/2012 of 14/07/2012 relating to the civil, commercial, labour and administrative procedure, article 195

Law N° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, article 192

Case laws referred to:

Nyirabugungo Isabelle v Etablissement Mironko Plastic Industries, RCAA 0116/11/CS rendered on 08/02/2013 by the Supreme Court

Author cited:

Ephrem Gasasira, Procédure civile et commerciale, 1993, P. 260

Judgment

I. BACKGROUND OF THE CASE

- [1] This case originates from the agreement of 15/02/1994 for the purchase of the car MAZDA E2000 with 15 or 18 seats, that agreement was concluded between Tuyisenge Zabuloni and Uzabumwana Dorothée and Rwanda Motor, when the former wanted to pick the car, Rwanda Motor informed them that the car was stolen like other products which were in its possession.
- [2] Tuyisenge Zabuloni and Uzabumwana Dorothée filed a claim before the First instance Court of Kigali claiming to be given or be compensated with its value, their claims were combined and the case was recorded on N° RC 23.394/95/S1-RC 23.742/95/S1.
- [3] On 30/06/1997, the Court rendered the judgment finding Tuyisenge Zabuloni and Uzabumwana Dorothée's claim with merit, It ordered Rwanda Motor S.A to give them the car bought

which is MAZDA E2000 with 15 or 18 seats, Rwanda Motor was also ordered to pay court fees equivalent to 3,500Frw.

- [4] Rwanda Motor was not contented with the judgment and appealed to the Court of Appeal of Kigali, the claim was recorded on N°, RCA 12206/KIG-RC3742/92, Rwanda Motor stated that Tuyisenge Zabuloni and Uzabumwana Dorothée paid for the car in three installments, the last one was paid on 15/02/1994, Rwanda Motor S.A showed them their car SG 28 with chassis number SRYOEZ 622110, engine number 930156 of the white color, they failed to pick it due to their reasons till the cars were stolen with other cars during Genocide perpetrated against Tutsi in 1994.
- [5] The Court of Appeal of Kigali motivated that Rwanda Motor S.A should not invoke force majeure since it agrees that Tuyisenge Zabuloni and Uzabumwana Dorothée paid purchasing price of the car as per the order of 15/02/1994, the war started on 07/04/1994, Rwanda Motor does not explain why it did not deliver that car to the owners within two months while they already paid. The Court explained that the car was not shown to Tuyisenge Zabuloni and Uzabumwana Dorothée because it was not yet identified and the buyers did not sign on the invoice to certify that the car was handed over.
- [6] The Court also motivated that there is not warehouse agreement between Tuyisenge Zabuloni and Uzabumwana Dorothée and Rwanda Motor S.A because they would not have put in the warehouse the car which was not delivered, that the damages for the productivity of that car in 5 years are baseless. After all, the car did not work so that the productivity may be considered accordingly, the Court ordered Rwanda Motor S.A to offer to Tuyisenge Zabuloni and Uzabumwana Dorothée the car

Minibus MAZDA E2000 with 15 or 18 seats since they paid for it knowing that Rwanda Motor S.A still sells cars.

- [7] Rwanda Motor S. A was not contented with the rulings of the judgment and applied for that judgment to be quashed, its claim was recorded on RCP 1000, after judicial reform in 2004, the case was transferred to the High Court and recorded on RCAA 0597/06/HC/KIG, on 02/11/2007, the Court decided that the claim be removed from the court register because Rwanda Motor did not follow up on its case.
- [8] Thereafter, Tuyisenge Zabuloni and Uzamukunda Dorothée filed a claim before the High Court, first, they wanted the Court to interpret the judgment RCA 12.206/KIG-RC 3742/92, the case was recorded on N° RC 0030/09/HC/KIG, on 12/05/2009, the Court held that there is no ground of the interpretation because the judgment is clear.
- [9] Tuyisenge Zabuloni again filed a claim praying to the Court to handle issues of the execution of the judgment RCA 12.206/KIG-RC 3742/92 basing on the fact that when they wanted the judgment to be executed, Rwanda Motor S.A told them that the type of the car which was bought was no longer on the market, she then asked to be given the equivalent of the car's value or another car of the same value, the claim was recorded on N° RCA 0081/09/HC/KIG. On 14/02/2011, the Court decided that Tuyisenge Zabuloni's claims intent to reverse the decision of the Court while the judgment acquired the force of res judicata, It ordered that the judgment be executed as it was rendered.
- [10] Tuyisenge Zabuloni and Uzamukunda Dorothée hired a court bailiff for the execution of the judgment, the court bailiff told them that a compulsory execution was not possible because

he found nothing to be seized. After all, Rwanda Motor S.A does not possess the cars of MAZDA E2000 which were ordered by the Court and nothing else can be seized while the judge did not decide so, also, the court bailiff asked Rwanda Motor S.A to offer similar car but it refused.

- [11] After those court cases, Tuyisenge Zabuloni and Uzamukunda Dorothée wrote to the Office of Ombudsman seeking justice. After analyzing the judgment RCA 12206/KIG-RC 3742/92, the Office of Ombudsman found that though the rulings of that judgment were clear, the object ordered by the Court cannot be executed because the car MAZDA E2000 with 15 or 18 seats for which the Court ordered Rwanda Motor S.A to give Tuyisenge Zabuloni and Uzamukunda Dorothée, no longer exists.
- [12] The Office of Ombudsman wrote to the Supreme Court on 23/05/2016 praying that the judgment RCA 0081/09/HC/KIG be reviewed. After considering the report of the Inspectorate of courts on that judgment, in the order dated 01/07//2017, The President of the Supreme Court decided that judgment RCA 12.206/KIG-RC 3742/92 between Rwanda Motor S.A and Tuyisenge Zabuloni and Uzamukunda Dorothée, rendered on 04/06/2001 by the Court of Appeal of Kigali, be reviewed on the ground of injustice.
- [13] The public hearing was conducted on 21/01/2019, Rwanda Motor S.A appeared to be represented by Counsel Rutembesa Phocas, whilst Tuyisenge Zabuloni and Uzamukunda Dorothée were represented by counsel Kazeneza Théophile.
- [14] Before the hearing of the case in merit, Rutembesa Phocas, Counsel for Rwanda Motor S.A requested to adjourn the

hearing stating that they want to resort to mediation for settling the issue amicably, whereas Kazeneza Théophile counsel for Tuyisenge Zabuloni and Uzamukunda Dorothée stated that mediation should not suspend the case, that the hearing should proceed and in case they come to settle the matter, they will inform the Court and that the case would end when they reach a certain agreement before the pronouncement.

[15] The Court immediately decided against proceeding with the hearing, that when the parties reach an agreement, they will inform the Court before the pronouncement of the case.

[16] Counsel Rutembesa Phocas representing Rwanda Motor S.A raised an objection stating that he bases on article 86 paragraph 2, litera 1 and 2 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning, and jurisdiction of the Supreme Court, he finds Tuyisenge Zabuloni and Uzamukunda Dorothée's claim to the Office of Ombudsman should not be admitted because the request was brought late. His argument bases on the fact that the judgment for which the review

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¹ Final decisions made before the publication of this Organic Law in the Official Gazette of the Republic of Rwanda shall be subject to an application for review due to injustice in accordance with the provisions of Article 81 of this Organic Law.

Such decisions shall be the following:

^{1°} final decisions alleged to be unjust made after the establishment of the Office of the Ombudsman in 2003, whether executed or not which shall be referred to the Office of the Ombudsman within one (1) year as of the publication of this Organic Law in the Official Gazette of the Republic of Rwanda;

^{2°} final decisions of ordinary, commercial and military courts alleged to be unjust that has been referred to various organs which shall be referred to the Office of the Ombudsman within six (6) months as of the publication of this Organic Law in the Official Gazette of the Republic of Rwanda.

on the ground of injustice is sought, was rendered on 04/06/2001, the case does not fall in those rendered after 2003, thus the request should have been addressed to the Office of Ombudsman within a period of six months from the date of promulgating the organic law mentioned above is the official gazette of the Republic of Rwanda. That the fact that Rwanda Motor S.A was contacted by the Office of Ombudsman in 2015, Counsel Rutembesa Phocas states that though he is not aware of the date the issue was addressed to the Office of Ombudsman, he considers that year as the one in which the issue was addressed to that organ, therefore, the request should have not been admitted because the period provided by the law has already elapsed.

[17] Counsel Kazeneza Théophile pleading for Tuyisenge Zabuloni and Uzamukunda Dorothée states that he does not find the rationale of this objection because if it is irregularities of the decision of the Office of Ombudsman, one should not sue to this Court and that the review of the judgment was ordered by the President of the Supreme Court, Counsel Kazeneza Théophile states that he does not find if the one who raises the objection intends to appeal against the order, thus that ground of objection raised by Rwanda Motor S.A has no merit.

[18] The Supreme Court decision on that objection raised by Counsel Rutembesa Phocas on behalf of Rwanda Motor S.A holding that it lacks merit because the judgment for which the review was requested is RCA 0081/09/HC/KIG rendered on 14/02/2011 and not the judgment RC 23.394/95/S1-RC23.742/95/S1 rendered on 04/06/2001 as stated by Counsel Rutembesa, that his statement that there was a delay to resort to the Office of Ombudsman, he does not prove it, The Court ordered to proceed with the hearing of the case in merit.

[19] The issue which is disputable between the parties is to know whether an object subject to the execution no longer exists, the winning party shall be given the value of the object in money.

II. ANALYSIS OF LEGAL ISSUE

Whether when an object subject to the execution no longer exists, the winning party shall be given the value of the object in money.

- [20] Counsel Kazeneza Théophile pleading for Tuyisenge Zabuloni and Uzamukunda Dorothée states that since the moment of the sale of the car with Rwanda Motor S.A in 1994, there was payment but till now, the car was not delivered, the reason being raised by Rwanda Motor S.A is that the car was among those stolen in Genocide, and now, the car cannot be found because those cars are no longer on the market.
- [21] He state that though those cars are no longer manufactured, Rwanda Motor S.A had an alternative of payment but it refused, such as offering the similar car or its value in money, that it failed to make one of both, rather, it kept clients' money while the latter did not receive the car.
- [22] He further argues that even if they wanted a car of the same value as that they bought, they have changed this position because that car is old fashioned and cannot fit in Rwanda while his clients bought it for transport business, they now want its value in money taking into account the current value, he prays the refund of the price of current value for that car equivalent to forty-one million and five hundred thousand(41,500,000Frw), basing on the fact that in 1993 exchange rate of 1USD was 80Frw, while

now the exchange rate is 850Frw, and at the time they paid 3,900,000Frw.

- [23] Counsel Rutembesa Phocas pleading for Rwanda Motor S.A states that what adversary parties pray to be executed, differ with the decision of the Court because the Court ordered to be given the car which they bought in Rwanda Motor S.A. He adds, he finds that the fact that the judgment is brought before the Court, Rwanda Motor S.A should be given justice because it justified why the car was not delivered to those who bought it but the Court disregarded it, whereby Rwanda Motor S.A explained that the car was bought as agreed between parties and the car was even put in its warehouse but the buyers failed to instantly pick it for their reasons, he concludes that also, the buyers have some liabilities in the failure of delivery.
- [24] He lets it be known that the judgment was not executed because the type of the car is no longer produced, that Rwanda Motor S.A cannot find a similar car, that in such circumstances, they should have agreed the price paid worth 3,900,000Frw but they complicated matters stating that they need current value whereas Rwanda Motor S.A is not responsible for not delivering the car.

THE DETERMINATION OF THE COURT

[25] Concerning the principles of laws related to the procedure, the law of procedure comes into force with immediate effect on the date of its publication.

[26] Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure which is in force today, does not provide what shall be done in case an object subject to the execution of a judgment no longer exists. However, the Court finds,the fact that there is no provision on that matter, does not mean that the will of the legislator was that those issues should not be addressed so that the winning party may lose the equivalent when what she/he gained from a judgment no longer exists, rather, it implies that it is an oversight, this cannot prevent the Court to rule on the matter basing on the fact that the law in force has that gap, rather, the Court shall render the judgment basing on the article 9 paragraph one and two of that law² which provides that a judge cannot refuse to decide a case on any pretext of silence, obscurity, or insufficiency of the law.

[27] The grounds for which, the Court finds that there was an oversight in law to address issues in relation to the disappearance of an object subject to the execution of a judgment, is that in Law N° 22/2012 of 14/07/2012 relating to the civil, commercial, labour and administrative procedure which was in force at the time the Office of Ombudsman applied for the review to the Supreme Court in article 195 provided that the execution of judgments and acts are intended to provide their beneficiary with the privileges of his/ her right, either in kind or the equivalent³,

² A judge adjudicates a case based on relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine.

A judge cannot refuse to decide a case on any pretext of silence, obscurity, or insufficiency of the law.

³ The execution of judgments and acts are intended to provide their beneficiary with the privileges of his/ her right, either in kind or the equivalent.

the provisions of that article are also provided in article 192 of Law No 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure that was in force when the case on that matter was being heard. (in 2011)⁴.

[28] This position is emphasized by the legal scholar Gasasasira Ephrem in his book *Procédure civil et commerciale*, 1993, page 260 whereby he states that the execution is done on the object which was in litigation or on a similar object, when execution is impossible, the equivalent shall be offered in money.⁵

[29] However, the beneficiary is not entitled to choose whether, in the execution of a judgment, he/she is given those objects or their equivalent, the equivalent shall be given in case the execution on the object was impossible, and also, the equivalent shall be given considering the current value.⁶

[30] Concerning this case, the Court finds, all parties agree that the car MAZDA E2000 with 15 or 18 seats is the one bought by Tuyisenge Zabuloni and Uzamukunda Dorothée from Rwanda Motor S.A in 1994, it is also the same car for which Rwanda Motor S.A was ordered by the Court of Appeal of Kigali to give

⁴ The execution of judgments and acts are intended to provide their beneficiary with the privileges of his/ her right, either in kind or the equivalent.

 $^{^5}$ \hat{L} 'execution est directe ou en nature, lorsque c'est la prestation meme qui consiste l'objet de l'obligation qui est fournie au creancier.

L'execution par equivalent a lieu lorsque l'execution directe est impossible, soit que l'objet du litige ne s'y prete pas, soit qu'il y ait mauvaise volonte du debiteur,

⁶ Judgment RCAA 0116/11/CS rendered on 08/02/2013 by the Supreme Court, Nyirabugungo Isabelle vs Etablissement Mironko Plastic Industries.

Tuyisenge Zabuloni and Uzamukunda Dorothée in the judgment RC 23.394/95/S1-RC 23.742/95/S1 rendered on 04/06/2001.

[31] The Court also finds, all parties agree on the fact that factories that used to manufacture that type of cars, no longer produce them, this implies that execution on that car cannot be possible since the object no longer exists, therefore, based on what stated in previous paragraphs, Tuyisenge Zabuloni and Uzamukunda Dorothée have to be given by Rwanda Motor S.A, the equivalent of that car in money taking into account the current value.

[32] The Court finds that on 15/02/1994 when Tuyisenge Zabuloni and Uzamukunda Dorothée paid the last installment for the car, the exchange rate of 1USD was 145,0248Frw⁷ as found on website of National Bank of Rwanda,thus they paid 26,896USD because they paid 3,900,000 Rwandan francs(3,900,000Frw: 145,0248Frw=26,896USD).

[33] The Court finds, at the moment, the exchange rate of 1USD in Rwandan francs is 875Frw⁸ which is also found on the website of the National Bank of Rwanda, this implies that by basing on that exchange rate, Tuyisenge and Uzamukunda have to be given by Rwanda Motor S.A, the equivalent worth 875 Frw x 26.896=23.534.000 Frw.

⁷ <u>https://www.bnr.rw/index.php?id=89</u>, the website of National Bank of Rwanda visited on 14/02/2019 at 10h55

⁸ https://www.bnr.rw/index.php?id=89, the website of National Bank of Rwanda visited on 14/02/2019 at 10h55

Whether Tuyisenge Zabuloni and Uzamukunda Dorothée should be awarded the interests of their payment for the car which was not delivered.

[34] Counsel Kazeneza Théophile pleading for Tuyisenge Zabuloni and Uzamukunda Dorothée states that his clients would not have justice if they are only given what they bought or it is equivalent without being granted interests for which the car should have produced. For those reasons, they claim the interests calculated on 18% in the period of 10 years.

[35] Counsel Rutembesa Phocas pleading for Rwanda Motor S.A states that those damages are baseless because the issue of interests is examined when its origin existed.

THE DETERMINATION OF THE COURT

[36] Article 10 of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that a judge may not decide more than he/she has been asked to.

[37] The Court finds that the ground of the claim, in this case, is not the interests from the loan or a payment to be done every year or a period below of a year as provided by article 657of the civil code book(contracts and obligations)⁹, rather, the claim

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⁹ The article provides that money which is paid periodically, rent of a house or a field to be cultivated, interests of the money borrowed and all payments to be done every year or a period below of a year when a period of five(5) elapses without being claimed, there shall be the prescription of rights over all that money.

concerns the execution of the final decisions of courts by requesting the equivalent.

[38] In light of the above motivations, the Court finds with no merit, Counsel Kazeneza Théophile'request on behalf of Tuyisenge Zabuloni and Uzamukunda Dorothée, that they should be given the interests calculated on 18% per year for the current value that the car would have in a period of 10 years, rather, they have deprived the chance of using that car.

[39] The Court finds as it was the position of courts, whether before this Court or International Courts¹⁰, deprivation of chance cannot be considered as a loss contrary to Counsel Kazeneza Theophile's statement, rather, it is a ground of being granted damages for not using an object for which someone was supposed to possess, those damages are awarded at the discretion of the Court.

[40] In light of the above motivations, the Court finds without merit, the interests claimed by Counsel Kazeneza Theophile on behalf of his clients.

Concerning damages requested.

[41] Counsel Kazeneza Théophile on behalf of Tuyisenge Zabuloni and Uzamukunda Dorothée, claims to be given moral damages for unnecessary lawsuits, for not executing the judgment worth 5,000,000Frw, they also claim procedural fees

¹⁰ Comme en responsabilité délictuelle, le juge du fond apprécie souverainement le préjudice dès l'instant qu'il a caractérisé la perte de chance. Cf. Civ. 1ère, 10 juillet 2002, Bull.civ. I, n° 197;

⁻ the judgment RCOMAA 0008/12/CS rendered on 06/06/2008 by the Supreme Court, Bank of Kigali vs Kampire and Sibomana.

and counsel fees of 5,000,000Frw, all amounting to 10,000,000Frw.

[42] RUTEMBESA Phocas counsel for Rwanda Motor S.A states that the damages requested are groundless because they are the ones to introduce the lawsuits.

THE DETERMINATION OF THE COURT

- [43] The Court finds, concerning damages requested by Tuyisenge Zabuloni and Uzamukunda Dorothée which stated in 38 and 39 paragraphs of this judgment for being deprived of the chance of using the car buying, they waited for it for a long time but they didn't find it while they paid for it, in its discretion, the Court awards them 2,000,000Frw.
- [44] The Court finds with no merit, moral damages requested by Counsel Kazeneza Théophile on behalf of Tuyisenge Zabuloni and Uzamukunda Dorothée for unnecessary lawsuits because they are the ones to file a case and not Rwanda Motor S.A, thus, the latter did not drag them into unnecessary lawsuits.
- [45] Regarding procedural and counsel fees, the Court finds, Tuyisenge Zabuloni and Uzamukunda Dorothée deserve them, because they were represented in hearings, they also made expenses for procedural reasons, however, damages should be awarded indiscretion of the Court because those requested are excessive, the Court awards them 300,000Frw for procedural fees and 500,000Frw for counsel fees, all amounting to 800,000Frw.

