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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 4 - 2021
Ukwakira, 2021



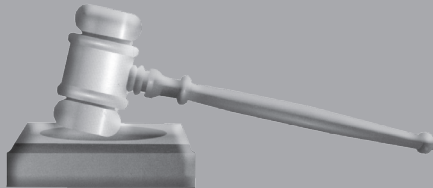
RWANDA LAW REPORTS

Law Reports V. 4 - 2021
October, 2021



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ABAGIZE KOMITE Y'UBWANDITSI

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IRIBURIRO

Basomyi bacu,

Tunejewe no kubagezaho icyegeranyo cy'Ibyemezo by'Inkiko, Volime 4 [2021]. Nk'uko mubizi, tubahitiramo imanza zikubiyemo bimwe mu bisubizo by'ibibazo muhura nabyo kenshi, haba mu mirimo yanyu ndetse no mu buzima bwa buri muni.

Muri iyi numero murasangamo imanza esheshatu (6) zikurikira: imanza ebyiri (2) zerekeranye n'ibirego bisaba kwemeza ko Itegeko rinyuranye n'Itegeko Nshinga, urubanza rumwe (1) rw'imbonezamubano, urubanza rumwe (1) rw'ubucuruzi n'izindi ebyiri (2) 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.

INYITO

Imanza ziri muri iyi volime zikoreshwa muri ubu buryo:

[2021] 4 RLR

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IBIREGO BYIHARIYE

**IBIREGO BISABA KWEMEZA KO
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N'ITEGEKO NSHINGA**

Re ASIIMWE

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00004/2020/SC (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire,
Hitiyaremye na Rukundakuvuga, J.) 26 Werurwe 2021]

Itegeko Nshinga – Ububasha bw'inkiko – Ubujurire – Ubujurire bwa kabiri – Ubutabera buboneye – Uburenganzira bwo kujurira ntayegayezwa ni ubujurire bwa mbere kandi nabwo bushobora gushyirwaho imbibe (limitations) hagamijwe intego ifite ireme – Uburenganzira bwo kujurira bushobora kugabanywa ku bujurire bwa kabiri, ariko bigakorwa hagaragazwa intego yemewe n'amategeko n'isano yumvikana ifitanye n'uburyo bwakoreshejwe.

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Incamake y'ikibazo: Asiiimwe yatanze ikirego mu Rukiko rw'Ikirenga asaba kwemeza ko ingingo ya 52, igika cya 3 n'iya 46, igika cya 2 z'Itegeko n°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko zinyuranye n'ingingo ya 29 y'Itegeko Nshinga rya Repubulika y'u Rwanda. Asobanura ko izo ngingo zibangamiye ubutabera buboneye buteganywa n'Itegeko Nshinga kuko mu gihe urukiko rusuzuma ubujurire bwa kabiri rugarukira

gusa mu kureba ko umuburanyi yatsinzwe ku mpamvu zimwe mu nkiko ebyiri zabanje ndetse no kuba yaremeyemo ibyo aregwa atemerewe gutanga ubujurire bwa kabiri.

Uhagarariye Leta y'u Rwanda avuga ko izo ngingo zavuzwe haruguru zitanyuranye n'ingingo ya 29 y'Itegeko Nshinga kuko amategeko yateganyije izindi nzira z'ubujurire umuburanyi ashobora kwiyambaza mu gihe yaba asanga yararenganye.

Urukiko rwakiriye ikirego cy'Urega gihabwa nimeru maze ku munsu w'iburanisha hasuzumwa ikibazo kijyanye no kumenya niba kutakira ubujurire bwa kabiri hashingiwe ku kuba uwajuriye yaratsinzwe ku mpamvu zimwe mu nkiko zibanza bibangamiye uburenganzira ku butabera buboneye hamwe n'ikibazo cyo kumenya niba kutakira ubwo bujurire ku manza z'ababuranye bemera ibyo baregwa binyuranyije n'ihame ryo kureshya imbere y'amategeko riteganyijwe n'ingingo ya 15 y'Itegeko Nshinga, bityo bikaba binanyuranyije n'uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga.