III. THE DECISION OF THE COURT

- [46] Finds with merit, Tuyisenge Zabuloni, and Uzabumwana Dorothée'claim for the review due to injustice the judgment RCA 0081/HC/KIG rendered on 14/02/2011 by the High Court/Kigali;
- [47] The judgment RCA 0081/HC/KIG rendered on 14/02/2011 by the High Court/Kigali is quashed;
- [48] Orders Rwanda Motor S.A for payment of 23,534,000Frw to Tuyisenge Zabuloni and Uzabumwana Dorothée as compensation of the car, type of MAZDA E2000 which they bought in Rwanda Motor S.A but the car was not delivered;
- [49] Orders Rwanda Motor S.A to give Tuyisenge Zabuloni and Uzabumwana Dorothée damages worth 2,000,000Frw, 300,000Frw for procedural fees, 500,000Frw for counsel fees, all amounting to 2,800,000Frw.
- [50] Orders that the court fees be charged to the public treasury.

NZITONDA v COGEBANQUE LTD ET.AL.

[Rwanda COURT OF APPEAL – RCOMAA 00012/2019/CA (Karimunda, P.J.) December 09, 2019]

Commercial procedure – The claim requesting for invalidation or stay of an auction – The filing and hearing of the claim requesting for the invalidation of an auction is conducted as a summary procedure because it aimed at protecting the interests of the mortgagor and that of the buyer of the mortgage in the public auction which may be prejudiced due to the delay of the lawsuits in the courts of law – The claim requesting for the invalidation of an auction can be appealed for the second time within three days in case it fulfills the requirements since it's a principal claim – Law N° 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, article 260.

Fact: After Entreprise de Construction & Techniques d'Architecture (E.C.T.A) won the tender for the construction of a modern market at Mulindi, it entered into a loan contract with COGEBANK Ltd, Nzitonda, its director was its personal guarantee and also furnished a mortgage on its behalf. E.C.T.A failed to honour its contractual obligations and consequently, the mortgage was auctioned.

Nzitonda filed a claim to Commercial Court requesting to invalidate the auction because it was unlawfully conducted. That court rendered the judgment and held that the auction was unlawfully conducted, based on the ground that Nzitonda was not

notified of the selling terms and conditions of the mortgage, was not notified of the out of the expertise conducted on his property and also the Registrar General did not respect the seven (7) days provided by the instructions of the Registrar General regulating public auction of mortgage, therefore, it ordered COGEBANK Ltd to reimburse Higiro the money he brought the mortgage and also ordered COGEBANK Ltd together with Gashema to jointly pay Nzitonda various damages.

Higiro and Gashema were not satisfied with the rulings, thus appealed to the Commercial High Court, whereby Higiro stated that the Commercial Court held that Nzitonda was not notified of the selling terms and conditions on the mortgage while he was notified of it, laws do not oblige to notify the owner of the property about the outcome of the expertise, laws do not from the expertise and that the Registrar General not approving the auction within seven days, is not a ground for declaring null and void the mortgage. For Gashema, he requested the Court to examine whether Nzitonda was not notified of the selling terms and conditions on the mortgage, whether it was also his duty to inform him about those conditions mentioned above, he also requested for the damages.

The Commercial High Court found the appeal filed by Higiro and Gashema with merit and held that the auction was legally conducted

Nzitonda appealed against the rulings of the Commercial High Court to the Court of Appeal stating that the court disregarded that he was not notified of the outcome of the expertise conducted on his property and the procedures of its auction, also that the registrar General did not comply with the law.

Higiro raised an objection of inadmissibility of the appeal on the ground that it is Nzitonda's second appeal on a summary procedure claim while a second appeal on a summary procedure claim is inadmissible and also that the time limit for filing the appeal wasn't respected. Gashema also concurs with him on the objection raised.

Regarding the objection raised, Nzitonda (the appellant) argues that his appeal does not originate from a summary procedure claim because from the beginning of this case it was heard as an ordinary claim, thus finds no ground to reject his second appeal Regarding the issue of not respecting the time limit for appeal, he states that he observed the ordinary time limit of filing an appeal, and since he did not file a summary procedure claim, there is no ground to compute the time limit based on that provided for when appealing a summary procedure claims

Held: 1.A claim for invalidation of an auction can be appealed for the second time because it is not a summary procedure claim even though it is filed and heard in the same period as the one provided for a summary procedure.

2. Even though the claim for invalidation of an auction it's not a summary procedure but since the law provides that it should be filed and heard in the same period as the one provided for a summary procedure, makes the time limit for the appeal against a claim for invalidation of an auction to be three working days from the time the order was pronounced or from the day the parties were aware of the decision. Therefore, since the appellant did not demonstrate exceptional reasons that are beyond his/her control as to why he did not comply with the time limit his appeal is not admitted (rejected).

The appeal is rejected because it was not filed within the

Court fees on the appellant.

Statutes and statutory instruments referred to:

Law Nº 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, article 21, 185, 188 and 260.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE

- [1] Entreprise de Construction & Techniques d'Architecture (E.C.T.A), for which Nzitonda Kiyengo is Director, after winning the tender for the construction of a modern market in Mulindi, signed a loan agreement with COGEBANQUE Ltd, Nzitonda Kiyengo being the personal guarantee of ECTA, he also furnished his property located in Bwiza village, Kibaza Cell, Kacyiru Sector, Gasabo District, Kigali City, registered on UPI 1/02/07/03 / 1458. E.C.T.A defaulted on the payment, the mortgage furnished by Nzitonda Kiyengo was auctioned. Nzitonda Kiyengo contested the auction that it was illegally conducted, thus he filed a claim at the Commercial Court of Nyarugenge requesting that the auction be invalidated.
- [2] In the Judgment RC0M 01138/2017 / TC / NYGE rendered on 13/03/2018, the Commercial Court of Nyarugenge found that during the auction some procedures were violated,

such as the fact that Nzitonda Kiyengo was not given the selling terms and conditions of his mortgage, was not given the result of the valuation (expertise) of his property which he is entitled to. and that in approving of the auction, the Registrar General did not comply with the seven days provided for in the Instructions on modalities of lease, sale, public auction and mortgage acquisition, it held that the auction of 24/02/2017 conducted while selling Kiyengo's property located Nzitonda on parcel 1/02/07/03/1458 is invalid, ordered COGEBANQUE Ltd and Gashema Félicien to jointly pay Nzitonda Kiyengo 1,850,000 Frw in damages, COGEANQ pays Higiro Martin 86,417,378 Frw including the amount he paid for the house in the house, interest, damages and court fees, COGEBANQUE Ltd and Gashema Félic to jointly pay HIGIRO Martin damages amounting to 1,000,000 Frw

[3] Higiro Martin and Gashema Félicien were not contended with the rulings of the case and appealed to the Commercial High Court, Higiro Martin argued that the Commercial Court ruled that Nzitonda Kiyengo was not notified of the selling terms and conditions well as he was notified, that the instructions do not provide that he should be notified of the property valuation, and for the Registrar General not approving the auction within seven days is not a ground for the cancellation of the auction, he requests that if on the appeal, the court sustains that the auction is invalid, he should be reimbursed the money he used to renovate that house. Gashema Félicien, on the other hand, requests the Court to examine whether indeed Nzitonda Kiyengo was not notified of the selling terms and conditions and whether it was his responsibility to inform him, he concludes by requesting damages.

- [4] The appeal of Higiro Martin was registered on RCOMA 00269/2018 / CHC / HCC, and that of Gashema Félicien registered on RCOMA 00274/2018 / CHC / HCC, during in the hearing, the two cases were combined, the judgment was rendered on 18/09/2018, the Commercial High Court found that Nzitonda Kiyengo himself submitted document which indicate where his wife signed that she has received to the "Approval of Selling Terms and Conditions" accompanied by the Selling Terms and Conditions, that he did not state that he had not received some other document and that there was no law stipulating that Nzitonda Kiyengo should be notified of the property valuation, the fact that he was notified of the selling terms and conditions of the auction which contained the value of the property is sufficient, especially that he already had the property valuation which was carried out while furnishing the mortgage, that the fact that a seven-day period had been set for the Registrar General to approve the auction, was intended to ensure that the buyer did not end up in doubt while he has already paid for that property, it held that the appeal of Gashema Félicien and HIGIRO Martin have merit, that the auction for the property of Nzitonda Kiyengo was conducted in accordance with the law, that the appealed judgment is reversed, that the damages awarded on the first instance are squashed, and Nzitonda Kiyengo to give Gashema Félicien, Higiro Martin and COGEBANQUE damages of 1.200.000 Frw each, all damages amounting to 3,600,000 Frw.
- [5] Nzitonda Kiyengo was not contented with the rulings and appealed to the Court of Appeal, stating that in the appealed judgment, the Court ignored the fact that he had not been notified of the value of his property and the auction procedures, and that the Registrar General did not comply with the provisions of article 16 of the Instructions of the Registrar General N°

03/2010/Org of 16/11/2010 on modalities of lease, sale, public auction and mortgage acquisition which provides that the Registrar General was required to submit a report approving the deeds of the receiver within seven days.

[6] The case was heard in public on 03/12/2019, Nzitonda Kiyengo assisted by Counsel FONYO Munyamashara Patient Counsel Nkaka Kagobora together with Séraphin, COGEBANQUE Ltd represented by Counsel Kayitare Serge, Gashema Félicien represented by Counsel Bikotwa Bruce, while Higiro was represented by Counsel Ndahimana Jean Bosco, the Registrar General was represented by Counsel Nkusi Fred, who raised the objection of non-admissibility of the appeal filed by Higiro Martin on the ground that it was the second appeal on the summary procedure which cannot be appealed twice and also that he filed the appeal beyond the time limit.

II. ANALYSIS OF THE LEGAL ISSUES

II.1. Whether a summary procedure can be admitted on the second appeal.

[7] Higiro Martin and his counsel Ndahimana Jean Bosco, argue that the claim filed by Nzitonda Kiyengo is a claim requesting for the cancellation of the auction, which is heard and appealed as a summary procedure as provided for in article 260 of Law No 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, that is why the Commercial High Court did not hold a pre-trial hearing. They explain that a second appeal is not admissible on the summary procedure, this is the ground on which they base their objection of lack of jurisdiction.

- [8] Counsel Bikotwa Bruce, representing Gashema Félicien, argues that a summary procedure cannot be appealed twice as it would be contrary to the provisions of article 21 of Law no 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure.
- [9] Counsel Nkusi Fred, representing the Registrar General and Counsel Kayitare Serge, representing COGEBANQUE Ltd, have nothing to argue about the objection raised.
- [10] Counsel Fonyo Munyamashara Patient, assisting Nzitonda Kiyengo argues that the claim cannot be a summary procedure and be heard as an ordinary case. He explains that the fact that they did not organize a pre-trial hearing was not due to the fact that it was a summary procedure but because it was not provided for by law, that in the Commercial Court held a preliminary hearing and the Commercial High Court just heard the case that is why he finds that the second appeal should be admitted.

DETERMINATION OF THE COURT

- [11] Article 21, paragraph one, point 6, of the Law N $^{\circ}$ 22/2018 of 29/04/2018 Law relating to the civil, commercial, labour and administrative procedure, provides that « The court registrar cannot register a claim if the claimant : 6° files the second appeal in case of urgent applications ... »
- [12] Article 185 of Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that: "If there is need to have an interim ruling on a matter which requires urgent resolution, an action is filed in

accordance with the ordinary procedure regarding principal suits, before an urgent applications judge in the jurisdiction where the urgent measure is required in accordance with ordinary summons procedure. An application for summary procedure is instituted through the same procedure as ordinary proceedings.".

- [13] Article 260, paragraph 5, of Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that « The suspension or invalidation of an auction conducted based on the decision of the Registrar General is requested to the Registrar General. The Registrar General responds within three (3) working days. In case there is a party not satisfied by the decision of the Registrar General or who does not get a response in the time limit provided for by in this paragraph, the party files a claim in the commercial court in accordance with provisions of this Article within five (5) working days running from the date the party was notified of the decision.»
- [14] The case file indicates that the claim which was filed in the Intermediate Court of Nyarugenge on 15/06/2017 was "nullification of the auction dated 24/02/2017", NZITONDA Kiyengo claiming that COGEBANQUE Ltd ignored the truth and requested that his residential house which he had lent to ECTA as a mortgage be sold in the auction which was held on 24/02/2017, that auction was not held in accordance with the rules and regulations, he requested that it should be declared null and void.
- [15] The Court finds that although the summary procedure is usually related to a principal claim, the claim for the stay or cancellation of the auction is not related to the principal claim, the fact that the legislator in article 260, paragraph four, of Law

N° 22 / 2018 of 29/04/2018 mentioned above, that such a claim is filed and heard within the same time limit as of that of the summary procedure, the intention was not because she/he wanted to change its nature of being an independent claim, rather the purpose was to protect the owner of the sold property who challenges its auction and the successful bidder winner from the loss which can be caused by the delay of the case in the court.

[16] The Court finds that while a claim for suspension or annulment of an auction in its nature is not a summary procedure and it is filed and heard as a summary procedure, nothing prevents it from being appealed on the second level, and therefore the arguments of Counsel BIKOTWA Bruce that appeal on the second level on stay or invalidating the auction is prohibited by section 6 of the first paragraph of article 21 of Law N° 22/2018 of 29/04/2018 of the law mentioned above is without merit because when that article is read together with article 188, paragraph 3, of that law¹what is prohibited is the second appeal of the summary procedure attached to a principle case is that when those articles are read and article 185 of that law², makes it clear that what is prohibited from being appealed a second time is an urgent complaint relating to another ground of appeal.II.2. Whether the appeal was not filed within the time limit

[17] Higiro Martin and Counsel Ndahimana Jean Bosco representing him argue that the appealed judgment was rendered

¹ "Appeals against summary procedure orders are submitted to a superior court and are appealable only once.."

² If there is a need to have an interim ruling on a matter which requires urgent resolution, an action is filed in accordance with the ordinary procedure regarding principal suits, before an urgent applications judge in the jurisdiction where the urgent measure is required in accordance with ordinary summons procedure."

on 18/09/2018, Nzitonda Kiyengo appealed on 15/10/2018, which means that he appealed in accordance within the days in a month yet based on the provisions of article 188 and 260, paragraph 4, of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, he should not have exceeded three working days, which is counted beginning from the date of the pronouncement of the judgment, the reason they request this court to reject the appeal because it was not filed within the time limit

- [18] The counsel for Gashema Félicien, Advocate Bikotwa Bruce, and Advocate Nkusi Fred, representing the Registrar General, argued that the claims of Higiro Martin and his counsel are founded, thus they request the Court to reject the appeal.
- [19] The counsel for COGEBANQUE Ltd, Advocate Kayitare Serge that the claim for staying or cancellation of the auction is a special claim which should be filed and appealed within the same time limit as that of the summary procedure, he also finds that Nzitonda Kiyengo did not comply with the time limit of appealing.
- [20] The counsel for Nzitonda Kiyengo, Advocate Fonyo Munyamashara Patient and Advocate Nkaka Kagobora Séraphin argue that in the Commercial High Court they appealed within the usual time limit of the appeal, they find that since the claim filed is not a summary procedure there is no ground the period of filing an appeal should be computed the same way as that of the summary procedure.

DETERMINATION OF THE COURT

- [21] Article 188, paragraph 2, of Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that « The appeal is made within three (3) working days from the time the order was pronounced or from the day the parties were aware of the decision. The case also is decided in a period not exceeding three (3) days. »
- [22] The case file demonstrates that the appealed case was pronounced on 18/09/2018, after coming into force of the Law No 22/2018 of 9/04/2018 mentioned above, implying that it's the one which should have been implied because it was appealed on 15/10/2018.
- [23] The Court finds that between 18/09/2018, when that case was adjudicated and 15/10/2018 when it was appealed, it is almost 27 days, yet article 188, paragraph 2, of Law No 22/2018 of 29/04/2019 cited above provides that " The appeal is made within three (3) working days from the time the order was pronounced....", which means that Nzitonda Kiyengo delayed late to appeal and before this Court, he does not demonstrate an event of force majeure that prevented him from appealing within the time limit prescribed by law, therefore his appeal was not filed within the time limit

III. DECISION OF THE COURT

[24] Holds that the appeal of Nzitonda Kiyengo is not admitted because it was not filed within the time limit;

[25] Orders that the court fees amounting to 50.000 Frw be paid by Nzitonda Kiyengo.

CASES IN MERITS

CIVIL CASE

AKISANTI v TUYISHIMIRE

[Rwanda SUPREME COURT- RS/INJUST/RC 00021/2018/SC (Rugege, P.J., Cyanzayire and Rukundakuvuga, J) November 22, 2019

Evidence – Scientific evidence – The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available scientific evidence, so that it is not left to bank upon presumptions unless science has no answer to the facts in issue.

Family law – Paternity petition – DNA test – The results of the DNA test have significant weight and are trustworthy because it's scientific evidance.

Facts: Tuyishimire Yves filed a paternity suit in the Primary Court of Nyamirambo requesting the court to declared that the deceased is his biological father and therefore inherit his estate. According to the elements of evidence produced such as the baptism file, the certificate issued by FARG, and others, the Court declared the applicant a child of the late Gusenga.

After that case, Akisante, who claims to be a sibling of Gusenga, lodged a third party opposition against the ruling of the Court arguing that Tuyishimire was not born by Gusenga and challenges the evidence based upon by the court. After examining the grounds on which he bases to oppose the judgment, the Court found them without merit, therefore the opposed judgment was sustained. Akisanti was not satisfied with that ruling, thus he appealed to the Intermediate Court of Nyamirambo, which also found the appeal without merit.

AKISANTE was never contented with the rulings of those courts, thus took his matter to the Office of the Ombudsman requesting for the review of the case due to injustice. After scrutinizing the issue, the Office of the Ombudsman wrote to the President of the Supreme Court requesting that the case be reviewed because it was vitiated with injustice because the Court refused to conduct a DNA test between Nyirabarera and Akisanti himself whom they share same parents with the deceased. After examining the report, the President of the Supreme Court decided that the case be reviewed due to injustice.

At the hearing, after hearing the explanations on each side, the Supreme Court ruled that before the case was decided at the root it was necessary to first compare the DNA tests to the following: Rejoice with the Body of Prayer (buried in the Memorial) of the Mountain Genocide); The so-called relatives of the deceased in Rwanda are Akisanti, Nyirabarera, and the body of Prayer; The Prayers of Innocent have already been mentioned by Tuyishimire Yves.

After the oral submissions of the parties, the Supreme Court, in the interlocutory judgment, held that before ruling on the merit of the case, the DNA should be tested: Tuyishire Yves and the remains of Gusenga Innocent (raid to rest at Gisozi Memorial Center); those assumed to be the siblings of Gusenga Innocent living in Rwanda, who are Akisanti Ayubu, Nyirabarera Jacqueline and the remains of Gusenga Innocent; and the mentioned siblings of Gusenga Innocent with Tuyishimire Yves.

The DNA test was carried out at the Gisozi Memorial Center, the results were submitted to the Supreme Court and both parties were notified of the results, hence the hearing was resumed.

In the report submitted to the Court, the experts explained that, after conducting a test based on the saliva samples of those who were to be tested, as well as the bone removed from the remains of Gusenga Innocent, the results are the following:

Between Gusenga and Tuyishimire, the calculated probability of paternity is 99.999999999483 %, implying that there is no doubt about the fatherhood of late Gusenga Innocent and the child Tuyishimire Yves;

Between Gusenga Innocent and Akisanti Ayubu, the probability of being brothers is 2.3125452031 %, whereas for not being brothers it is 97.6874547968%;

Between Gusenga Innocent and Nyirabarera Jacqueline, the probability for the latter being the sister of Gusenga Innocent, meaning that they share the same parents, is 99.999999927%, whereas the probability of not being biologically related is 0.0000000072 %;

Between Akisanti Ayubu and Tuyishimire Yves, the probability of the latter being a fraternal nephew of Akisanti Ayubu, meaning that the father of Tuyishimire Yves is a brother of Akisanti Ayubu, is 2.3125452031 %, that of not being biologically related is 97.6874547968 %;

Before the beginning of the hearing, Akisanti prayed to the Court that the hearing is held in camera because his private life may be put in public which contravenes good morals, the other party argues that since the beginning of the hearing, he never requested that it should be conducted in camera, he finds the request groundless, after deliberating the Court found the raised issue without merit.