Ku kibazo cy'ingingo ya 52, igika cya gatatu, y'Itegeko n°30/2018 ryavuzwe haruguru iteganya kutakira ubujurire bwa kabiri hashingiwe ku kuba uwajuriye yaratsinzwe ku mpamvu zimwe mu nkiko zabanje, Urega avuga ko ituma uwarenganyijwe n'inkiko zo hasi iyo yiyambaje Urukiko rw'Ubujujire kugira ngo rukosore inenge zose zakozwe n'izo nkiko, rwiambura ububasha ruvuga ko yatsinzwe ku mpamvu zimwe bigatuma rudasuzuma urubanza mu mizi kugira ngo rumenye niba harabaye kwica amategeko cyangwa kwirengagiza ibimenyetso, bikaba binyuranyije n'itegeko y'inzira y'ubujurire, bityo uwajuriye akaba yambuwe uburenganzira ku butabera buboneye.

Akomeza avuga ko iyo itegeko riteganya ko Urukiko rw'Ubujujire rutakira ubujurire bwa kabiri mu gihe uwajuriye

yatsinzwe mu nkiko zibanza ku mpamvu zimwe, ariko rubanje gusuzuma niba hatarabaye kwica amategeko no kwirengagiza ibimenyetso, uburenganzira bw'umuburanyi ku butabera buboneye bwari kuba bwubahirijwe. Asoza kuri iyi ngingo avuga ko kuba hari imanza zisubirwamo ku mpamvu z'akarengane, bisobanuye ko inkiko zibanziriza Urukiko Rukuru, n'Urukiko rw'Ubujurire zishobora gukora amakosa mu icibwa ry'imanza. Bityo, mu gihe cyose iyo ngingo ya 52, igika cya 3 y'Itegeko n° 30/2018 ryavuzwe haruguru yakomeza gukoreshwa mu buryo Urukiko rw'Ubujurire ruyikoresha, umuburanyi wavukijwe uburenganzira bwo kuburana mu mizi kandi abizi neza ko yarenganyijwe ku rwego rwa mbere n'urwa kabiri, ashobora kubifata nko kwimakaza akarengane na ruswa mu butabera.

Uhagarariye Leta y'u Rwanda avuga ko amategeko u Rwanda rugenderaho yemera ihame ry'ubujurire bumwe, ariko hanateganyijwe irengayobora ku manza zimwe zishobora kujuririrwa kabiri habanje gusuzumwa niba inkiko ebyiri ziri ku nzego zitandukanye zarafashe umwanzuro umwe zishingiye ku mpamvu zimwe cyane cyane ko inkiko zizeweho gutanga ubutabera buboneye.

Avuga kandi ko ku ngingo irebana n'ubutabera buboneye, Umushingamategeko yageneye uburenganzira ku buryo bungana abafitanye ikibazo. Ku ruhande rumwe hateganywa uburenganzira bwo kujurira k'uwatsinzwe n'urubanza, ku rundi ruhande uburenganzira bwo guhabwa ubutabera k'uwatsinze urubanza, bikaba aribyo bihura n'ibiteganywa n'ingingo ya 15 y'Itegeko Nshinga iteganya ko abantu bose bareshya imbere y'amategeko, itegeko ribarengera ku buryo bumwe. Asoza avuga ko igika cya 2 cy'ingingo ya 46 n' igika cya 3 cy'ingingo ya 52 z'Itegeko n° 30/2018 ryavuzwe haruguru bitanyuranye n'ingingo ya 29 y'Itegeko Nshinga.

Ku kibazo kijyanye no kutakira ubujurire bwa kabiri ku manza z'ababuranye bemera ibyo baregwa, Urega avuga ko ibiteganywa n'igika cya 2 cy'ingingo ya 46 n' igika cya 3 cy'ingingo ya 52 z'Itegeko n°30/2018 ryavuzwe haruguru bizitira uwajuriye waburanye yemera icyaha mu nkiko zabanje, mu gihe uregwa waburanye ahakana icyaha we ubujurire bwe bwemerwa harebwe gusa niba yarahanishijwe igihano cy'igifungo cy'imyaka 15, agasanga iyo ngingo inyuranyije n'ihame ryo kureshya imbere y'amategeko rivugwa mu ngingo ya 15 y'Itegeko Nshinga. Agaragaza ko mu manza nshinjabyaha, igikwiye kumvikana neza, ari uko n'ubwo uwakoze icyaha aba yemeye icyaha mu nkiko zabanje, bidakwiye kumwambura uburenganzira bwo kujuririra Urukiko rw'Ubugurire mu gihe asanga Inkiko zabanje zitaramuhaye igihano gikwiye.