The case proceeded in merit, both parties submitted their arguments on the results of the DNA test, Akisanti challenged the results on the basis that it was submitted without the signature of the administrator of the organ which issued it, that the statement contradicts itself therefore it is not trustworthy because what is written was dictated by Tuyishimire.

Tuyishimire, on the other hand, argues that Akisanti's claim that they do not accept the outcome of the test is a tactic to delay justice because they are the ones who requested it.

Tuyishimire requested various damages and in his defense, Plaintiff argues that the issues which were not examined in previous courts should not be submitted at this level because it's a new claim.

Held: The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left bank upon presumptions unless science has no answer to the facts in issue.

The results of the DNA test have significant weight and are trustworthy because it's a piece of scientific evidence.

The claim for review of the case due to injustice have no merit;
Gusenga Innocent is the biological paternal parent of Tuyishimire.

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 6 and 75

Law N° 32/2016 of 28/08/2016 governing persons and family, article 282

Law Nº 15/2004 of 12/06/2004 relating to evidence and its production, article76

Law Nº 41/2016 of 15/10/2016 establishing the Rwanda Forensic Laboratory and determining its mission, organization and functioning, article 26, paragraph 6 and 7

Cases referred to:

Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576

Authors:

DR. HIMANSHU Pandey & Ms. ANHITA Tiwari, Evidential value of DNA, Bharati Law Review (online), Jan. – March 2017, p. 1[seen the 18th Nov. 2019], published in the articles section of www.manupatra.com.

Judgment

I. BRIEF BACK GROUND OF THE CASE.

[1] Gusenga Innocent was killed in the Genocide against the Tutsi in 1994. In 2014, Tuyishimire Yves filed a paternity suit in the Primary Court of Nyamirambo requesting the court to

declared that the deceased is his biological father and therefore inherit his estate. The claim was registered on RC 0669/14/TB/NYB and the judgment was pronounced on 08/10/2014. The Court held that Tuyishimire Yves is the son of Gusenga Innocent and that he has to be registered as his child. The court based its decision on the testimony of the witnesses, the baptism card, and on the document issued by FARG indicating that the father of Tuyishimire Yves is Gusenga Innocent.

- [2] After the paternity suit was ruled in favour of Tuyishimire Yves, Akisante Ayubu opposed that judgment stating that the Court based on false information. He filed a claim on 17/03/2016, which was registered on RC0162/16/TB/NYB and adjudicated on 29/11/2016. The Court held that the claim filed by Akisanti Ayubu has no merit, thus the opposed judgment is sustained. The Court, based on the fact that the witnesses Misago Pascal and Gakire Steven produced by Akisante Ayubu have no idea on the issue at hand because they averred that they only knew Gusenga Innocent from their workplace, they did not know his private life.
- [3] Akisante Ayubu appealed that judgment before the Intermediate Court of Nyarugenge , it was registered on RCA 00010/2017/TGI/Nyge, and the judgment was rendered on 06/07/2017. The Court found his appeal without merit, sustained the appealed judgment RC 00162/16/TB/NYB rendered by Primary Court of Nyamirambo on 29/11/2016.
- [4] After all those cases, Akisante Ayubu wrote to the Office of Ombudsman requesting to review the judgment RCA 00010/2017/TGI/NYGE because it is vitiated by injustice. The office of the Ombudsman after assessing the request of Akisante Ayubu, also wrote to the President of the Supreme Court

requesting that the case RCA00010/2017/TGI/NYGE be reviewed because it is vitiated by injustice. The Ombudsman motivated that the Intermediate Court refused to conduct a DNA test on Nyirabarera Jacqueline and Akisanti Ayubu, whom both share the same parents with Gusenga Innocent basing on the fact that, there was no DNA test conducted between them and Gusenga Innocent to determine whether they are biologically related or not. The Office of Ombudsman indicated that the rulings of the Intermediate Court are erroneous because it is inconsistent with the precedent of the Supreme Court, in the case RS/REV/INJUST/CIV 0005/15/CS, it rendered on 19/06/2015.

- [5] The office of the Ombudsman indicated that the pleadings of Tuyishimire Yves are similar to those of Umugire Alphonse in the case RS/REV/INJUST/RC 0005/15/CS, because they all stated that, it is impossible to conduct a DNA test between the relatives of the deceased and the child who seeks to be declared a child of the deceased, therefore deciding contrary to that precedent would be an error in law because, the decisions of the Supreme Court are binding to all other Courts as provided by article 47 paragraph 6 of the organic Law N^O 03/2012 OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court which was into force at the time of rendering that judgment.¹
- [6] The President of the Supreme Court, based on the assessment made by the Ombudsman and on the report made by the inspectorate general of Courts, decided the case to be scheduled for review, it was registered on RS/INJUT/RC

¹ Judgments and decisions of the Supreme Court shall be binding on all other courts of the country.

00021/2018/SC, and the hearing of the case was scheduled on 14/05/2019.

- [7] The hearing was held on 14/05/2019 in public, Akisanti Ayubu appeared in Court assisted by Counsel Muhayimana Isaie together with Abijuru Emmanuel, whereas Tuyishimiye Yves was also present assisted by Counsel Murindabigwi Mariam together with Counsel Muhiganwa Damas. The parties argued upon the evidence relied on by the previous Courts, also they argued upon the issue of whether is necessary to conduct a DNA test to determine if Tuyishimiye Yves is a child of Gusenga Innocent.
- [8] After the oral submissions of the parties, the Supreme Court, in the interlocutory judgment, it held that before ruling on the merit of the case, A DNA test should be performed between:

Tuyishire Yves and the remains of Gusenga Innocent;

Those who are said to be the siblings of Gusenga Innocent living in Rwanda, who are Akisanti Ayubu, Nyirabarera Jacqueline, and the remains of Gusenga Innocent;

The aforementioned siblings of Gusenga Innocent and Tuyishimire Yves.

[9] On 03/06/2019, the Chief Registrar of the Court wrote to Rwanda Forensic Laboratory requesting it to perform the DNA test in order to enforce the decision of the Court. The DNA test was performed on 15/10/2019 at Kigali Genocide Memorial at Gisozi. On 06/11/2019, the results were given to the Supreme Court and both parties were notified of the results, the hearing resumed on 07/11/2019, in presence of all parties.

- [10] Before the beginning of the hearing, Counsel Abijuru Emmanuel representing Akisanti Ayubu, based on article 70, paragraph 2 of the Law N° 22/2018 of 29/04/2018 on civil, commercial, labor and administrative procedure², prayed to the Court that hearing is held in camera because the private life of Akisanti Ayubu may be put in public which contravenes the good morals.
- [11] Tuyishimire Yves and his counsels argued that since the beginning of the case, the hearing was held in public and none was at stake, also that it requires the consent of both parties for the hearing to be held in camera, thus they find that request without merit.
- [12] The Court after deliberating on the request submitted by Counsel ABIJURU Emmanuel, it found that since this case started before the Primary Court and before the Intermediate Court, it was heard in public, and even Akisanti Ayubu does not indicate the inconvenience caused, also if the hearing is conducted in public, it will not cause any disorder, it found his request without merit, the hearing resumed in public, the parties made oral submissions on the report submitted by Rwanda Forensic Laboratory. One of the experts who performed the DNA test was also present during the hearing to provide explanations on that report.
- [13] The hearing of the case was closed, the parties were notified of the pronouncement scheduled on 22/11/2019. The

² However, if the court, upon its motion or application by both parties or any of them, believes that the hearing conducted in public may disrupt public order or good morals or if it is against people's right to privacy, it may decide that the hearing be conducted in camera and the explanation thereof is given.".

main issue under litigation in this case and which was examined by the Court is whether there is irrefutable evidence that proves that Tuyishimire Yves is a child of Gusenga Innocent.

II. ISSUES TO BE ANALYSED

A. Whether there is irrefutable evidence that proves that Tuyishimire Yves is a child of Gusenga Innocent.

[14] Counsel Muhayimana Isaie and Counsel Abijuru Emmanuel who represent Akisanti Ayubu state their client's grounds of injustice are the following:

Article 282 of the Law N° 32/2016 of 28/08/2016 governing persons and family provides for the procedure to determine the paternity of the child of supporting evidence. None of the provisions of that article was respected in deciding that Tuyishimire Yves is a biological child of Gusenga Innocent, including the DNA test.

Their client requested to conduct a DNA test which indicates without any confusion the paternity relationship, this was possible because there are some of the siblings of Gusenga Innocent are still alive, but the Court rejected it. However as decided by the Supreme Court in the case RS/REV/INJUST/CIV 0005/15/CS rendered on 19/6/2015, that test is possible and resolves the dispute irrevocably.

The intermediate Court did not put into consideration the contradictions in the testimony of the witnesses before the Primary Court, because they failed to prove that Tuyishimire Yves is a child of Gusenga Innocent:

A witness called Migambi Déogratias stated that he has no proof that the parents of Tuyishimire Yves are Gusenga Innocent and Nzitonda Médiatrice; this is a contradiction from the content of the copy of the judgment on page one, where the Court indicated that he affirmed that Tuyishimire is a child of Gusenga Innocent

A witness called Nyiribambe Joselynewho stated that Nzitonda Médiatrice(the mother of Tuyishimire Yves) was her classmate, her testimony should not have been based on because she stated that the sister of Gusenga Innocent who used to work from the taxi park was the one who used to give Nzitonda Médiatrice money to look after the child whereas Gusenga Innocent was still alive;

Whether Tuyishimire Yves was born in 1992 or 1993 because he keeps on changing his date of birth, the testimony of Nyiribambe Joselyne is untrustable since she states that Nzitonda Médiatrice did not suspend her studies whereas it is impossible due to pregnancy, giving birth, and breastfeeding the baby; it should also be noted that during that time when a girl got pregnant without a husband she had to drop out of school.

The baptism card based on as evidence contains the following irregularities:

The falsification as regards to the mother's name, where it was written Béatrice and later changed it to Médiatrice;

The names of the parents which appear on the card, (Gusenga and Nzitonda) are not the ones that appear

in the register of the children baptized in "Eglise Episcopale au Rwanda" from 11/03/1992 to 10/04/1993;

If the baptism card was not a forgery, the parent's names of the child Tuyishimire baptized on 24/12/1992, would be Rwabutogo Emmanuel and Nzitonda Béatrice as it's the case for other children baptized on that date of 24/12/1992;

Rwabutogo Emmanuel, who appears on baptism form as the godparent of the child, also appears in the register as the father of the child. This should be the truth as mentioned by the witness called Migambi Déogratias, whereby he testified that he has no proof that the father of Tuyishimire Yves is Gusenga Innocent.

Also, it is not understandable, how Gusenga Innocent who was catholic would baptize his child in an Anglican church.

The student identity card of "Ecole Techinique Nyarurema" of 2012, which the previous Court qualified as FARG certificate, on which it based its rulings, it indicates that the owner of that card is Tuyishime Yves who is different from Tuyishimire Yves the claimant in this case. Akisanti Ayubu states also that the concerned card indicates that Tuyishime Yves was born on 25/05/1992 (that year is also falsified), whereas the baptism card on which the Court also relied on indicates that he was born on 14/05/1992;

The way Tuyishimire Yves keeps on changing his names, date, and year of birth as affirmed by NIDA, it is proof

that he makes and uses the documents as he wants depending on the motive. They also state that his paternal parent who is registered in the civil registry, who also raised him since he was very young, is called Kanyamibwa, and does not refute it.

[15] Tuyishimire Yves and his counsel Adv.Murindabigwi Mariam and Adv. Muhiganwa Damas in responding to Akisanti Ayubu's grounds for injustice, state that:

The intermediate Court decided in its discretion because it motivated that Akisanti Ayubu requests for a DNA test between him and Tuyishimire Yves or between Tuyishimire Yves and Nyirabarera Jacqueline, the sister to him and Gusenga Innocent, but he does not indicate whether there was a DNA test performed between him and Gusenga or between Gusenga and Nyirabarera, which indicated that Gusenga is biologically related with one of them;

At the time of filing the claim, the DNA test was not provided by the Law of 27 October 1988 relating to book I of the Civil Code, the judge referred to various elements of evidence, including the baptism file which indicates that Gusenga registered that child as his own, and FARG certificate which indicates that is a child of Gusenga Innocent;

The other party requested a DNA test between Tuyishimire Yves, Akisanti Ayubu, and Nyirabarera Jacqueline, whereas there is nothing that proves that they are brother and sister of Gusenga Innocent. Tuyishimire Yves and his counsel requested that the DNA test should be performed between him and the remains of Gusenga

Innocent's which was laid to rest at the Genocide Memorial at Gisozi because some people know where he is buried also there is a video taken at his burial ceremony;

As regards the testimonies of the witnesses, Akisanti Ayubu disregards the facts that, they corroborate with the written evidence produced before the Court, which includes the baptism card and the FARG certificate which indicates that his tuition is paid by the latter. With regards to witnesses produced by Akisanti Ayubu, they stated that they only knew Gusenga Innocent at the workplace, they are not aware of the birth of Tuyishimire Yves;

With regards to the baptism card:

The written errors as regards the names are common and they were rectified by Anglican Church.

Where it is written Rwabutogo it concerns another child who was baptized on the same day with Tuyishimire Yves

Being baptized in Anglican Church whereas Gusenga Innocent was a catholic, this was due to the fact that his mother was a member of the Anglican Church.

after the debate on the baptism card and the register of the baptized children produced before the Court by his opponent, Tuyishimire Yves was given the Christian certificate which testifies that he was baptized and is the son of Gusenga Innocent and Nzitonda;

With regards to the FARG certificate produced before the Court, which indicates that his tuition is paid by the latter

and the student's card was produced separately. For the student's card containing some errors, it is not an issue because he has a diploma that indicates his name. Akisanti Ayubu filed a complaint before police for the forged document, his claim was transferred to the prosecution which found it groundless and dismissed it.

As regards the names, Tuyishimire Yves does not change names as it is alleged, but when his mother got married, he went to stay with his grandmother, and those two names were registered on him; then when he grew up he changed them, and remained with those given to him by his parents.

[16] After the Court held that Rwanda Forensic Laboratory performs a DNA test, and it was done and the report notified to parties, the Counsel for Akisanti Ayubu, contested it, thus they requested the Court to disregard it because it contained the following irregularities:

The first issue concerns those who performed it because of the way it was done you cannot recognize the authors of that report;

The report which was given to the Court contains the names of 3 people but nothing indicates that their work was approved by the Director-General of Rwanda Forensic Laboratory. There is no letter written by the Director General to the Supreme Court accompanying the requested report as provided by article 26 of the Law establishing Rwanda Forensic Laboratory especially in litera 6 and 7³, where it provided that the Director General

³ The Director General of RFL has the following responsibilities:

is the spokesperson of the organ, this means that when the report is made by someone else or when is not its signatory, it is not valid;

When the report is submitted by an organ rather than the one requested to submit it, that implies that it was made by the incompetent person, thus, its contents cannot be based upon. With regards to the experts who came to explain to Court the content of that report, they have no comments because nothing proves that, they are Rwanda Forensic Laboratory employees, also if the Director General does not appear in Court or does not sign on the report, it should have been done by some sent by him with a letter accompanying the report.

The report would have been sent together with some other documents which would facilitate the reader to understand it easily because it contains many abbreviations and it was made in the professional terminology and the figures lack explanations to facilitate someone else who is not an expert in that field to understand them. They argue that the experts who made it should make it complete.

the authors of the report do not indicate how they got the figures and the software used, this is the reason why their report does not give guidance to the issues raised by the Court.

The report contradicts itself and that casts doubt on its contents and its truthfulness. This is emphasized by the

^{6°} to serve as the legal representative of RFL and give publicity to its activities:

 $^{7^{\}circ}$ to serve as the spokesperson of RFL.

fact that, on 06/11/2019, Rwanda Forensic Laboratory reported that, it has not yet performed a DNA test between either Gusenga Innocent and his siblings or between Tuyishimire Yves and the siblings of Gusenga Innocent, due to the fact that the software to be used was not yet available, it is thus not understandable how that software was immediately procured in the morning basing on the procedure for the public procurement;

another reason to doubt that report is that the numbers it provides keep on changing, whereby the biological relationship between Gusenga Innocent and Tuyishimire Yves is different from the relationship in percentage between Gusenga Innocent and Nyirabarera Jacqueline. They state also that numbers do not match well, they state that they do not understand how the percentage reach 99,999% where Gusenga Innocent has 15/16 whereas Tuyishimire Yves has 13/16 somewhere else, Gusenga Innocent has 7/8, whereas Tuyishimire Yves has 6/11, also at line 14 Tuyishimire Yves has 8/11 whereas Gusenga Innocent has 13/14;

The experts indicated that the probability that Nyirabarera Jacqueline is related to Tuyishimire Yves 99.9999999997%, whereas the probability between Gusenga Innocent and Tuyishimire Yves is 99.999999999483%, this may indicate that Tuyishimire Yves is closely related to Nyirabarera than he is related to Gusenga Innocent. They state that if that is not a coincidence or an error, they are the lies, reason why they pray the Court to disregard this report, and another one contradicting it be performed abroad (*Contre expertise*);

The fact that the report emphasizes the allegations made by Tuyishimire Yves since the beginning of the case, that among the siblings of Gusenga Innocent some are half brothers and sisters, means that its authors wrote what they have been told by Tuyishimire Yves, to the extent that someone may assume that there has been impartiality or bribery, though they can not affirm or deny it.

[17] Tuyishimiye Yves and his counsels responded to the claimant's critics about that report as follows:

Akisanti Ayubu and his counsel challenging the results of the test is just a tactic to delay justice because they are the ones who requested it,

It is not understandable how the counsels are trying to challenge the work of experts while they don't have any skills in that field, the arguments for the counsel of Akisanti Ayubu should not be considered; also if they fail to understand some of the contents of the report, the expert will explain to them because that is the reason why the expert was summoned to give explanations.

Basing on article 93 of the Law governing evidence and its production, they find that the report was made in accordance with the law because it does not provide that the report should be signed by the Director General of the institution which made it.

With regards to the way the report was made, they find that it does not have any problem because every issue raised by the Court, was tackled by the experts and a conclusion was made upon it. Stating that the experts did the report in favour of Tuyishimire Yves and that they were biased, is uncalled for because an advocate cannot just make an allegation before the court without substantiating it with, therefore, they must withdraw that statement;

Requesting to conduct another test abroad, would be seen as not having trust in the Rwandan justice system;

They conclude by stating that, it is surprising that Akisanti Ayubu who requested for DNA test, is also the one who requests that it should be nullified.

One of the experts who conducted the DNA test who [18] appeared before the Court, representing the DNA department in Rwanda Forensic Laboratory, demonstrated how the test was conducted, he even explained what the counsel for Akisanti Ayubu had not understood. He indicated that the probability between Gusenga Innocent and Tuvishimire parentage Yves(99.999999999483 %) is high than that between Nyirabarera Jacqueline and Tuyishimire Yves(99.999999927 %), this is indicated by figures "9" it contains. He explained that a child normally has 50 % of his mother's chromosomes and 50% of his father's. he explained also that, there was no procurement bid to be advertized, rather the renewal of the license.

DETERMINATION OF THE COURT

[19] The major irregularity indicated as the ground of review the case RCA00010/2017/TGI/NGYE due to injustice, is that the Intermediate Court of Nyarugenge, decided that Gusenga Innocent is the father of Tuyishimire Yves without performing the DNA test which was requested by Akisanti Ayubu.

[20] Article 76 of Law N° 15/2004 of 12/06/2004 relating to evidence and its production provides that evidence by experts is that which is intended to give to the court, explanations based on expertise as well as conclusion which is beyond the ordinary knowledge of a judge in his or her duties, depending on the underlying special expertise. Whereas article 282 of the Law N°32/2016 of 28/08/2016 governing persons and family provides that DNA test or other scientific evidence is one of the grounds for a paternity petition to be admissible⁴

[21] In other words, these articles indicate that a judge may use experts who have particular expertise to guide him/her on the issue at hand, particularly he/she can use the DNA test to rule on a paternity petition. This was the position of the Supreme Court of India in the case *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*, (2014)2 SCC 576, whereby it held that "The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left bank upon presumptions unless science has no answer to the facts in issue".