Asoza avuga ko kuba hari izindi nzira z'ubujurire zidasanzwe zateganyijwe harimo no gusubirishamo urubanza ku mpamvu z'akarengane, bidakemura ikibazo kuko n'ubundi iyo uwatsinzwe asubirishijemo urubanza ku mpamvu z'akarengane, yiyambaza Urukiko rutakiriye ubujurire, bikaba nta kizere cyo kurenganurwa aba afite.

Uhagarariye Leta y'u Rwanda, avuga ko ingingo ya 52, igika cya 3 n'ingingo ya 46, igika cya 2 z'Itegeko n°30/2018 rigena ububasha bw'inkiko zitanyuranyije n'ingingo ya 29 y'Itegeko Nshinga kuko n'ubwo ubujurire bwa kabiri butakirwa kubera ko uwajuriye yaburanye yemera mu nkiko zabanje, ariko amategeko ateganya uburyo aramutse yararenganyijwe yarenganurwa.

Incamake y'icyemezo: 1. Ku mpamvu y'imigendekere myiza y'itangwa ry'ubutabera, umushingamategeko yateganyije ko kugira ngo ubujurire bwa kabiri bwakirwe, uwajuriye agomba kuba ataratsinzwe ku mpamvu zimwe, ibyo rero ntibimwambura

uburenganzira ku butabera buboneye kuko aba yarahawe uburenganzira bwo kujuririra urubanza bwa mbere, kandi bukaba aribwo burenganzira ntayegayezwa adashobora kuvutswa, n'ubwo nabwo bushobora gushyirwaho imbibi (*limitations*) hagamijwe intego ifite ireme;

2. Kuba ikirego cy'umuburanyi kitakiriwe kuko yatsinzwe ku mpamvu zimwe ntibyatumye arengana kuko umushingamategeko yateganyije inzira yo gushubirishamo urubanza ku mpamvu z'akarengane apfa gukurukiza ibihe biteganywa n'amategeko, bityo rero ingingo ya 46, igika cya 2 n'ingingo ya 52, igika cya 3 z'Itegeko n° 30/2018 ryo kuwa 02/06/2018 rigena ububasha bw'inkiko ntizinyuranyije n'ingingo ya 29 y'Itegeko Nshinga, icyakora imyandikire y'ingingo ya 52 y'iryo Tegeko yakosorwa, igika cya 3 ntikijyane n'uduce twose tw'igika cya 2 cy'ingingo ya 52, ahubwo kikajyana gusa n'agace ka 8 n'aka 9 tw'igika cya 2; ibyo ninako byagenda ku bireba ingingo ya 46, igika cya 2 kikajyana gusa n'agace ka 6 k'igika cya 1

3. Kuba uwaburanye ahakana icyaha aregwa ashobora kwemererwa ubujurire bwa kabiri hashingiwe ku gihano yahawe mu gihe nyamara uwaburanye yemera icyaha aregwa ubujurire bwe bwa kabiri butakirwa kandi aba yarafashije ubutabera, ni ugusumbanya ababuranyi no kutabafata kimwe ndetse bikaba binyuranyije n'ihame ryo kureshya imbere y'amategeko riteganyijwe mu ngingo ya 15 y'Itegeko Nshinga; bityo rero igice cy'igika cya 3 cy'ingingo ya 52 n'igice cy'igika cya 2 cy'ingingo ya 46 z'Itegeko n°30/2018 rigena ububasha bw'inkiko birebana no kutakira ubujurire bwa kabiri kubera ko uwajuriye yemeye ibyo aregwa binyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda, bikaba binanyuranyije n'ingingo ya 29 y'Itegeko Nshinga.

Ikirego kigamije gukuraho ingingo zinyuranyije n'Itegeko Nshinga gifite ishingiro kuri bimwe. Igika cya 2 cy'ingingo ya 46 n'igice cy'igika cya 3 cy'ingingo ya 52 z'Itegeko n°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'Inkiko birebana no kutakira ubujurire bwa kabiri “*ku manza z'ababuranye bemera ibyo baregwa*” binyuranyije n'ingingo ya 15 y'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 n'ya 29 Amasezerano Mpuzamahanga yerekeye uburenganzira mu by'imbenezamubano no mu bya politiki, ingingo ya 14, igika cya 1 n'icya 5; Itegeko N°30/2018 rigena ububasha bw'inkiko, ingingo ya 46, igika 2 n'ya 52, igika cya 3;

Imanza zifashishijwe:

RS/INCONST/SPEC 00003/2019/SC, Re Me Kabasinga rwaciwe n'Urukiko rw'Ikirenga kuwa 4/12/2019.
RS/REV/INJUST/CIV 0023/16/CS, Rutabayiro n'abandi v Mukakabano, rwaciwe n'urukiko rw'Ikirenga ku wa 27/09/2019;
Kotak Mahindra Bank Pvt. Limited Vs Ambuj A. Kasliwal & Ors, Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 538 of 2021, <https://indiankanoon.org/doc/56200562/>.