[22] In this case, the Court requested Rwanda Forensic Laboratory as a government institution that has the expertise to perform a DNA test as it is to determine whether Gusenga Innocent is the father of Tuyishimire Yves. In the report submitted to the Court, the experts of Rwanda Forensic Laboratory explained that after performing the test from saliva

⁴ Even though this Law came into force after this case was already filed, it can be relied on pursuant to the first paragraph of article 330, which provides

can be relied on pursuant to the first paragraph of article 330, which provides that All cases pending before courts at the time of commencement of this Law are tried in accordance with this Law, but with no retrospective effect over acts thereto related already accomplished.

samples of the persons who had to be tested, and also from the bone extracted from the remains of Gusenga Innocent, the results were as follows:

Between Gusenga Innocent and Tuyishimire Yves, The calculated probability of paternity is 99.999999999483 %. From a forensic point of view there is no doubt about the fatherhood of late Gusenga Innocent and the child Tuyishimire Yves;

Between Gusenga Innocent and Akisanti Ayubu, the probability of being brothers is 2.3125452031 %, whereas for not being brothers it is 97.6874547968%;

Between Gusenga Innocent and Nyirabarera Jacqueline, the probability for the latter being the sister of Gusenga Innocent, meaning that they share the same parents, is 99.99999997%, whereas the probability of not being biologically related is 0.0000000072 %;

Between Akisanti Ayubu and Tuyishimire Yves, the probability of the latter being a fraternal nephew of Akisanti Ayubu, meaning that the father of Tuyishimire Yves is a brother of Akisanti Ayubu, is 2.3125452031 %, that of not being biologically related is 97.6874547968 %;

[23] The Court based on the explanations of the experts as demonstrated in the previous paragraph finds that there is no

doubt that Tuyishimire Yves is a child of the late Gusenga Innocent and he is a fraternal nephew of Nyirabarera Jacqueline, but he is not biologically related to Akisanti Ayubu. The results produced by the DNA test are highly valuable and trustworthy because it is scientific evidence that is reliable. The experts state that the DNA of a person is composed of chromosomes from both parents, this emphasizes the fact that the DNA test is reliable in determining the biological relationship between parents and their descendants⁵. This corroborates with the explanations provided by experts of Rwanda Forensic Laboratory during the hearing.

[24] The Court finds that it is no longer necessary to examine the elements of evidence relied on by the Intermediate Court Nyarugenge which were challenged by Akisanti Ayubu, those elements of evidence comprise mainly of; testimonies of the witnesses, baptism card issued by the Anglican Church of Rwanda and the card for the student paid by FARG because the results produced by DNA test are trustworthy. The Court finds also that Tuyishimire Yves being registered on Kanyamibwa (the husband of his mother) in the civil registry, changes nothing on the truth established by the DNA test.

[25] The arguments of the counsel for Akisanti Ayubu, that the report made by the expert is null and void because nothing proves that the task they did was approved by the administration of

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⁵ « DNA is made up of one half of our biological mother's DNA and one half of our biological father's DNA. 50 % of our DNA is passed down to our biological children. It is this that ensures DNA is unique and allows for accurate testing of parentage and direct descendants through a DNA paternity test"; DR. HIMANSHU Pandey & Ms. ANHITATiwari, Evidential value of DNA, Bharati Law Review(online), Jan. – March , 2017, p. 1[seen the 18th Nov. 2019], published in articles section of www.manupatra.com

Rwanda Forensic Laboratory, which should also be the one to submit it to the Court, this Court finds it without merit because the test was conducted by experts designated by that institution based on their expertise and knowledge after swearing as provided by article 93 of the evidence Law No15/2004 of 12/06/2004 relating to evidence and its production, they prepared the report which they submitted to the Court registry as provided by article 95 of the aforementioned Law.

[26] The Court finds that article 26, litera 6 and 7 of the Law No 41/2016 of 15/10/2016 establishing the Rwanda Forensic Laboratory and determining its mission, organization and functioning, referred to by the counsel for Akisanti Ayubu, does not provide that the Director General has to write to the Court when submitting the experts' report to the Court after he has approved. That article rather in litera 6 and 7, provides that the Director General serves as the legal representative of RFL and gives publicity to its activities, and he serves also as its spokesperson.

[27] Furthermore, the counsels for Akisanti Ayubu challenge the report of the expert that it contains many abbreviations and figures which don't have explanations also lacks merit because, despite that the experts summarized the report to the extent that it can be understood by an ordinary person with no knowledge of DNA test, they also took enough time to explain it before the Court, they even answered all questions about what the parties to the case wanted to know. About the concern raised by the counsel for the plaintiff, that RFL first sent a report indicating that the software to be used was not yet available, and the next morning it sent another report containing the results got from that software whereas the public procurement usually takes a long time, the

experts explained that what was needed is the renewal of the license, not the advertisement of the bid, and this can be done in a short time. The court also finds this ground with no merit.

- [28] The court finds that in general the irregularities raised by the counsels for the plaintiff seeking to declare the report null and void, have no connection with the consistence or substance of the report made by the expert. The Court finds that despite that their statements being baseless, they can not even render the report of the experts void, also their request that another test should be performed abroad, lacks merit.
- [29] The court finds then that, Basing on all the motivations given above, the Court finds that there is enough evidence to prove that Tuyishimire Yves is a child of Gusenga Innocent.

B. Whether damages should be awarded in this case.

i. Damages requested by Tuyishimire Yves

[30] Tuyishimire Yves states that Akisanti Ayubu frivolously dragged him into a lawsuit whereas he knew that he is the son of Gusenga Innocent, because of this, he has to pay him damages calculated as follows:

Moral damages equal to 10,000,000 Frw for denying him whereas he knows the truth, he defamed him calling him a liar whereas he should be the one, who should have looked after him, also for having suspended his job because he was in jail due to these court cases.

Damages equivalent to 6,000,000Frw which includes:

1,000,000Frw paid to the Counsel at the Primary Court level;

1,000,000Frw he paid to the counsel at the Intermediate court level;

500, 000Frw he paid while the file was still in police and 500,000Frw he paid to the Prosecution;

2,000,000Frw he paid at the Supreme Court;

493,020 Frw he paid for DNA test;

[31] Akisanti Ayubu and his counsel state that, the claims which were not mentioned in the pre-trial meeting and not included in the court submissions should not be examined, because it will be a new claim. They state that the damages requested by Tuyishimire Yves for the proceedings before the previous courts and before the prosecution has no merit because they can not be heard before this Court.

Damages requested by Akisanti Ayubu

- [32] Akisanti Ayubu requests the Court to award him damages for being dragged in unnecessary lawsuits, which are calculated as follows:
 - 3,000,000Frw for being dragged in the unnecessary lawsuit;
 - 2,500,000 Frw for counsel fees for three court instances where this case was heard;
 - 1,000,000Frw for procedural fees.

DETERMINATION OF THE COURT

The damages requested by Tuyishimire Yves

- [33] Article 6, paragraph one of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that the subject matter of the claim is determined by parties' respective arguments. Arguments are laid down in the document instituting proceedings and in the defense submissions and are confirmed during the pretrial conference, where applicable.
- [34] The motive of the provisions of this article is to prevent parties to the case unexpectedly during the hearing bring up claims to the other part and the Court which they did not submit before. This is also in the same spirit (meme logique) as the provision of article 75, paragraph one of the aforementioned law; the intention was to grant the rights to defence (Droit de defence). That article 75, paragraph one provides that "In general, no documents, submission, brief or pleading notes may be deposited with the court after the pretrial conference".
- [35] The case file indicates that Tuyishimire Yves did not request, damages before the previous courts, either in defence submission submitted before the court or during the pre-trial conference; rather he requested them in the hearing of 07/11/2019. The Court finds it contrary to the provisions of article 6, paragraph one of the Law N° 22/2018 of 29/04/2018 aforementioned.
- [36] Based on the motivation and the provisions given above, the Court finds the claim of the moral damages and civil damages comprising of the money spent by Tuyishimire Yves in the case

which was before the Judicial police and in the Prosecution, can not be admitted. The Court finds that he should be awarded procedural and counsel fee in its discretion because what he is asking for is excessive and can not prove it. The Court awards him 793,020Frw for procedural fees which include 300,000Frw spent on transport and 493,020Frw he paid for the DNA test and 1,500,000Frw for counsel fee for the three instances. All amounting to 2,293,020Frw.

The damages requested by Akisanti Ayubu

[37] The Court finds that the damages requested by Akisanti Ayubu can not be awarded because he has lost the case.

III. DECISION OF THE COURT

- [38] Decides that the claim filed by Akisanti Ayubu requesting to review the judgment N° RCA 00010/2017/TGI/NYGE, rendered by Nyarugenge intermediate Court 06/07/2017 due to injustice, has no merit;
- [39] Decides that the ruling of the judgment N° RCA 00010/2017/TGI/NYGE rendered by Nyarugenge intermediate Court on 06/07/2017, is sustained;
- [40] Decides that Tuyishimire Yves is was born by Gusenga Innocent;
- [41] Orders Akisanti Ayubu to pay to Tuyishimire Yves 2,293,020Frw of procedural and counsel fee.

LABOUR CASE

NIWEMUGENI v KCB RWANDA LTD

[Rwanda SUPREME COURT – RS/INJUST/RSOC 00001/2019/SC (Mukamulisa, P.J. Nyirinkwaya, Cyanzayire, Rukundakuvuga and Hitiyaremye, J.) January 31, 2020]

Contract law – Employment contract – Termination of an openended contract – An employee who is dismissed from work without notice, is entitled to the damages equivalent to the net salary after deducting the withholding tax and employee's contribution for the social security fund.

Contract law – Termination of employment contract – Reasonable ground – Employee's conduct – The misconduct of the employee resulting from his conduct and ability is a reasonable ground for the termination of an employment contract.

Contract law – Termination of an employment contract – The onus of proof – In case of the disputes on the committed misconduct, the onus of proof is upon the employer.

Contract law – Misconduct of employee – The fact that an employee was not found guilty or not prosecuted for criminal action, does not exonerate the employee from the disciplinary sanction since the criminal action is different from the disciplinary sanctions which result from the committed misconduct.

Fact: Niwemugeni was an employee of KCB, it dismissed her on the ground that she used her medical insurance card of UAP Insurance Rwanda Ltd to cover the medical cost of someone who is not covered by her insurance, thereafter, she filed a case against

KCB at the intermediate Court of Nyarugenge arguing that it unlawfully dismissed her, for that she requests for various damages. The court found her claim without merit.

Niwemugeni appealed to the High Court alleging that she was dismissed without the evidence that demonstrates the fault which was based on in dismissing her, that there is no competent court that confirmed she committed the fault, and she was not given the notice. The High court sustains the rulings of the appealed judgment, rather it orders Niwemugeni to pay KCB procedural and counsel fees.

Niwemugeni wrote to the president of the court of appeal stating that judgments that were rendered by the previous courts have injustice in them. After examining that injustice, the case was heard by the Supreme Court.

During the hearing, the plaintiff stated that the defendant dismissed her unlawfully because it did not give her notice, that she did not commit any fault and there is no competent court confirmed that she committed gross negligence.

The defendant explains that the plaintiff was not unlawfully dismissed because her dismissal was based on the ground which everyone can verify, the fact that she was not able to contradict the evidence which was produced, she should not have to wait for the court to pronounce on that fault, because those were done when an employee was dismissed due to gross negligence, while the plaintiff was dismissed due to reasonable ground.

Held: 1. An employee who is dismissed from work without notice is entitled to the damages equivalent to the net salary after deducting the withholding tax and employee's contribution to the social security fund. (overruling of the jurisprudence). This

position overrules the position which was taken in the cases rendered before this court, includes judgment RSOCAA 0003/15/CS rendered on 05/05/2016, RUGENERA Marc and Soras Assurances Générales Ltd (SORAS AG) and the judgment RSOCAA 0001&0002/16/CS rendered on 14/10/2016, NTUKAMAZINA Jean Baptiste and Prime Insurance Ltd (PRIME), whereby in those judgments, the court held that the allowances which were given to an employee in case he/she was dismissed on work are brut salary.

- 2. The misconduct of the employee resulting from his conduct and ability is a reasonable ground for the termination of an employment contract.
- 3 In case of the disputes on the committed misconduct, the onus of proof is upon the employer
- 4. The fact that an employee was not found guilty or not prosecuted for criminal action, does not exonerate the employee from the disciplinary sanction since the criminal action is different from the disciplinary sanctions which result from the committed misconduct

Application for reviewing a judgment on the ground of injustice has no merit.

Statute and statutory instruments referred to:

Law No 86/2013 of 11/09/2013 establishing the general statute of the public servants (repealed), article 78.

Law Nº 13/2009 of 27/05/2009 regulating labour in Rwanda (repealed), article 29 and 32.

Law N° 16/2005 of 18/08/2005 on direct taxes on income (repealed), article 4 and 13.

- Presidential Order N° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants.
- International Labour Convention no 158 of 1982 concerning the termination of employment an employment contract (not yet ratified by Rwanda).

Cases referred to:

Government of Rwanda v Nkongoli John, RADA 0012/07/CS rendered by the supreme court on 27/03/2009

Author cited:

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Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] Since 10/12/2013, Niwemugeni Jeannette was an employee of KCB Bank Rwanda Ltd, as a Sales Manager at Musanze branch. After six months of probation, she was given an indefinite contract. She was transferred to the headquarter on the post of Business Banker with a salary of 1,556,775Frw per month.
- [2] She states that she was dismissed on 04/08/2016 due to the trumped-up case against her that she used her health insurance card of UAP Insurance Rwanda Ltd to cover treatment charges of Mukeshimana Mariam at Clinic Bien Naitre who is not an affiliate to her health insurance.
- [3] Niwemugeni Jeannette filed a claim against KCB Bank Rwanda Ltd to the Intermediate Court of Nyarugenge for unlawful dismissal, she claims for damages for unfair dismissal of 9.340.650 Frw, 1.556.775 Frw for terminal benefits, 980.336 Frw which she was unfairly deducted, counsel, and procedural fees
- [4] On 13/02/2018, the Intermediate Court of Nyarugenge rendered a judgment RSOC 00250/2017/TGI/NYG and found without merit the claim of Niwemugeni Jeannette, it held that she was lawfully dismissed based on the grave misconduct and that she was given the terminal benefits, therefore they cannot be awarded again, that she does not deserve to be awarded the notice of 980,336Frw she requests for, it ordered her to pay KCB Bank

Rwanda Ltd 500.000 Frw for the procedural fees and 1,000,000Frw of the counsel fees.

- [5] Niwemugeni Jeannette appealed against the judgment to the High Court, she submitted the following grounds of appeal:
 - a. that KCB Bank Rwanda Ltd did not produce the evidence to prove that she committed the alleged misconduct and she was not founded guilt by the competent court
 - b. she was dismissed without notice
 - c. that the person whom KCB Bank Rwanda Ltd alleged that she paid her medical bills was never produced.
- [6] On 28/06/2018, High Court rendered the judgment N° RSOCA 00056/2018/HC/KIG and sustained the rulings of the appealed judgment RSOC 00250/2017/TGI/NYGE, it ordered Niwemugeni Jeannette to pay 100.000Frw of the procedural fees and 250.000Frw of the counsel fees to KCB Bank Rwanda Ltd
- [7] Niwemugeni Jeannette wrote to the president of the Court of Appeal requesting for the review of the judgment N° RSOCA 00056/2018/HC/KIG because it was vitiated with injustice, After examining her request the latter wrote to the President of the Supreme Court that the judgment may have been vitiated with injustice, thus, it can be analyzed and confirm whether it should be reviewed due to injustice.
- [8] In his decision no 080/CJ/2018, the President of the Supreme Court ordered that the judgment be transferred to the registry of the Supreme Court and be recorded in the relevant register, to be reviewed.

- [9] The hearing of the case was scheduled on 10/01/2020, held in public, Niwemugeni Jeannette was assisted by Counsel Bagaza Magnifique and Counsel Maguru Amir Ahmed whereas KCB Bank Rwanda Ltd was represented by Counsel Bimenyimana Eric. The hearing was closed and the parties were notified that the judgment will be pronounced on 31/01/2020.
- [10] The oral submissions of the parties during the hearing were to determine whether Niwemugeni was unlawfully dismissed, and it is the main legal issue in this judgment. The issue of the damages requested was also analysed.

II. ANALYSIS OF THE LEGAL ISSUES

- i. Determining whether KCB Bank Rwanda Ltd unlawfully dismissed Niwemugeni Jeannette.
- [11] Niwemugeni Jeannette states that the grounds supporting her claim that KCB Bank Rwanda Ltd dismissed her unlawfully are the following:
 - a. she had an open-ended employment contract, but it dismissed her without notice,
 - she was dismissed without committing any misconduct be it minor or gross because the charges against her that she used her insurance clear the medical bills of unauthorized person are trumped-up charges;
 - c. no competent court convicted her of that misconduct as provided for by article 32 paragraph 3 of the law N° 13/2009 of 27/05/2009 regulating labour in Rwanda that was into force at the time of her dismissal.

- [12] The advocates for Niwemugeni Jeannette argue that she was unlawfully dismissed because the courts applied only paragraph one of article 32, law No 13/2009 of 27/05/2009 regulating labour in Rwanda, instead of applying paragraph 2 which provides the termination of the employment contract without notice in case of gross misconduct.
- [13] They further state that the misconduct should have been confirmed by the competent court before terminating the contract as provided by paragraph 3 of the above-mentioned article and the party which wants to terminate it provides the notice of 48 hours. They explain that misconduct must be proven and be informed to the employee in 48 hours, after informing her, the employer files a claim to the competent jurisdiction to declare the misconduct, thereafter the employee is dismissed.
- [14] Furthermore, they state that KCB Bank Rwanda Ltd dismissed Niwemugeni Jeannette on 04/08/2016, before lodging a criminal case for the offense for which she was dismissed because it was filed on 01/12/2017 after more than a year, this means that they dismissed her without concrete evidence that she really committee that fault.
- [15] KCB Bank Rwanda Ltd states that Niwemugeni Jeannette was lawfully dismissed due to the following grounds:
 - a. That fact that she was dismissed on the ground anyone can investigate,
 - b. The fact that she did not contradict the elements of evidence which includes the document of UAP

Insurance Rwanda Ltd of 30/06/2016¹, testimonies of those who saw her at the hospital seeking medical treatment for the person who is not insured by KCB Bank Rwanda LTD;

- c. The fact that the criminal file includes the testimonies of the doctors who received Niwemugeni Jeannette who confirmed that she tried to seek medical treatment of someone else, as is emphasized by their minutes. Those are Dr. Murindwa Patrick, Diane Mudahogora Rwigirira, and Mukambungo Amerberg
- d. Provisional document of closing the file which Niwemugeni Jeannette bases on in demonstrating that there is no court which convicted her, should not be based on because of the basis of the principle that a criminal prosecution is different from a disciplinary fault, as it was emphasized in the judgment N° RADA 0002/16/CS rendered by the Supreme Court on 23/02/2018 (page 5-6). In that judgment, the court found that nothing can prevent Salimini Saidi to be prosecuted and be disciplinary sanctioned even if he was not sued in a criminal case. This is also emphasized by the legal scholar Jean Rivero, in the book named "Droit Administratif", whereby he

¹ That document stipulates that:" On 23rd 2016 evening she visited CLINIQUE BIEN NAITRE for medical attention. She used her fingerprint and allowed a bill for 19, 500 Rwf to be deducted from her benefits. In the process of approving the bill, the nurses at the hospital noted that the person who was

actually examined and treated by Doctor is not her but somebody else. Hence she was using her card to give service to an unauthorized beneficiary. On this noticing, the hospital questioned her and requested that she pays the bill in full. She paid the bill as requested and but also mentioned to them that she has done this several times before and therefore they shouldn't bother her".

explained that a single action can lead an employee to be prosecuted both criminally and disciplinary, and the decision in a criminal case can not prejudice the decision that can be taken in disciplinary sanctions, except on those related to the actions which the judge in the criminal case have been approved definitely that they happened or not.

[16] Bimenyimana Eric, the counsel for KCB Bank Rwanda Ltd states that it should not have to wait for the court to confirm the fault, because those are done in case an employee was dismissed due to gross negligence, but Niwemugeni Jeannette was dismissed on reasonable ground that is why she was given notice and she did not deny that she did not receive it. He states that nothing wrong with filing a complaint to judicial police after dismissing her, considering the faults Niwemugeni Jeannette has committed, there is no other sanction that could be taken against her considering her level.

[17] Concerning the elements of evidence proving the misconduct for which Niwemugeni Jeannette was dismissed, counsel Bimenyimana Eric states that in order to be revealed, the physician who was in the consultation room called the one who was on the reception and told her that there is a woman dressed as a Muslim, make for her a receipt so that she can pay, the one on reception answered that the one who comes to pay was not a Muslim. He states that after Niwemugeni realizing that she has been exposed she paid by using a fingerprint, and the one she was paying her medical bills paid cash, that is the reason why there are two receipts.

DETERMINATION OF THE COURT

[18] Article 29 of the law No 13/2009 of 27/05/2009 regulating labour in Rwanda, stipulates that an open-ended contract may always be terminated by the will of either of the parties but for legitimate motives. This termination is subject to a prior notice given by the party that takes the initiative to terminate the contract.

The law does not explain the justifiable grounds that can lead to the termination of an open-ended contract. The International Labour Organization (ILO) Convention termination of employment, explains the justifiable ground for terminating an open-ended contract. Even if this convention is not binding in Rwanda because it is not yet ratified, but its provisions are persuasive. Article 4 of that convention provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service². In the Democratic Republic of Congo (DRC), the labour code provides that the reasonable ground that can lead to the termination of an open-ended contract is the ground which is basing on the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or

² Article 4 de la Convention de l'OIT n° 158 sur le licenciement, 1982 : « Un travailleur ne devra pas être licencié sans qu'il existe un motif valable de licenciement lié à l'aptitude ou à la conduite du travailleur ou fondé sur les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service ».

service³. Basing on those motivations, it is clear that the conduct of the worker, especially the faults he/she can commit in terms of work, is one of the justifiable grounds that can lead to the termination of the contract.

[20] A law regulating labor in Rwanda does not enumerate the faults that can lead to the termination of an employment contract due to their gravity, which is different in some other countries⁴, or the general statutes for public service laws in Rwanda⁵. The termination of the contract must be preceded by the notice or damages in absence of the notice, except if the fault which was committed is gross negligence (article 29 and 32 of Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda)

[21] In case of the dispute regarding whether the fault was committed as a valid reason that can be lead to termination of the contract, Law N° 13/2009 of 27/05/2009 mentioned above does not provide who has a burden of proof, but borrowing from countries and International Labour Organization (ILO)

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³ Article 62 du Code du travail de la RDC: "Le contrat à durée indéterminée ne peut être résilié à l'initiative de l'employeur que pour motif valable lié à l'aptitude ou à la conduite du travailleur sur les lieux de travail dans l'exercice de ses fonctions ou fondé sur les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service »

⁴ In SENEGAL, they differ "simple fault, serious fault, gross negligence" whereas, in FRANCE, they differ" serious fault, serious misconduct, gross negligence" cfr N'Deye N'Doye, Le licenciement pour motif personnel en France et au Sénégal :[étude de droit comparé], Droit, Université de Strasbourg, HAL, 2012, p.59, 64

⁵ Article 76 of Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service, and Presidential order no 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants

Convention on termination of the contract, the onus of proof is upon the employer⁶.

- [22] The motivations provided in previous paragraphs implying that:
 - a. the open-ended contract can be terminated if there is a justifiable ground;
 - b. faults committed by an employer in terms of work is among the justifiable ground that can lead to the termination of an employment contract;
 - c. if the contract is terminated due to the faults, the one who took the initiative to terminate it provide the notice or it's equivalent, apart from gross negligence;
 - d. in case of disputes, the employer who terminated the contract bears the burden of proof that the fault was committed.
- [23] The defense of Niwemugeni Jeannette and her counsel is premised on three main grounds to prove that she was unlawfully dismissed:
 - a. The fact that she was dismissed when she did not commit either a fault or a gross negligence
 - b. The previous courts did not comply with the provision of article 32 of law N° 13/2009 of 27/05/2009 regulating labour in Rwanda;

⁶ Aux termes de l'article L 63 al.3 du nouveau code du travail Sénégalais :

[«] En cas de contestation, la preuve du motif légitime incombe à l'employeur ».

c. No competent court confirmed that she committed gross negligence and the fact that KCB Bank Rwanda Ltd did not wait for the rulings on the criminal case before dismissing her.

The court will examine these grounds, one by one.

ii. Concerning the claim that Niwemugeni Jeannette did not commit any fault that is sanctionable by dismissal

- [24] The dismissal letter dated 04/08/2016 which KCB Bank Rwanda Ltd wrote to Niwemugeni Jeannette, informed her that the reason for the termination of the contract is because of her fraudulent conduct, of wrongly using her health insurance, card to pay for someone who is not included on that insurance.
- [25] The elements of evidence that KCB Bank Rwanda Ltd produced to the court to prove that NIWEMUGENI Jeannette committed the fault which led to her dismissal, are the following:
 - a. In the letter dated 30/06/2016, UAP Insurance Rwanda Ltd wrote to KCB Bank Rwanda Ltd informing it of what transpired at *Clinique Bien Naitre*, that Niwemugeni Jeannette used her fingerprint to pay 19.500Frw for someone who is not insured;
 - b. The document indicates that the receipt for medical treatment was paid using a health insurance card, after being revealed that the patient was not among the insured, she paid again the receipt by cash;
 - c. The testimonies of physicians and employees of Clinique Bien Naitre who saw her when she was seeking

medical treatment for someone who is not among the insured, including:

- i. Dr. Mulindwa Patrick received Niwemugeni Jeannette;
- ii. Mudahogora Diane Rwigirira;
- iii. Mukambungo Amerberg.
- [26] The letter of UAP Insurance Rwanda Ltd explains that on 23/06/2016, Niwemugeni Jeannette went to *Clinique Bien Naitre*, and used her fingerprint to pay 19,500Frw for someone who is not among the insured, the employees of that clinic found it out and requested her to pay the bill without using the health insurance card. In that letter, UAP Insurance Rwanda Ltd requests KCB Bank Rwanda LTD to act upon that issue react to it, and informed it that it has immediately deactivated her medical card to prevent further abuse.
- [27] The court finds that the content of this letter, collaborated with the payment receipts that were submitted to the court, it is obvious that on 23/06/2016, Niwemugeni Jeannette paid using online 19.500Frw to Clinique Bien Naitre that had to be paid by UAP Insurance Rwanda Ltd. On the same day, 19.500Frw was paid on the ordinary receipt (completed by handwriting) by Mukeshimana Mariam who sought medical treatment on behalf of Niwemungeri Jeanette. Mukeshimana Mariam says that she did not seek medical treatment from Clinique Bien Naitre, while Niwemugeni Jeannette says that she was treated on 23/06/2016, but that statement was contradicted by the receipt mentioned above which Mukeshimana Mariam paid, together with the statement of the hospital employees who received and handled the issue

[28] Mukambungo Amerberg, the nurse from « Clinique Bien Naitre » explained before the Prosecution that Mariam came together with Jeannette and pretended that the latter was the one who came for treatment, but it was Mariam who received the consultation. She stated that after she met the doctor, she gave the appointment to Jeannette as if she is the one who has been in consultation, while it was Mariam who had been treated in the place of Jeannette. She explained that she telephoned at the reception requesting them to take a medical test for that Muslim lady, and the replied her that she was not the one who got the medical consultations, rather she was Jeannette, this led her to call the doctor and inform him that the woman whom he has examined was not the owner of the insurance card, thus even the appointment was canceled.

Mudahogora Dianne Rwigirira, the cashier explained before the Prosecution that Niwemugeni Jeannette came for medical treatment with Mukeshimana Mariam, after receiving her she left her insurance card there and went to see the doctor. After her treatment, Niwemugeni Jeannette came to collect her card. Meanwhile, Mukambungo Amerberg called her requesting that they carry out the medical test for that Muslim lady, implying, mukeshimana Mariam and she replied that she was not the one who was treated instead she is Niwemugeni Jeannette. She explained that because they were near to them they asked them who was treated, Niwemugeni Jeannette replied to them that she sought medical treatment for Mariam on her insurance card because people do so anywhere. Mudahogora Dianne Rwigirira further explained to the Prosecution that they requested them to pay for themselves and informed immediately to UAP Insurance Rwanda LTD because Niwemugeni Jeannette had already used fingerprint so that it does not pay that money.

[30] The statements of the witnesses collaborate with the letter UAP Insurance Rwanda Ltd wrote to KCB Bank Rwanda Ltd. after being informed about the issue at Clinique Bien Naitre, and when read together with the documents which indicate that on 23/06/2016 Niwemugeni Jeannette paid 19.500Frw using the insurance of UAP Insurance Rwanda Ltd, and the same amount was also paid using an ordinary receipt in the names of Mukeshimana Mariam, this implies that Niwemugeni Jeannette committed the fault of paying the medical bills for someone not covered by the insurance that is given to the employees of KCB Bank Rwanda Ltd. The court finds that the fault committed by Niwemugeni Jeannette of paying the medical bills of a person who is not covered by the insurance, by using the insurance of UAP Insurance Rwanda Ltd, is a justifiable ground that led to the termination of the employment contract that she had with KCB Bank Rwanda Ltd

iii. Regarding the claim that the previous courts did not comply with the provisions of article 32 of Law $N^{\rm o}$ 13/2009 of 27/05/2009 regulating labour in Rwanda

[31] Article 32 of the law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, which was into force at the dismissal of Niwemugeni Jeannette provides that any termination of the contract without notice or without having observed the notice period compels the responsible party to pay the other party an allowance corresponding to the salary and other benefits from which the worker would have benefited during the notice period that has not been effectively respected.

However, termination of the contract may take place without notice in the case of gross negligence by one of the parties. In that case, gross negligence is notified to the other party within fortyeight (48) hours. The gross negligence is left to the appreciation of the competent jurisdiction

[32] This article has 4 main elements:

- a. First, it is applied when no notice was given or the period was not respected (article 29 of the Law N^{o} 13/2009 of 27/05/2009 mentioned above)
- b. Second, in case the contract was terminated without notice or the period of notice was not respected, the responsible party shall pay the other party the allowance corresponding to the salary and other benefits from which the worker would have benefited during the notice period that has not been effectively-respected
- c. Third, in case of the termination of the contract due to gross negligence, there is no notice, the allowance to replace the notice, rather the responsible is obliged to notify the other party within forty-eight (48) hours.
- d. Fourth, The gross negligence is left to the appreciation of the competent jurisdiction (This will be analyzed by examining the third issue of the submissions)
- [33] The letter dated 04/08/2016 which KCB Bank Rwanda Ltd wrote to Niwemugeni Jeannette, informing her that it has terminated the employment contract they concluded, it further informed her that it has the immediate effect, which means that the notice was not given. As it was demonstrated above, in case the notice was not given, there will be given an allowance corresponding to the salary and other benefits from which the worker would have benefited during the notice period. This is not the particularity of the Organic law regulating labor in Rwanda, according to the law scholars François GAUDU and Raymonde

VATINET, as well as Gilles AUZERO and Emmanuel DOCKES⁷

[34] In the letter of 04/08/2016 of dismissing Niwemugeni Jeannette on work, KCB Bank Rwanda Ltd informed her what she is entitled to such as one month salary instead of notice. The letter of 12/08/2016 which KCB Bank Rwanda Ltd wrote to Niwemugeni Jeannette again which she signed that she received, indicates all she is entitled to, including the notice allowances of one month salary of 1.556.775Frw. NIWEMUGENI Jeannette acknowledged that she received that money during the hearing, the problem she has is 980,336Frw which was deducted, KCB Bank Rwanda Ltd states that it was withholding tax.

[35] Law N° 16/2005 of 18/08/2005 2005 on direct taxes on income which was into force at the dismissal of Niwemugeni Jeannette, explains the source of the taxable income. Article 4 of that law, provides in its one litera that income generated from services performed in Rwanda, including income generated from employment. Article 13 of that law, explains the elements of the income from employment, it's litera 5 provides that payments for redundancy or loss or termination. These articles demonstrate ko among what shall be taxed includes what an employee is given at the termination of an employment contract, like the amount of money that replaces the notice when it was not given.

⁷ «Le préavis est en principe une période de travail, le salarié devant rester à la disposition de l'employeur. L'employeur peut cependant dispenser le salarié de l'exécution du préavis, en lui versant alors l'équivalent du salaire sous forme d'une indemnité de préavis; François GAUDU et Raymonde VATINET, Droit du travail, 5° édition, Dalloz, 2013, p. 213-214.

- [36] The court finds that the motivations mentioned in the previous paragraph demonstrate that the money which is given to the employee at his/her dismissal, they are not gross as claimed by Niwemugeni Jeannette and her counsels, rather it is net salary after reducting taxes on income. It is the same for the social security funds even if it was not pleaded upon. This is also the position of the law scholars⁸. This decision overlures the prior decision rendered by this court in the following cases:
 - a. The judgment N^O RSOCAA 0003/15/CS, between Rugenera Marc and Soras Assurances Générales Ltd (SORAS AG) rendered on 05/05/2016;
 - b. The judgment N^O RSOCAA 0001&0002/16/CS, between Ntukamazina Jean Baptiste and Prime Insurance Ltd (PRIME) rendered on 14/10/2016. The decision taken in those cases was that the allowances which an employee is entitled to at his/her dismissal are gross salary, however, no legal basis was given.

⁸ « Bien que le salarié ne fournisse pas de prestation de travail, il a droit à une rémunération et à des avantages identiques à ceux qu'il aurait obtenus s'il avait travaillé jusqu'à l'expiration du préavis.L'indemnité compensatrice de préavis est assimilée juridiquement à un salaire; elle est soumise au régime juridique du salaire aussi bien au regard des garanties de salaire....qu'au regard des cotisations sociales »; Gilles AUZERO et Emmanuel DOCKES, Ibidem, p. 620

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[«] Le montant de l'indemnité compensatrice de préavis est égal au montant du salaire qu'aurait perçu le salarié s'il avait pu travailler pendant la durée de son préavis Cette indemnité est versée à la date de rupture du contrat de travail et est considérée comme un salaire. A ce titre, elle est soumise à l'impôt sur le revenu et aux cotisations sociales »; Article publié par jurifiable.com, https://www.jurifiable.com/consel-juridique/droit-dutravail/indemnité- compensatrice-de-préavis, consulté le 27/01/2020

- [37] Regarding the pleadings of the counsels for Niwemugeni Jeannette which state that the Court emphasized on paragraph one of article 32 which provides notice, while they had to rely on paragraph 2 and 3 which provide for gross negligence, the court finds that KCB Bank Rwanda Ltd did not consider the fault that led Niwemugeni Jeannette as gross negligence, and chose to give her the replacement of notice, it is not understandable why counsels for Niwemugeni Jeannette want that the paragraph which provides for gross negligence of article 32 be the one to be applied.
- [38] Basing on the motivation provided above, the court finds that article 32 of Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda was respected.
- iv. The claim that there is no competent court that confirmed that Niwemugeni Jeannette committed gross negligence and also that KCB Bank Rwanda Ltd had to first wait for the rulings of the criminal case before dismissing her
- a. The claim that there is no competent court that confirmed that Niwemugeni Jeannette committed a gross negligence
- [39] Paragraph 3 of article 32 of the law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, provides that the gross negligence is left to the appreciation of the competent jurisdiction. Even if the gross negligence which is mentioned in this article was not the fault which KCB Bank Rwanda based on for dismissing Niwemugeni Jeannette as it was explained, the court finds it is necessary to clarify it. Because the legislator did not list the acts or conducts which would be considered as gross negligence that leads to the dismissal of an employee without notice, but he stated who must decide that the fault committed

was gross negligence in case the employee and the employer disputes on it. Therefore, it is clear that power was given to the competent court, which was seized when the disputes arose.

[40] The court finds that it is impossible that the opinion of the legislator was that the court must first confirm that the gross negligence was committed before an employer dismisses an employee, that he provides in the previous paragraph that the gross negligence terminates the employment contract without notice, and be notified to an employee within 48 hours (from the time an employer knew it). The reason why there is not notice is that the gross negligence is the fault that it is impossible for an employer maintains an employee in the company⁹. It was not necessary to add that gross negligence is left to the appreciation of the competent jurisdiction in paragraph 3 of article 32 in case of the dispute, as it is indicated in laws from some countries like France¹⁰, since the way article is written is well understandable.

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⁹ Article 11 de la Convention de l'OIT n° 158 sur le licenciement, 1982 : « Un travailleur qui va faire l'objet d'une mesure de licenciement aura droit à un préavis d'une durée raisonnable ou à une indemnité en tenant lieu, à moins qu'il ne se soit rendu coupable d'une faute grave, c'est-à-dire une faute de nature telle que l'on ne peut raisonnablement exiger de l'employeur qu'il continue à occuper ce travailleur pendant la période de préavis ».

[«] La faute grave est toute faute qui rend impossible le maintien du salarié dans l'entreprise durant le préavis » ; Cass. Soc., 16 juin 1998, Dr. Soc.1998, p.949 (NB : La faute grave est assimilable à la faute lourde dans certaines législations dont la nôtre

¹⁰ Article L1235-1de la loi portant réglementation du travail:" En cas de litige,le juge, à qui il appartient d'apprécier la régularité de la procédure suivie et le caractère réel et sérieux des motifs invoqués par l'employeur, forme sa conviction au vu des éléments fournis par les parties après avoir ordonné, au besoin, toutes les mesures d'instruction qu'il estime utiles » ; legifrance .gov.fr

[41] Basing on the motivations above, the court findings that the gross negligence should not have been first confirmed by the court for Niwemugeni Jeannette to be dismissed from work.

b. Whether KCB Bank Rwanda Ltd had to first wait for the rulings of the criminal case before dismissing her

- [42] In the Law N^o 13/2009 of 27/05/2009 regulating labour in Rwanda, there is no provision on that issue unlike law N^o 86/2013 of 11/09/2013 establishing the general statute of the public servants which provides for it. The court finds that nothing prevents it to be guided by the provisions of this law on employees governed by the law regulating labor, in case the latter is silent
- [43] Article78 of the Law N° 86/2013 of 11/09/2013 mentioned above, stipulates that the disciplinary sanction of a public servant shall be independent of criminal liability and punishment as provided by the criminal code to the extent that the same fault may cause both disciplinary procedure and criminal procedure. The provisions of this article were emphasized by case laws whether for the employees who are governed by the general statutes for the public servant or those governed by the employment contracts.
- [44] In the judgment N° RADA 0012/07/CS between the Government of Rwanda and Nkongoli John, rendered by the Supreme Court on 27/03/2009, the court held that the fact that Nkongoli John was not found guilt does not mean that he should have not been disciplinary sanctioned in terms of work, on the basis that the criminal action is independent of disciplinary sanction that resulted from the fault and it should not be considered as the same. Its rulings were based on the opinions of

the law scholars who include Georges DUPUIS, Marie Josée Guedon na Patrice Chretien¹¹ .the court also used the opinions of these legal scholars¹², indicating that there is an exception in case a judge in criminal matters found guilt an employee for the actions is suspected to commit without any doubt. This is also the opinion of the legal scholar Emilie MAIGNAN, considering the decision taken by the courts¹³.