Inyandiko z'Abahanga :

Serge Guinchard, Droit processuel : Droit commun et droit comparé du procès équitable, 4ème Ed. Dalloz 2007, Page 420

The Right to Appeal as a Fundamental Right under International Acts and Jurisprudence, with Special Emphasis on Criminal Procedure. Acta Universitatis Danubius. Juridica, Vol 13, No 1 (2017), <http://journals.univ-danubius.ro/index.php/juridica/article/view/3868/4027>

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Tarun Jain, Limitations on Second Appeal: The Law Revisited, 18 November 2010, <http://legalperspectives.blogspot.com/2010/11/limitations-on-second-appeal-law.html>; Sabodt Asthana, Second Appeal under Civil Procedure Code: Nature, Scope, Forum and Procedure, 4 January 2020, <https://blog.ipleaders.in/second-appeal>

Kotak Mahindra Bank Pvt. Limited Vs Ambuj A. Kasliwal & Ors, Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 538 of 2021

Urubanza

I. IMITERERE Y'IKIBAZO

[1] Asiimwe Frank yaregeye Urukiko rw'Ikirenga arusaba kwemeza ko ingingo ya 52, igika cya 3 n'iya 46, igika cya 2 z'Itegeko n°30/2018 ryo ku wa 02/06/2018 rigena ububasha

bw'inkiko zinyuranye n'ingingo ya 29 y'Itegeko Nshinga rya Repubulika y'u Rwanda, ikirego cye cyandikwa kuri N° RS/INCONST/SPEC 00004/2020/SC.

[2] Asobanura ko kuba mu gusuzuma ubujurire bwa kabiri, Urukiko rugarukira gusa ku kureba ko umuburanyi yatsinzwe mu Nkiko ebyiri zibanza ku mpamvu zimwe rudasuzumye niba izo mpamvu zikurikije amategeko, bibangamiye uburenganzira ku butabera buboneye. Avuga kandi ko kuba uwaburanye yemera ibyo aregwa mu nkiko zibanza atemererwa ubujurire bwa kabiri nabyo bibangamiye ubutabera buboneye, agasobanura ko kwemera ibyo umuntu aregwa bitandukanye no kwemera imicire y'urubanza.

[3] Uharariye Leta y'u Rwanda avuga ko ingingo ya 52, igika cya 3 n'ya 46, igika cya 2 z'Itegeko n°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko zitanyuranye n'ingingo ya 29 y'Itegeko Nshinga iteganya ko: “*Buri muntu wese afite uburenganzira ku butabera buboneye*” kuko amategeko yateganyije izindi nzira z'ubujurire umuburanyi ashobora kwiyambaza mu gihe yaba asanga yararenganye.

[4] Iburanisha ry'uru rubanza ryashyizwe ku wa 11/01/2021, kuri uwo muni ntiryaba ryimurirwa ku wa 04/03/2021, uwo muni iburanisha ribera mu ruhame, ababuranyi bose bitabye, Asimwe Frank yunganiwe na Me Rwigema Vincent, Me Kabasinga Florida, Me GAKUNZI Musore Valéry na Me Munyentwali Charles, naho Leta y'u Rwanda ihagarariwe na Me Gahongayire Myriam.

[5] Rushingiye ku myanzuro y'urega n'imiburanire ye n'abamwunganiye, Urukiko rusanga ibibazo bikwiye gusuzumwa ari ibi bikurikira:

Kumenya niba kutakira ubujurire bwa kabiri hashingiwe ku kuba uwajuriye yaratsinzwe ku mpamvu zimwe mu nkiko zibanza bibangamiye uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga;

Kumenya niba kutakira ubujurire bwa kabiri ku manza z'ababuranye bemera ibyo baregwa binyuranyije n'ihame ryo kureshya imbere y'amategeko riteganyijwe n'ingingo ya 15 y'Itegeko Nshinga, bityo bikaba binanyuranyije n'uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga.