[45] In judgment N° 2622 of 13/12/2017 rendered by the cassation court in french, it was ruled that the disciplinary sanctions are different from the sanction in criminal matters, to the extent that an employer can sanction an employee for the

^{11 &}quot;Une faute professionnelle d'un fonctionnaire peut entraîner, à la fois, une répression disciplinaire et une répression pénale. Dans les deux cas, il s'agit d'édicter une sanction en réponse à une faute. Il existe toutefois une réelle indépendance des deux procédures. L'autonomie de la répression disciplinaire tient à son lien avec l'exercice d'une fonction: la faute est fonctionnelle et la peine l'est aussi, alors que la répression pénale concerne tous les individus pour des faits qui ne sont pas liés à une fonction, et que la sanction pénale ne vise pas le coupable dans sa fonction mais dans sa liberté ou sa propriété. Pratiquement, la décision de l'autorité disciplinaire ne lie jamais le juge pénal: de nombreux agissements sont des fautes disciplinaires sans être, pour autant, des délits »; Georges DUPUIS, Marie-Josée GUEDON et Patrice Chrétien, Droit administratif, 10e édition, Editions SIREY, 2007, page 381

^{12 «} De même, l'autorité disciplinaire n'est pas liée par la décision du juge pénal, sauf lorsque ce dernier s'est prononcé sur l'existence ou l'inexistence de certains faits: ses constatations matérielles s'imposent à l'autorité administrative"; Georges DUPUIS, Marie-Josée GUEDON et Patrice Chrétien, ibidem

¹³ « ... Ce n'est en effet que lorsque la relaxe repose sur l'inexistence de la matérialité des faits que le juge disciplinaire sera soumis à l'autorité de la chose jugée; Emilie MAIGNAN (Master II Droit des affaires), article publié dans la RJOI numéro 16, p.61, consulté le 27/01/2020. L'Auteur cite l'arrêt de la Cour de cassation française, chambre Sociale, 12/7/1989, D.1990.132

faults he/she is being accused of in the criminal court, without prejudicing the principle that a person is presumed innocent until found guilty by the court. ¹⁴

[46] The motivations above imply that:

a. The fact that an employee was not found guilty or not prosecuted for criminal action, does not prevent disciplinary sanction to be taken against that employee because the criminal action is different from the disciplinary sanctions which result from the faults committed.

b. There is an exception in case a judge in criminal matters found that the acts for which the employee is accused were committed or not committed without a doubt

[47] In this judgment, it is clear that there is a complaint which KCB Bank Rwanda Ltd filed to the prosecution against Niwemugeni Jeannette and Mukeshimana Mariam, then the file was closed by the Prosecution on the ground that they are no irrevocable evidence against the suspects. As it was motivated in previous paragraphs, the fact that an employee was not prosecuted in the criminal court, does not prevent an employer to take disciplinary sanction against that employee when there is evidence that the employee committed that fault. This means that the fact the Prosecution closed the file against Niwemugeni Jeannette, does not stop KCB Bank Rwanda Ltd from disciplinary sanction her for the fault for which it has the

¹⁴ « La procédure disciplinaire est indépendante de la procédure pénale, de sorte que l'exercice par l'employeur de son pouvoir disciplinaire ne méconnait pas le principe de la présomption d'innocence lorsque l'employeur prononce une sanction pour des faits identiques à ceux visés par la procédure pénale »

evidence that it was committed. The exception which was mentioned in the previous paragraph cannot be applied in this case, because there is no final ruling by the court that the acts for which Niwemugeni Jeannette has been accused did not exist.

[48] Basing on the motivation provided above, the court finds that KCB Bank Rwanda Ltd did not have to wait for the ruling of the criminal case before dismissing Niwemugeni Jeannette

General conclusion

[49] Basing on the motivations above, and on the Law N^o 13/2009 of 27/05/2009 regulating labour in Rwanda which was into force when Niwemugeni Jeannette was dismissed from work, the Court finds that KCB Bank Rwanda Ltd dismissed Niwemugeni Jeannette lawfully.

v. Examining damages requested by KCB Bank Rwanda Ltd in the counterclaim

- [50] KCB Bank Rwanda Ltd requests to order Niwemugeni Jeannette to pay 1,000,000Frw for the counsel fees.
- [51] The counsel for Niwemugeni Jeannette state that the damages requested by KCB Bank Rwanda Ltd are groundless because if it did not unlawfully dismiss her, there would not be lawsuits.

DETEMINATION OF THE COURT

[52] The court finds that the counsel fees requested by KCB Bank Rwanda Ltd have merit, but because what it requests for is excessive and it has no evidence for it, in the court's discretion it is awarded 500,000Frw on this instance.

III. DECISION OF THE COURT

- [53] Finds without merit the claim of Niwemugeni Jeannette for reviewing the judgment N° RSOCA 00056/2018/HC/KIG rendered on 28/06/2018 by the High Court of Kigali on the ground of injustice;
- [54] Finds with merit the counterclaim of KCB Bank Rwanda Ltd
- [55] Sustains the rulings of the judgment N° RSOCA 00056/2018/HC/KIG rendered by the high court of Kigali on 28/06/2018;
- [56] Orders Niwemugeni Jeannette to give to KCB Bank Rwanda Ltd 500,000Frw of the counsel fees.



STRONG CONSTRUCTIONS LTD v RADIANT INSURANCE COMPANY LTD

[Rwanda SUPREME COURT – RS/INJUST/RCOM 00002/2019/SC (Rugege, P.J., Kayitesi, Hitiyaremye, Cyanzayire and Rukundakuvuga, J.) November 15, 2019]

Contract – Contracts of suretyship – Joint surety (Caution solidaire) – The creditor has the right to enforce the surety before seeking the payment from the principal debtor's personal property in case the latter defaults on the payment of the debt – A guarantor who breaches the contract of joint surety and causes a loss to the insured is liable for damages.

Facts: Strong Constructions Ltd signed with Radiant Insurance Company Ltd a contract to guarantee the loan it took from the Bank of Kigali to execute the tender it won at Kanombe Military Hospital. In that contract, Radiant Insurance Company Ltd had to pay the loan when it is obvious that Strong Constructions Ltd did not get enough money from that tender to pay the loan.

Strong Constructions Ltd did not meet the deadline for the payment which resulted in the Bank of Kigali requesting Radiant Insurance Company Ltd to repay that loan for which it had insured. Before paying the loan, Radiant Insurance Company Ltd requested the Bank of Kigali to provide it with information regarding the transactions on the bank account of Strong Construction Ltd and after realizing that through its bank account, it received a lot of money which can cover the loan, it refused to pay the loan it had insured, this led to Strong Construction Ltd to

sue Radiant Insurance Company Ltd in the Commercial Court for the breach of the contract.

That Court found the claim with no merit because Strong Construction Ltd was the one to repay the loan it was given.

Strong Construction Ltd appealed to the Commercial High Court, which rendered the judgment and found the appeal with merit on the ground that Radiant Insurance Company Ltd was in breach of the guarantee contract as it failed to prove that Strong Construction Ltd received payment from the tender for which it had insured. This led the Commercial High Court to order Radiant Insurance Company Ltd to reimburse Strong Construction Ltd the money it had been charged for late fees by the Bank of Kigali and also pay the money which the Bank of Kigali had seized.

As a result, Radiant Insurance Company Ltd appealed to the Supreme Court, it found the appeal with merit on the ground that Strong Construction Ltd did not fail to get the money for the payment because enough money to pay the laon it owed the Bank of Kigali had been deposited on its bank account.

Thereafter, Strong Constructions Ltd wrote to the Office of Ombudsman requesting that the judgment be reviewed because it is vitiated with injustice. After analyzing the judgment, the Ombudsman wrote to the President of the Supreme Court requesting the review of that judgment. The President of the Supreme Court ordered the judgment to be reviewed.

During the hearing, Strong Constructions Ltd argue that the Supreme Court ignored the fact that Radiant Insurance Company Ltd was a joint guarantor "Caution Solidaire", and is also accepted to pay on first demand and it also ignored the evidence proving that it was not able to repay the loan, which includes the

fact that the owners of the tender failed to secure the funds and consequently failed to pay it on time.

On the issue of failing to secure the funds « financement », Radiant Insurance Company Ltd argues that Strong Constructions Ltd was the principal debtor, therefore it had to pay only if it failed to pay but on the contrary, it had the money as the hitorique of its bank account indicated.

On the issue that it agreed to be a joint surety "Caution solidaire" and to pay on first demand, it argues that this is not the case, because the contract set out the requirements which must first be fulfilled before it pays, they include to first demonstrate that the money deposited on the Strong Constructions Ltd' account was not enough to repay the loan.

- **Held:** 1. The creditor has the right to enforce the surety before seeking the payment from the principal debtor's personal property in case the latter defaults on the payment of the debt.
- 2. A guarantor who breaches the contract of joint surety and causes a loss to the insured is liable to pay damages.

The claim for the review of the judgment due to injustice has merit.

The judgment rendered by the Supreme Court is overturned.

Statutes and statutory instruments referred to:

Law Nº 45/2011 of 25/11/2011 governing contracts, article 64 and 137.

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Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] On 14/04/2014, Strong Constructions Ltd received a loan from Bank of Kigali of 272,000,000 Frw for the construction of VIP WING at Kanombe Military Hospital., on 15/04/2014, Strong Constructions Ltd immediately signed a contract with Radiant Insurance Company Ltd called "Contract de Cautionnement no RD 0010CRI1403488" to insure the loan. On the same date, in a document entitled "Acte de Cautionnement no RD 0010CRI1401759 / 02645", Radiant Insurance Company Ltd agreed to repay the loan on behalf of Strong Constructions Ltd, in case the money it will get from the tenders is not enough to service the loan paid on the bank account no 010- 0323102-28 in the Bank of Kigali.
- [2] Strong Constructions Ltd did not repay the loan to the Bank of Kigali on the agreed period, and on 13/04/2015 the Bank

of Kigali wrote to Radiant Insurance Company Ltd informing it that Strong Constructions Ltd was in breach of its obligations to repay the loan amounting to 272,000,000 Frw, thus required Radiant Insurance Company Ltd to repay that loan as stipulated in the insurance a contract, (contract de cautionnement) it signed with Strong Construction Ltd.

- [3] Upon receiving the request, Radiant Insurance Company Ltd asked the Bank of Kigali for information on the loan granted to Strong Constructions Ltd to see if any money had been paid from the tender for the construction of VIP WING at Kanombe Hospital, the "historique" of the account of Strong Constructions Company Ltd in the Bank, showed that it received 354,681,513 Frw for advance payment "advance deemrage", paid in two installments, 300,000,000Frw paid on 21/11/2013 and 54,681,513 Frw paid on 16/06/2014.
- [4] After noticing that money was transferred to Strong Constructions Ltd's account, Radiant Insurance Company Ltd refused to pay the Bank of Kigali. Strong Constructions Ltd immediately filed a claim to the Commercial Court of Nyarugenge claiming that Radiant Insurance Company Ltd was in breach of the insurance agreement, they concluded on 15/04/2014.
- [5] In the judgment NoRCOM 00011/2016 / TC / NYGE rendered on 05/05/2016, the Court found the claim of Strong Constructions Ltd that Radiant Insurance Company Ltd breached with without merit, as it was the one with the primary responsibility to pay the debt it had taken, and did not demonstrate that it failed to get the money to repay the loan or any other reason why it did not pay, it also ordered it to pay

counsel and procedural fees amounting to 1,000,000 Frw to Radiant Insurance Company damages.

- [6] Strong Constructions Ltd appealed to the Commercial High Court and in judgment No. RCOMA 00312/2016 / CHC / HCC rendered on 14/10/2016, the Court found the appeal with merit on the ground that Radiant Insurance Company Ltd has no substantial evidence. To prove that Strong Constructions Ltd was paid for the tender of the construction of VIP WING at Kanombe Hospital, but did not repay the loan it got from the Bank of Kigali, therefore, it held that Radiant Insurance Company Ltd did not comply with its obligations as stipulated in the insurance contract. It also ordered Radiant Insurance Company Ltd to reimburse Strong Constructions Ltd, Frw 84,271,004 it paid to the Bank of Kigali for late fees, to repay Frw 83,103,377 Frw seized by the Bank of Kigali, to pay Frw 126,000 it paid for court fees on the first and second instance and to pay him 3,000,000 Frw for the procedural and counsel fees on those levels.
- [7] Radiant Insurance Company Ltd appealed to the Supreme Court, in judgment No. RCOMAA 00065/2016 / SC-RCOMAA 0071/16 / CS rendered on 21/06/2017, the Court found the appeal of Radiant Insurance Company Ltd with merit, that it should not pay the loan given to Strong Constructions Ltd, as the latter did not fail to get the money to repay the loan because it has been realized that enough money to repay the debt owed to it by the Bank of Kigali was deposited on its account, but failed to do it, it ordered it to give Radiant Insurance Company Ltd, 1,000,000FRW for counsel and procedural fees, and to reimburse the court fee of 100,000 Frw.
- [8] On 11/09/2017, Strong Constructions Ltd wrote to the Office of the Ombudsman requesting that judgment N^o

RCOMAA 00065/2016 / SC-RCOMAA0071 / 16 / CS be reviewed because it is vitiated by injustice. After analyzing the grounds of Strong Constructions Ltd, the Ombudsman found that Radiant Insurance Company Ltd did not comply with the insurance contract it had with Strong Construction Ltd, therefore wrote to the President of the Supreme Court requesting for the review of that judgment.

- [9] After examining the issue, in his order dated 27/06/2019, the President of the Supreme Court ordered the case to be referred to the Registry of the Court and be recorded in the register so that, the case be reviewed.
- [10] The case was heard in public on 8/10/2019, Strong Constructions Ltd represented by Counsel Idahemuka Tharcisse, while Radiant Insurance Company Ltd was represented by Counsel Kazungu Jean Bosco, Counsel Ruzindana Ignace, and Counsel Twiringiyemungu Joseph, the hearing was closed and the pronouncement scheduled for 15/11/2019.
- [11] In its court submissions and also during the hearing in the Court, Strong Constructions Ltd, the ground of the injustice is based on the fact that in the judgment N°. RCOMAA 00065/2016 / CS-RCOMAA 0071/16 / CS rendered by the Supreme Court on 21/06/2017, the Court ruled that it did not fail to get the funds to repay the debt owed to it by the Bank of Kigali, ignoring the evidence that it was incapable of repaying that loan. One such evidence is that the owner of the tender for the construction of the VIP WING at Kanombe Military Hospital, MINADEF / RMH, failed to secure the funds, therefore, the work did not go as planned, thus it was also unable to complete the work on time, and that is the reason why Radiant Insurance Company Ltd had to pay. The fact that Radiant Insurance Company Ltd as its

insurer did not pay for it it has to be liable for the damages and the loss caused.

[12] Radiant Insurance Company Ltd argues that the Strong Constructions Ltd's account had enough money to repay the debt owed to it by the Bank of Kigali but decided not to repay it, thus it would not have paid on its behalf when it did not fail to get the funds to repay the loan. The issue to analyze is whether Radiant Insurance Company Ltd breached its contractual obligations stipulated in the insurance contract it signed with Strong Constructions Ltd, if it breached them, then analyze whether the damages for the loss requested by Strong Constructions Ltd should be awarded.

II. ANALYSIS OF THE LEGAL ISSUES

- a. Whether Radiant Insurance Company Ltd breached the surety agreement (Acte de cautionnement) it had with Strong Constructions Ltd.
- [13] Adv. Idahemuka, the counsel for Strong Constructions Ltd alleges that the injustice contained in judgment RCOMAA 00065/2016 / SC-RCOMAA0071 / 16 / CS is as follows:

The fact that in the judgment the Supreme Court ruled that Radiant Insurance Company Ltd was not liable to repay the debt of 272,000,000 Frw owed to Strong Constructions Ltd by the Bank of Kigali which is insured, because it did not fail to get the money to repay it, since enough funds to repay it was deposited on its account, but it ignored the evidence proving that it was not able to repay the loan, which includes the fact that MINADEF / RMH failed to get the funds and consequently failed to

pay it on time, resulting in the work not being done as planned.

The Supreme Court ignored the fact that the first clause of the contract (Contract de cautionnement No RD0010CRI1403488) it signed with Radiant Insurance Company Ltd stipulated that it accepted to be "Caution Solidaire", and to pay on first demand (assuming an irrevocable guarantee of payment), and in the document entitled "Acte de cautionnement No RD0010CRI1401759 / 02645" in its paragraph 5, it accepted to pay the Bank of Kigali immediately when it formally requests it in writing

The Court's disregard for the origin of the loan payment of 272,000,000 Frw, confirms that a sufficient amount has been transferred to the account of Strong Constructions Ltd and paragraph 5 of the contract (Acte de Cautionnement) provided that the payment will come from the money to be paid on the invoices for the insured tender of the construction of VIP WING at Kanombe Hospital, and the fact that the loan was confused with the advance payment while it had a special contract called advance payment guarantee No RD001RC0A1305281 dated 04/10/2013, and it was paid before the contract in litigation was signed because it was signed on 15/04/2014 while the advance was paid on 30/10/2013.

[14] Counsel Idahemuka Tharcisse furthermore argues that another cause of the injustice is that the Court disregarded the following provisions of the law:

Article 170 of the CPCCSA prohibiting the judge from adjudicating beyond the limit of the appeal subject-

matter, as it examined all funds transferred through the Strong Construction Ltd account including those paid for other tenders, ignoring the fact that the issue was the Kanombe Military Hospital's payment for the contract for the construction of the VIP WING, and it ignored the fact that a commercial or civil case belongs to the parties themselves

Article 110 of Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that a judicial admission refers to statements the accused or his or her representative makes before the court. Such statements shall serve as plaintiff arguments, so the fact that in the contract, Radiant Insurance Company Ltd agreed to be a joint surety " Caution solidaire " and provided an irrevocable guarantee "garantie irrevocable" of repaying the loan should not have been ignored by the Court.

[15] Counsel Kazungu Jean Bosco, Counsel Ruzindana Ignace and Counsel Twiringiyemungu Joseph representing Radiant Insurance Company Ltd responded to the arguments made by Strong Constructions Ltd as follows:

On the issue of failing to secure the funds « financement », they argue that Strong Constructions Ltd was the one who took the loan from the Bank of Kigali, and it was the principal debtor, therefore Radiant Insurance Company Ltd had to pay only if Strong Constructions Ltd failed to pay, on the contrary, it had the money to pay. After all, the Bank of Kigali indicated that on its account, the amount of money deposited on it exceeds the loan which Radiant insured and that the Bank of Kigali paid its debts because Strong Constructions Ltd had it.

On the issue that Radiant Insurance Company Ltd had agreed to be a joint surety "Caution solidaire" and to pay without any hesitation, they argue that this is not the case, because the contract stipulates the requirements which must first be fulfilled before it pays, including first showing that the money deposited on the Strong Constructions Ltd' account in that bank was not sufficient to repay the loan. They explain that the provisions of the "acte de cautionnement" on which Strong Constructions Ltd bases on do not engage it, because that contract was between the Bank of Kigali and Radiant Insurance Company Ltd, so no other party can base on it to sue based on the principle that the contract binds the parties, and therefore it does not engage Strong Construction Ltd, as it is not its beneficiary

On the issue that Radiant Insurance Company Ltd disregarded the origin of the payment, they argue that the money paid to Strong Constructions Ltd, whether it was advance payment or any other payment received later, all had to be used for the payment of the loan, that is why the Bank of Kigali paid itself from the money which was on the bank account of Strong Construction Ltd.

[16] They further argue that in a letter from the Bank of Kigali dated 14/04/2014, granting a loan to Strong Construction Ltd, it included properties that were furnished as mortgages, on which the Bank of Kigali used to repay its debt. These mortgages are:

Registered mortgage of 599,000,000 Rwf on 1st rank on parcelle No 2276 in Gisozi-Gasabo,

Fire insurance covering the building given as a guarantee with an endorsement transfer of interests in our favor made on 06/17/2014,

Guarantee of the partners of 807,800,000Frw and domiciliation des paiements des divers contrats

[17] They argue that based on such mortgages, in particular, the " domiciliation des paiements des divers contrats" it is obvious that the Bank of Kigali had to pay itself the money freontractsnvoices paid if it was insufficient, then requests Radiant Insurance Company Ltd to pay the balance pursuant to pay for the loss under the « Acte de cautionnement », or based on the terms of the loan contract pays itself on the money deposited on the account regardless of its origin, which is what it did, therefore since it did it, and paid itself, Radiant Insurance Company Ltd hand no other obligation.

[18] Concerning the legal provisions that Strong Constructions Ltd claims that they were not complied with, the counsels for Radiant Insurance Company Ltd respond as follows:

Regarding article 170 of the CPCCSA which provides that a judge only adjudicates on the appealed subject matter, they state that in paragraph 20 of the judgment sought to be reviewed due to injustice, it appears that the Court examined the appeal of Radiant Insurance Company Ltd and found that on the Strong Constructions Ltd's account the money which was deposited on it was enough to repay the loan, therefore it did not adjudicate beyond the limits of the appealed subject matter because it had to pay only if on the account there was no enough money to repay the loan. They add that the principle that in civil and commercial hearings, the case belongs to the

parties, is also no longer applicable, instead, according to the new laws, the case belongs to the parties and the Court ; they give an example of a pre-trial meeting held by the Court, and another one that the Court may on its initiative go to the location of the subject matter.

Regarding article 110 of Law N°15/2004 of 12/06/2004 relating to evidence and its production, whereby Strong Constructions Ltd alleges that Radiant Insurance Company Ltd acknowledged the loan, they refute that it never did it because according to articles 5 and 8 of the guarantee contract (contrat de cautionnement), Strong Constructions Ltd was the one given the loan and was the one to repay it, if it is paid by Radiant Insurance Company Ltd them the former would reimburse the money it paid on its behalf, they conclude by stating that since the Bank of Kigali was paid, they find this case unfounded.

DETERMINATION OF THE COURT

[19] Strong Constructions Ltd claims that alleges that it failed to repay the loan of 272,000,000 Frw it got from the Bank of Kigali because the owners of the project of constructing a VIP WING at Kanombe Hospital failed to get the funds and thus it was not paid and that there is evidence to prove it, and Radiant Insurance Company Ltd refused to pay the loan as it had agreed in their surety contract dated 15/04/2014 (Contract de Cautionnement N° RD0010CRI1403488).

[20] On the issue of failure to repay the loan because the owners of the tender failed to get the funding, the evidence in the case file which was argued upon by both parties shows that the

agreement to construct a VIP WING at Kanombe Hospital was signed between Strong Constructions Ltd and Rwanda Military Hospital in partnership with the Ministry of Health, was not implemented within the provided time framework due to the lack of funds which affected the payment of Strong Constructions Ltd for the work it had completed, which caused it not to honor the loan contract of 272,000,000 Frw it concluded with the Bank of Kigali.

[21] Those elements of evidence include:

The bank statement issued by Bank of Kigali demonstrate that the first invoice No 04/01/023/2013 / T / NCB / RHM / MOH of143,864,240 Frw issued by Strong Construction Ltd on 23/05/2014 and a second invoice No 05/02/023/2013 / T / NCB / RMH / MOH of 60,751,920 Frw, issued on 07/07/2914 was not paid by Kanombe Military Hospital;

The bank statement issued by the Bank of Kigali demonstrates that since the surety contract was signed on 15/04/2014, Kanombe Hospital had paid 54,681,513Frw paid on 16/06/2014, 51,484. 678 Frw paid on 20/03/2015, and 136.123.194 Frw paid on 10/12/2015.

Except for 54,681,513 Frw paid on 16/06/2014, others were paid after the period stipulated in the contract for the construction of VIP WING had expired, because clause 5 of the contract provided that the construction was to be completed within 15 months, beginning from the date it was signed by both parties on 15/10/2013, thus that duration had to expire on 15/01/2015;

A letter dated 16/10/2014 from Strong Constructions Ltd to the Director of Kanombe Hospital reminding them to

pay those bills (No 04/01/023/2013 / T / NCB / RHM / MOH of 143,864,240 Frw and invoice No 05/02/023/2013 / T / NCB / RMH / MOH of 60,751,920 Frw). That letter indicated that as of 16/10/2014, no invoice of Strong Constructions Ltd had been paid;

Two letters, dated 20/01/2016 and 30/03/2016, of the Directorate of Military Hospital requesting the Minister of Health to continue funding the project of constructing the VIP WING at Kanombe Hospital. It is obvious that the hospital by writing those letters they were short of funds, as stated by Strong Constructions Ltd.

A letter dated 19/02/2015 from the Director of Military Hospital in response to a letter from Strong Constructions Ltd dated 18/02/2015 requesting an extension of the deadline for the completion of the work.

In the case file, there is no single letter from the Military Hospital stating that Strong Constructions Ltd was the one that delayed the work.

- [22] The contracts on which both parties base are in two categories: the surety contract dated 15/04/2014 (Contrat de Cautionnement N° RD0010CRI1403488) whereby Radiant Insurance Company Ltd agreed to pay on behalf of Strong Constructions Ltd in case it fails to get the payment, and the contract dated 15/04/2014 entitled "Acte de Cautionnement RD0010CRI1401759 / 02645" concluded by Radiant Insurance Company Ltd assuring the Bank of Kigali to repay the debt of Strong Constructions Ltd in case it defaults.
- [23] Concerning the claims of Radiant Insurance Company Ltd that Strong Constructions Ltd should not use the contract of

the "Acte de Cautionnement RD0010CRI1401759 / 02645" as its defense because it does not engage it as it was concluded by Radiant Insurance Company Ltd alone, the Court finds that the mentioned contract should not have existed in the first place in the absence of the principal loan contract between the Bank of Kigali and Strong Construction Ltd, which is the basis of the surety contract (Contrat de Cautionnement). That surety contact "Contrat de cautionnement" is dependent on the principal contract in which Strong Constructions Ltd has an interest, Radiant Insurance Company Ltd cannot claim that Strong Constructions Ltd has no interest in it or it does not engage it, because all are based on a loan it got from the Bank of Kigali. Regarding the issue that the Bank of Kigali should have been the one to sue because it's the one which the contract "Contrat de Cautionnement" engages, the Court finds that whether it did not sue or it sued but later abandoned the claim as alleged by the counsels for Radiant Insurance Company Ltd, does not prevent Strong Constructions Ltd to sue if it finds that the contract it signed with Radiant Insurance Company Ltd was not honored.

[24] Regarding the surety contract in general, Legal scholars state that anyone who agrees to be a guarantor undertakes to answer for the performance of another person's obligation in the event of a default by the person primarily responsible for it [...celui qui se rend caution d'une obligation, se soumet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui même...]¹.

[25] Legal scholars distinguish between simple guarantee (cautionnement simple) and joint guarantee (Caution solidaire)

¹ Denis Philippe, Delphine Dehasse, Code Civil, 5 ème edition, Bruylant, 2007, page 287.

and argue that their consequences are different. They argue that under the simple guarantee, the creditor has to first try to get the payment in the debtor's property, after it has been established that he cannot pay the debt then the guarantor pays. [...le cautionnement est simple, lorsque la caution dispose d'un bénéfice de discussion. Elle peut contraindre, à certaines conditions, le créancier à discuter d'abord les biens du débiteur, c'est-à-dire à établir son insolvabilité...]. On the other side for the joint guarantee, (Caution solidaire) they explain that the guarantor has no right to request that the payment first be sought first from the insured person's property. ...[la caution solidaire, en effet, ne dispose pas de bénéfice de discussion, ...la caution est exposée au paiement de la dette principale lorsque, celle-ci, est exigible..]².

The Court finds that in the first clause of the contract Company Ltd Radiant Insurance and Constructions (contract de Ltd cautionnement of 15/04/2014), RD0010CRI1403488 Radiant Company Ltd explicitly agreed to be a joint guarantor (Caution solidaire) of Strong Constructions Ltd, it put it in these words [....déclare se porter caution solidaire de Strong Construction Ltd envers Bank of Kigali Ltd, et assumer la garantie irrévocable du paiement d'un montant de 272.000.000 Frw (deux cent soixante-douze millions de Francs Rwandais) représentant la garantie de bonne exécution du contrat ci-haut cité...]. Pursuant to this clause and the explainations of the scholars, the Court finds that in order for the Bank of Kigali's debt to be repaid, it was not necessary to first seek payment from Strong Construction Ltd's own assets

² Jérôme François, Droit civil, les sûretés personnelles, Tome VIII, Economica, Paris, 2004, page 33

[27] The court also finds that in the "Acte de cautionnement" issued by Radiant Insurance Company Ltd alone, despite being a unilateral contract (contrat unilatéral)³, it directly obliged itself of repaying the debt owed to Strong Constructions Ltd by the Bank of Kigali, which was intended to increase trust and chances of repaying the loan in case Strong Constructions Ltd failed to repay it because it assured the Bank of Kigali to repay the loan if it fails to repay it and pay immediately after the bank has requested for the payment. This is also emphasized by the scholars that the first demand guarantee agreement is a way to make it easier for the creditor to be repaid because he has two people who have to pay him and that anyone who acknowledges that procedure directly is reliable to the creditor. [..., la garantie à première demande renforce la situation du cr éancier en lui donnant deux débiteurs au lieu d'un seul. Tandis que le cautionnement est une obligation accessoire, la garantie à première demande est une obligation autonome, le garant s'engageant, non pas pour autrui, mais à l'occasion des relations contractuelles d'autrui., ... il promet non pas d'exécuter l'obligation du débiteur principal défaillant, mais de verser sur simple réclamation du créancier une somme déterminée...]⁴.

[28] As for the source of the payment, the contract titled "Acte de Cautionnement" indicates that the source of the payment is money got from the contract for the construction of the VIP WING at Kanombe Military Hospital, whereby that clause stipulates that Radiant Insurance Company Ltd will pay the Bank

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³ Martin Imbleau, William A. Schabas, Introduction au droit rwandais, Les éditions Ivon Blais Inc, 1999, page 83.

⁴ Pierre Voirin, Gilles Goubeaux, Droit civil, Personnes-Famille-Incapacité-Biens-Obligations-Sûretés, Tome 1, 30ème édition, LGDJ, Paris, page 635

of Kigali after proving that the amount of the invoice paid and the money deposited on the bank account of Strong Constructions Ltd in the Bank of Kigali for that specific tender is not enough to repay the loan. The agreement stipulates that: « Et nous nous engageons à rembourser BANK OF KIGALI, dès réception de sa demande écrite, montrant que le Contractant (Strong Construction Ltd) ne se conforme pas aux stipulations du contrat signé entre lui et Bank of Kigali, la somme ci- dessus stipulée (272.000.000 FRW) après avoir prouvé que le(s) paiement (s) au compte 040-0323102-28 ouvert à la BANK OF KIGALI au nom de Strong Construction Ltd, pour le marché ci-haut mentionné, n'a pas été suffisant pour le remboursement du crédit contracté ».

- [29] Again the source of the payment can be found in the letter dated 14/05/2015 issued by the Bank of Kigali in response to the Radiant Insurance Company Ltd's request for information regarding the account of Strong Constructions Ltd, whereby the Bank of Kigali had informed it that on the account of Strong Constructions Ltd, money had been deposited on it but it does not originate from the tender which is guaranteed, and in a letter dated 13/09/2018, it wrote to the Ombudsman explaining that the money for the payment of the loan it gave to Strong Constructions Ltd had only to be got from the payment of the tender for the construction of VIP WING at Kanombe Hospital.
- [30] The Court finds that the claims of the counsel for Radiant Insurance Company Ltd that the payment should first have been sought from other mortgages furnished by Strong Constructions Ltd without merit because based on "Acte de Cautionnement RD0010CRI1401759 / 02645" especially in its paragraph 5, Radiant Insurance Company Ltd had to pay the loan of Strong

Constructions Ltd on the first demand, and that is the view of the scholars that if the contract of guarantee is joint (caution solidaire) which is the contract that Radiant Insurance Company concludes with Strong Constructions Ltd, the guarantor has no right to first request that the payment should first be sought from the debtor's property...[la caution solidaire, en effet, ne dispose pas de bénéfice de discussion,...la caution est exposée au paiement de la dette principale lorsque, celle-ci, est exigible..]⁵.

[31] The court also finds that in terms of the nature of the insurance itself, the guarantee of good execution "garantie de bonne exécution", when the issue of non-payment is a result of the work not being executed as expected due to the lack of funds, a ground which was not caused by strong Constructions Ltd, and which is not prohibited under clause 4 of the guarantee contract N° RD0010CRI1403488, the representatives of Radiant Insurance Company Ltd cannot claim that the payment should have been sought first from the other mortgages.

As to whether there was a confusion between the loan for [32] the advance payment and the 272,000,000 Frw granted to Strong Constructions Ltd, the Court finds in the case file that there are two guarantee contracts entered into by Radiant Insurance Company in the benefit of Strong Constructions Ltd, namely: The contract dated 04/10/2013 entitled "Advance Payement Security/Advance payment guarantee No RD001RCOA1305281" and the contract dated 15/04/2014 entitled "Contrat de cautionnement No RD0010CRI1403488". Although the two contracts are related to the construction of VIP WING at Kanombe Hospital, the Court finds that it differs in its structure, timing, purpose, and on the amount guaranteed, this

 $^{\rm 5}\,$ Jérôme François, Droit civil, Ibidem, page 33

implies that even the loans on which it is premised must be separated, therefore the claims of the representatives of Radiant Insurance Company Ltd that it had to use it first to get the money for the payment is unfounded.

[33] The Court also finds that, as indicated in paragraph five of the "Acte de Cautionnement RD0010CRI1401759 / 02645", one of the grounds on which Radiant Insurance Company Ltd had to base before paying on the behalf of the Strong Constructions Ltd was that, if it found that its account which it had opened with the Bank of Kigali, there was not enough money transferred on it to repay a loan of 272,000,000 Frw got from the payment of the tender for which is guaranteed. The Court finds that there was no other way Radiant Insurance Company Ltd would have known whether Strong Constructions Ltd had been paid enough money for the construction of the VIP WING at Kanombe Hospital to pay the loan, without considering all the money passed through its account, as the Court had examined it, therefore the Court did not adjudicate beyond the limit of the subject matter of the appeal.

[34] Therefore, the Court finds that since in the guarantee contract dated 15/04/2014 (Contrat de Cautionnement no RD0010CRI1403488), Radiant Insurance Company Ltd agreed to be a joint guarantee "Caution Solidaire" for the loan owed to the Bank of Kigali, as well as in the contract (Acte de Cautionnement RD0010CRI1401759 / 02645) it agreed to the Bank of Kigali that in the event Strong Constructions Ltd fail to repay, it will pay on the first demand, Radiant Insurance Company Ltd as a guarantor had to pay, especially that in its letter dated 4/05 / 2015, it informed Strong Constructions Ltd that in case it pays for it, the money has to be immediately reimbursed to Radiant Insurance Company Ltd.

- [35] The Court also finds that in the judgment RCOMAA 00065/2016 / SC-RCOMAA 0071/16/CS, it was decided that Radiant Insurance Company Ltd should not pay for Strong Constructions Ltd, as it has the money to pay for itself because the Bank account history indicated that the transactions carried out on that account the amount was far much that the amount of the laon, that was an error, there was confusion on the source of the payment because other money which Strong Constructions Ltd was paid from other tenders was not supposed to cover the payment of that loan, as each tender has its management otherwise, the work would be delayed or not executed, which could cause another loss.
- [36] The Court also finds that in the judgment RCOMAA 00065/2016 / SC-RCOMAA 0071/16 / CS sought to be reviewed on the grounds of injustices, the Court held that the payment of the loan had to be got from all the money deposited on the bank account of Strong Constructions Ltd, in that case, the payment was got from its private property, rather than for money got from the tender of construction of the VIP Wing at Kanombe Hospital because it was a joint guarantee, which was an error which prejudiced Strong Constructions Ltd.
- [37] Based on the motivations given above and on article 64 of Law N° 45/2011 of 25/11/2011 governing the contract, which provides that the contract is legally binding on the parties, the Supreme Court finds that for Radiant Insurance Company Ltd refusing to repay the loan of Strong Constructions Ltd was in breach of the guarantee contract dated 15/04/2014, therefore the judgment No RCOMAA 00065/2016 / CS-RCOMAAA0071 / 16 / CS rendered by the Supreme Court on 21/06/2017 is vitiated by injustice, therefore it has to be overturned.

b. Whether damages claimed by Strong Construction Ltd should be awarded

[38] Counsel Idahemuka argues that in previous cases and this case, Strong Constructions Ltd did not sue for the payment of the debt because the Bank of Kigali has been paid; instead it sued claiming for the late fees and penalties amounting to 84,271,004 Frw which it was charged after Radiant Insurance Company Ltd refused to pay, and to release the following money which was seized: 52,598,296Frw it got from the contract. of "mechanization RADA" and 30,505,081Frw which was paid by the OT, all amounting to 83,103,337Frw, that seizure led to nonexecution of other tenders.

[39] He argues that the contract which Strong Constructions Ltd had with Kanombe Military Hospital was on the various occasion extended, without its role but because the government did not have the funding, and that the contract between it and Radiant Insurance Company Ltd, and the contract between Bank of Kigali and Radiant Insurance Company Ltd were not extended. He states that all the contracts had a one-year term and that the Bank of Kigali was not within that year, the reason why Strong Constructions Ltd was charged late fees.

[40] Regarding the interest and late fees claimed by Strong Constructions Ltd, Counsel Kazungu Jean Bosco, Counsel Twiringiyemungu Joseph and Counsel Ruzindana Ignace representing Radiant Insurance Company Ltd, argue that those late fees and penalties do not apply to Radiant Insurance Company Ltd, because if the Bank of Kigali finds that it has not complied with its guarantee contract (Acte de cautionnement) it would have sued it, because based on the principle that contract is bidding to the parties, no one else could use it to sue other than

itself, and that the Bank of Kigali sued Radiant Insurance Company Ltd in Commercial Court of Nyarugenge, but after receiving the payment from Strong Constructions Ltd it abandoned the claim.

[41] They argue that the Bank of Kigali should be the one to be sued for late fees and penalties because that loan generated the late fees and it had the payment and that so far the Bank of Kigali has no problem because it has been paid, and Strong Constructions Ltd should have no problem because he extinguished its obligation when it paid. They conclude that the contract between Strong Constructions Ltd and Kanombe Military Hospital was restructured and that restructuring was not notified to Radiant Insurance Company Ltd, nor should it have been the one to guarantee it.

DETERMINATION OF THE COURT

- [42] Article 137 of the Law N°45/2011 of 25/11/2011 governing contracts provides that the aggrieved party has the right to damages from the party failing to perform his/her contractual obligations unless the claim for damages has been suspended or withdrawn.
- [43] The court finds that the arguments of the counsel for Radiant Insurance Company Ltd that Strong Constructions Ltd should not rely on the contract entered into between Radiant Insurance Company Ltd and the Bank of Kigali to sue for damages without merit. Even though the contract signed by Radiant Insurance Company Ltd "Acte de Cautionnement N° RD0010CRI1401759 / 02645" is a unilaterally contract whereby it agreed to repay the debt of Strong Constructions Ltd to the

Bank of Kigali on its behalf⁶, but that contract was based on another contract between Strong Constructions Ltd and Radiant Insurance Company Ltd, and also it was concluded in its benefits as described above.

[44] The court also finds that if Strong Constructions Ltd paid late fees which it did not have to pay if Radiant Insurance Company Ltd honoured its contract, which it requests to be reimbursed, thus Radiant Insurance Company Ltd cannot claim that it has no right to sue.

[45] The court finds that Radiant Insurance Company Ltd did not honour its contractual obligations under the guarantee contract it concluded with Strong Constructions Ltd as set out in the preceding paragraphs, there is a loss incurred including the late fees amounting to 84,271,004 Frw which it was charged, which caused it not to comply with its obligations of other tenders with other parties, as explained by Counsel Idahemuka Tharcisse, its representative, therefore Radiant Insurance Company Ltd is liable for damages.

[46] The Court, therefore, finds that pursuant to article 137 of the Law N° 45/2011 of 25/11/2011 mentioned above, Radiant Insurance Company Ltd is liable to pay Strong Constructions Ltd

⁶ ...« Et nous nous engageons à rembourser BANK OF KIGALI, dès réception de sa demande écrite, montrant que le Contractant (Strong Construction Ltd) ne se conforme pas aux stipulations du contrat signé entre lui et BANK OF KIGALI, la somme ci-dessus stipulée (272.000.000 FRW) après avoir prouvé que le(s) paiement au compte 040-0323102-28 ouvert à la BANK OF KIGALI au nom de Strong Construction Ltd, pour le marché ci-haut mentionné, n'a pas été suffisant pour le remboursement du crédit contracté »

damages equivalent to the late fees amounting to 84,271,004 Frw which Bank of Kigali charged it.

[47] As for the amount of 83,103,337 Frw which Strong Constructions Ltd claims to have been seized by the Bank of Kigali, and it is seeking reimbursement from Radiant Insurance Company Ltd, as the seizure resulted in non-execution of other tenders, the Court finds that it was not reimbursed, as it was unable to prove to the court that it is among the money which reduced the loan it owed to that Bank.

III. DECISION OF THE COURT

- [48] Admits the claim for the review of the judgment No RCOMAA 00065/2016/CS-RCOMAAA0071/16/CS rendered by the Supreme Court on 21/06/2017 on the grounds that it was vitiated with injustice and upon its examination, it finds it with merit;
- [49] Holds that Radiant Insurance Company Ltd breached the guaranteeship contract it had with Strong Constructions Ltd on 15/04/2014;
- [50] Holds that Judgment No RCOMAA 00065/2016/CS-RCOMAA0071/16/CS rendered by the Supreme Court on 21/06/2017 is overturned;
- [51] Orders Radiant Insurance Company Ltd to give Strong Constructions Ltd 84.271.004Frw for the damages equivalent to the late fees it was charged by the Banki of Kigali;

[52] Orders Radiant Insurance Company Ltd to give Strong Constructions Ltd procedural and counsel fees equivalent to 3.000.000 Frw and 126.000 Frw for the court fees it was awarded by the Commercial High Court.

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CRIMINAL CASE

PROSECUTION v. GATABAZI

[Rwanda SUPREME COURT – RPA 0263/12/CS (Hatangimbabazi, P.J., Gakwaya and Karimunda) 20 May 2016]

Evidence law — Evidence in criminal matters — Murder — In murder cases, "to cause the death" means to cause the death at the time when, and the place where, the deceased died — No one should be convicted of murder based on the suspicion that he was the one with the interest in the death of the victim without proving that the accussed committed the murder.— The accused can be not be convicted on the basis that it was possible for her/him to commit the offence, instead that should serve as a benefit of the doubt.

Facts: The prosecution prosecuted Gatabazi et. al in the High Court for the murder of his wife Mukakabera, the defendants pleaded not guilty. The court found Gatabazi guilty and sentenced him to life imprisonment, while his co-accused, the Court found doubt in the evidence brought against him, and thus he was acquitted.

Gatabazi was not contented with the decision and appealed to the Supreme Court claiming that he was convicted of the offence of murder of his wife based on the fact that he requested her to go home earlier which is not proof that he killed her but instead which proves that he did not want anything bad to happen to her and that the accusation of his siblings that he requested them to track her and investigate the adultery of his wife and his codefendant and also that he buried the deceased immediately without a post-mortem are all lies, he concludes that there is no causal link between him and his wife's death

The prosecution argues that the deceased was killed by her jealous husband when his former co-accused gave her a drink of his alcohol and that he does not deny that he was jealous of his wife because he told his elder brothers that he had asked them to put an eye on his wife to ensure that she does not commit adultery with that man and that for the doctor failing to reveal the cause of the death it is not a surprise since the dead body was measured six days after burial. It concludes that although no one saw him kill her, the fact that the deceased was given a drink by a man he was suspected to be committing adultery with and she died the following day is enough to suspect him because he was the one who had the interest in her death

- **Held:** 1. No one should be convicted of murder based on the suspicion that he was the one with the interest in the death of the victim without proving that the accussed committed the murder.
- 2. In murder cases, "to cause the death" means to cause the death at the time when, and the place where, the deceased died. Although the appellant manifested disgraceful conduct after the death of the deceased by refusing to know the information of the last caller or claiming that he has no money to carry out the postmortem, itself is not a piece of evidence to prove guilt because it does not establish his involvement in the death of the deceased
- 3. The accused can be not be convicted on the basis that it might have been possible for the accused to commit the offence, rather that should serve as a benefit of the doubt, therefore the Appellant cannot be convicted on the ground that he might have committed the offence.

The appellant is not guilty of the murder of his wife.

Statutes and statutory instruments referred to:

Law Nº 15/2004 of 12/06/2004 relating to evidence and its production, article 119

Law Nº 30/2013 of 24/5/2013 relating to the criminal procedure (repealed), article 165

Authors cited:

CR Snyman, Criminal Law, Durban, Lexis-Nexis, 2002, P. 75. Nyabirungu mwene Songa, Traité de droit pénal Congolais, Kinshasa, Editions Universitaires, 2007, P. 321.

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] This case started before the High Court, chamber of Rusizi where Gatabazi Félicien and Kanyarukiga Jean-Pierre were prosecuted for the facts that on 26/05/2011 in the evening they abused Mukakabera Donata Gatabazi Félicien's wife with whom they were sharing in a bar but she left earlier, and was found next morning on 27/07/2011 murdered, her head upside down in Kadasomwa river. Gatabazi Félicien and Kanyarukiga Jean-Pierre pleaded not guilty.
- [2] In the case RP0015/12/HC/RSZK rendered on 31/05/2012, the Court found enough evidence for incriminating Gatabazi Félicien for the offence he was prosecuted for, it decided that the latter murdered his wife because he suspected her of adultery, and sentenced him for life, and ordered him to pay Court fee. Concerning Kanyarukiga Jean-Pierre, the Court

found doubtful the evidence produced by the prosecution and acquitted him.

- [3] Gatabazi Félicien was not contained with that decision and appealed before the Supreme Court.
- [4] The hearing in public was scheduled for 07/03/2016, that day Gatabazi Félicien appeared assisted by Counsels Hakizimana Martin and Rwigema Vincent whereas the prosecution was represented by Munyaneza Nkwaya Eric, a National prosecutor. The counsels for Gatabazi Félicien notified the Court that they lacked the time to read through the file and to consult with their client, they requested to postpone the hearing so that they can prepare themselves consequently. The hearing was postponed to 18/04/2016.
- [5] That day, the hearing was conducted in public, Gatabazi Félicien assisted by Counsel Hakizimana Martin whereas the prosecution was represented by Munyaneza Nkwaya Eric, a National prosecutor.

II. ANALYSIS OF THE LEGAL ISSUE.

Whether there is incriminating evidence that GATABAZI Félicien committed the offence for which he is prosecuted.

[6] Gatabazi Félicien, states that he appealed because the High Court convicted him whereas he is innocent, that there were no disputes between him and his wife to the extent that he can abuse her also that, if he did it, he would admit it and apologize for that. He explained that he was living at the bar, and the deceased died while he had gone to stock up on drinks because that was his overnight plan, they called him and found

Mukakabera Donata felled in the river upside down, the alcoholic drinks had come out through her mouth and nose. Which the evidence that she was killed by alcohol because the doctor consulted him and affirmed that she was not beaten by any blunt object. He explained that she was buried in presence of her family, with the authorization of the administrative authorities and the certificate provided by the police, but that certificate was burnt during Muhanga prison's fire.

- [7] He states also that; his cousins whose names are Riberakurora and Bavugirije who accuse him of spying on his wife's adultery with Kanyarukiga Jean-Pierre, he asked them to shut their mouth when they came closer to tell him a story of a person that the deceased called on the telephone for the last time or that he hurried to bury the deceased to escape the autopsy all these are lies fabricated aimed at keeping him in prison to appropriate his plots of lands which are usually in litigation. He concludes by requesting the Court to redress the injustice he suffered and be acquitted because he was convicted for the offence he did not commit.
- [8] Counsel Hakizimana Martin states that the Court convicted Gatabazi Félicien for killing his wife basing on the fact that he ordered his wife to return home early from the bar, whereas that is not an evidence for killing her rather an evidence for caring for her, it based also on the fact that he went to stock up on drinks whereas his wife was dead, the Court disregarded the fact that the bar was not located at their home reason why he used to return home time to time, that specific day he left early for stock up without him knowing that his wife has died, because if he had some facts for self-incrimination he would have stayed nearby and intervene firstly for evidence distract, is based also

on the fact he buried the deceased without an autopsy test whereas it was done with the authorization of the administrative authorities and the certificate provided by the police, but that certificate was burnt during Muhanga prison's fire, this would not have been done if there was a suspicion that the death was caused by an offence.

Counsel Hakizimana Martin states also that the Court based on the fact that Riberakurora and Bavugirije tried to tell Gatabazi Félicien about a person who called his wife lastly but he asked them to shut their mouth and that he was the one who called them during the night of his wife's death however these are just words without any further evidence mostly that, there was no reason to ask them to shut their mouth while administrative authorities and were present, all this indicates that Gatabazi Félicien was convicted basing on the lies of Kanyarukiga Jean-Pierre who would not be a witness in this case because he was also a suspect, and he was interrogated he could not explain where he left the deceased whereas he is the one who met her lastly, and on conspiracy of his cousins who want to dispossess him his land which is the reason why the body was exhumed for its examination whereas it was buried in their presence, however the doctor could not indicate the cause of the death after examination.

[10] He concludes by stating that there is no link between the death of Mukakabera Donata and Gatabazi Félicien also that if the latter committed the offence nothing would prevent him from admitting it because seven years he has spent in prison is enough for deterrence, however, he has no blood on his hands, he prays the Court, to decide that there is no evidence to convict Gatabazi

Félicien for the offence he is prosecuted for, thus declare him innocent.

The representative of the prosecution states that Mukakabera Donata was killed by her husband Gatabazi Félicien who felt jealous when Kanyarukiga Jean Pierre shared with her a drink. He explains that Gatabazi Félicien does not deny that he felt jealous against his wife because he talked about it with his old brothers who accused him of requesting them to spy on his wife to know whether she does not have sex with Kanyarukiga Jean-Pierre and up to now he can't evidence for the dispute he pretends to have with them, this indicates that though Kanyarukiga Jean-Pierre is the cause of the death of the deceased he is not the killer, even the argument of Gatabazi Félicien that he was given the authorization to bury the deceased in hurry but the certificate got burnt in Muhanga prison it has no merit because it is usual for prisoners when they fail to get evidence of their statement, with regarding the fact that the doctor did not indicate the cause of the death of Mukakabera Donata, that is not a problem because the body was examined six days after the burial

[12] He concludes by stating that though none witnessed Gatabazi Félicien killing Mukakabera Donata, the fact that she shared a drink with a man whom Gatabazi Félicien was suspecting to have sex with him, and died the following day, is enough to suspect him because he was the one to benefit from that death, that factual evidence and the statement of the witnesses were and still enough to convict Gatabazi Félicien for the offence he is prosecuted for, thus he prays the Court to sustain the decision of the appealed judgment.

DETERMINATION OF THE COURT.

- [13] Article 119 of evidence Law N° 15/2004 of 12/06/2004 provides that "In criminal cases, the evidence is based on all grounds, factual or legal provided that parties have been given a chance to be present for cross-examination. The courts rule on the validity of the prosecution or defense evidence".
- [14] Article 165 of the Law N° 30/2013 of 24/5/2013 relating to criminal procedure provides that "The benefit of the doubt shall be given in favour of the accused. If the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving beyond a reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal".
- The case file indicates that Gatabazi Félicien stated before the judicial police and before the prosecution that Mukakabera Donata was not too drunk when she left with Kanyarukiga Jean-Pierre, and children who went to fetch water the next morning found her in the water her neck stuck in the mud, her legs downside up, the father of those children named Busenyi Jean-Pierre called the relatives of the deceased, after her burial, he knew that she kept in touch through a telephone with Kanyarukiga Jean-Pierre before her death. He explains that he buried her without an autopsy because he had no means, however, her brother named Gahima was present and he signed on the document made for her burial kept by the police and at the sector office (identification number 22-25 and 67-70). A person named Busenyi Jean-Pierre stated that he is among the persons who withdrawn the body of the deceased from the water, they recognized her when the children around saw her and started

crying stating that she is their mother but he doesn't know the killers (identification number 52).

The case file indicates also that Kanyarukiga Jean-Pierre [16] stated before the judicial police and before the prosecution that he was in the bar of Gatabazi Félicien, the latter had disputes with his wife asking what she is still doing in the bar with other men, when he heard this, whereas that woman was the one who was sharing with him her drink, he left, then that woman came after him, they walked together, that woman asked him a help to look for her grand child who was has gone missing, but in their way Mukakabera Donata passed by Riberakurora's home, while he kept on going and when he noticed that he delays whereas they have a plan to look for her grandchild, he called her on phone but she did not come, and went away, the next morning he heard that Mukakabera Donata was dead but he does not know the person who escorted and killed her though he heard information that Gatabazi Félicien had requested Riberakurora and Bavugirije to escort them to check whether they don't have sex, also he has suspicion about Riberakurora because perforated the genocide against the Tutsi memorial for stealing blankets. (cotes 12-15, 62 and 63).

[17] Riberakurora Théodor told the judicial police that Mukakabera Donata was living in harmony with her husband, on the of her death she passed by his home, Kanyarukiga Jean-Pierre kept on calling her stating that she is delaying, for the third time he told her that he has gone, that she will find him at the river, that specific river is where they found Mukakabera Donata, her head stuck in the mud, they removed her but before burring her, they made a document, when he told Gatabazi Félicien that

someone was calling his wife before her death, he asked him to keep quiet so that they can bury her.

[18] The case file indicates also that, Bavugirije Vedaste stated before the judicial police that, Gatabazi Félicien requested him to monitor his wife because she was drunk, but he replied that he cannot monitor a woman with whom they did not share a drink, the next day, he heard the information that, Mukakabera Donata was dead (identification mark 34-38). Whereas Ngarukiye Damien and Ntawugayumugabo Phénias who were at night watch state that Kanyarukiga Jean-Pierre together with a woman unknown to them, passed near to them and were had not yet reached RIBERAKURORA, but during that night they did not see GATABAZI Félicien (identification mark 46 and 49).

Mujawamaliya Donatella, the sister of Kakabera Donata, stated before the judicial police that she suspects Kanyarukiga Jean-Pierre and Gatabazi Félicien for killing Mukakabera Donata because Riberakurora told her that before her death Kanyarukiga Jean Pierre called her on phone, asking her to join him at Fidèle for the first time and asked her to join him at Kadasobwa for the second, the river in which they found her dead body, Gatabazi Félicien found his wife dead instead of asking for her examination to know the cause of her death, he lied to police that it is an accident, consequently was buried without knowing the cause of her death, however at the time of her burial, her brother named Munyandamutsa and other family relatives were present and she heard that before the burial, a document was made though she did not see it (identification mark 8-9). Whereas Ntawiragira Théogène stated before the judicial police that Gatabazi Félicien was not in a good relationship with his wife because he broke her arm, but she knew about the document made by family relatives for the burial of the deceased, however, she did not know why she was buried without conducting an autopsy and why Gatabazi Félicien first went to buy beverages while he lost his wife. (identification mark 41-42).

[20] The court finds that, as indicated in paragraphs 11 and 12 of appealed judgment, Gatabazi Félicien was convicted based on the fact that he ordered Mukakabera Donata to leave the bar earlier, and asked Bavugirije Vedaste and Riberakurora Théodore to monitor that his wife does not have sex with Kanyarukiga Jean-Pierre, which wife was found dead next morning, this led the court to decide that he was the murderer because he had jealous against her, thus was the one to benefit from her death, whereas all witnesses questioned including those who were at night watch during the night of death of Mukakabera Donata even Kanyarukiga Jean-Pierre who left together with the deceased and had a plan to look for her grand child who gone missing, none states that he/she saw Gatabazi Félicien going after Mukakabera Donata and Kanyarukiga Jean-Pierre or states that after they left, he/she saw her passing through the way they passed through in their way back home, this indicates that on this ground, Gatabazi Félicien was convicted based only on suspicions, that he was the one to benefit from the death but there is no proof that he is the one who murdered her

[21] The Court finds also that, in absence of further incriminating evidence for Gatabazi Félicien regarding the death of Mukakabera Donata, his behavior after the death of the deceased that he rejected the informations regarding the person who called her for the last time or that he stated that he had no means to conduct an autopsy before the burial, this cannot be considered as the evidence to convict Gatabazi Félicien the

offence he is prosecuted for, because that behavior, though it is unworthy, it does not indicate that he took part in the death of the deceased. This precedent is the same as the findings of the Law scholar named Snyman who states that causing death means to cause it at the time and place where the deceased died.¹

The Court finds also that, the witnesses questioned [22] affirmed that the dead body was withdrawn from the water by the police, their testimonies are emphasized by a document titled "P.V. de descente" made by a judicial police officer named Nzaramba Remy and approved by the chief of the village of kazizi named Ahishakiye Célestin and other citizens namely Mbarubukeye Théogène na Nyabyenda Boniface (identification mark 58), also the family members of the deceased which includes the brothers of the deceased named Gahima and Munyandamutsa agreed with Gatabazi Félicien's family that Mukakabera Donata should be buried, they even made a document which they submitted to Sector officers, she was buried in presence of citizens and local authorities namely Kanyarukiga Jean-Pierre who is in charge of security in the village of kazizi, this means that if there was a suspicion that Makakabera Donata was killed, all those official organs, her brothers and other citizens who were present would not agree to burry Mukakabera Donata without an autopsy to know the cause of her death, thus, it finds without merit, the argument of the prosecution that Gatabazi Félicien buried in hurry the deceased and in secret with the purpose of destroying the incriminating evidence.

 1 « ... in cases of murder or culpable homicide, it must be remembered that « to cause the death » actually means to cause the death at the time when, and the place where, Y died. » CR Snyman, Criminal Law, Durban, Lexis-Nexis, 2002, P. 75.

[23] The Court finds that based on the motivations and the Law recalled above, there was no incriminating evidence produced before the Court, to convict Gatabazi Félicien for the offence of murdering Mukakabera Donata, thus, the errors committed by the High Court, chamber of Rusizi based at Karongi have to be corrected as it convicted Gatabazi Félicien for the offence basing only on the fact that he could commit it, thus he has to be acquitted. This is the same reasoning as for Law scholars that, the Court could not convict the accused, basing only on probability for committing it, rather he/she has to benefit from that doubt and be acquitted, this also emphasizes the fact that Gatabazi Félicien has to be acquitted for the offence is prosecuted for, murdering M Mukakabera Donata.

III. DECISION OF THE COURT

- [24] Decides that the appeal of Gatabazi Félicien has merit
- [25] Decides that Gatabazi Félicien is acquitted from the offence of murdering Mukakabera Donata for which he was prosecuted;
- [26] Decides that the ruling of the case RP0015/11/HC/RSZK rendered by the High Court, chamber of Rusizi working from Karongi is reversed on all grounds;

² "Le juge ne saurait se contenter d'un lien probable ou possible. Il s'abstient de déduire la causalité de la simple succession des faits, et le moindre doute devra béneficier au prévenu. Le lien de causalité manque si la possibilité d'autres causes n'est pas exclue. » Nyabirungu mwene Songa, Traité de droit pénal Congolais, Kinshasa, Editions Universitaires, 2007, P. 321.

[27] Orders that Court fees are to be borne by the public treasury.