II. ISESENGURA RY'IBIBAZO BIGIZE URUBANZA

A. Kumenya niba kutakira ubujurire bwa kabiri hashingiwe ku kuba uwajuriye yaratsinzwe ku mpamvu zimwe mu nkiko zibanza bibangamiye uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga

[6] Mu myanzuro Asiiimwe Frank n'abunganizi be bashyikirije Urukiko no mu miburanire yabo, bavuga ko ingingo ya 52, igika cya 3 y'Itegeko n°30/2018 ryavuzwe haruguru, ituma uwarenganyijwe n'inkiko zo hasi iyo yiyambaje Urukiko rw'Ubujurire kugira ngo rukosore inenge zose zakozwe n'izo nkiko, rwiya mbura ububasha ruvuga ko yatsinzwe ku mpamvu zimwe. Basobanura ko uko kudasuzuma urubanza mu mizi kugira ngo rumenye niba harabaye kwica amategeko cyangwa kwirengagiza ibimenyetso, binyuranyije n'intego y'inzira y'ubujurire iteganyijwe mu ngingo za 150 na 157 z'Itegeko n° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize

y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu.

[7] Bashyigikira icyo gitekerezo bavuga ko kutakira ubujurire kuko umuburanyi yatsinzwe ku mpamvu zimwe, byambura uwajuriye uburenganzira ku butabera buboneye. Ihame ry'ubutabera buboneye barisobanura mu buryo bubiri bashingiye ku rubanza n° RS/INCONST/SPEC00003/2019/SC rwaciye n'Urukiko rw'Ikirenga: ubutabera buboneye bashingiye ku migendekere, ni ukuvuga uruhererekane rw'ibigomba kubahirizwa mu migendekere y'urubanza hashingiye ku mahame ateganywa n'amategeko; n'ubutabera buboneye bashingiye ku biteganywa n'itegeko. Ubu buryo bukaba bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba bidashyira mu gaciro zibangamira uburenganzira bw'abaturage.

[8] Basobanura ihame ry'uburenganzira ku butabera buboneye, banahereye ku rugero rw'urubanza East African Law Society v Attorney General of the Republic of Burundi & The Secretary General of the East African Community,¹ bavuga ko urwo Rukiko rwashingiye ku kuba uwatanze ikirego yaravukijwe uburenganzira ku butabera buboneye, bityo bikaba binyuranyije n'ihame ryo kugendera ku mategeko riteganyijwe mu ngingo ya 6(d) na 7(2) y'Amasezerano ashahiraho Umuryango w'Ibihugu by'Afurika y'Iburasirazuba.

[9] Bavuga kandi ko ubwo burenganzira bunashimangirwa n'ingingo ya 14 y'Amasezerano Mpuzamahanga yerekeye uburenganzira mu by'imbonezamubano no mu bya politiki (International Covenant on Civil and Political Rights) iteganya ihame ryo guca urubanza rutabera. Basobanura ko ibiteganyijwe

¹ EACJ, Reference No. 1 of 2014, delivered on 15 May 2015.

n'ingingo ya 46, igika cya 2 n'ingingo ya 52, igika cya 3 z'Itegeko n° 30/2018 ryavuzwe haruguru binyuranyije n'iryo hame kuko bishyiraho inzitizi zibuza umuburanyi warenganyijwe n'inkiko ebyiri, kujuririra urundi rukiko kugira ngo arenganurwe.

[10] Basobanura kandi ko impamvu zimwe zitagomba kwitiranywa n'impamvu zimwe ziboneye, zifite ishingiro kandi zikurikije amategeko, izo mpamvu zikaba zidashobora kugaragazwa Urukiko rutinjiye mu mizi y'urubanza, cyane ko mu nkiko zibanza akenshi umuburanyi ataba yunganiwe, bikumvikana ko mu Rukiko rw'Ubujurire aba abonye amahirwe yo gucukumbura ibimenyetso. Bavuga ko iyo Itegeko riteganywa ko Urukiko rw'Ubujurire rutakira ubujurire bwa kabiri mu gihe uwajuriye yatsinzwe mu nkiko zibanza ku mpamvu zimwe, ariko rubanje gusuzuma niba hatarabaye kwica amategeko no kwirengagiza ibimenyetso, uburenganzira bw'umuburanyi ku butabera buboneye bwari kuba bwubahirijwe.

[11] Bagaragaza ko mu gihe Urukiko rw'Ubujurire rutakiriye ubujurire kuko uwajuriye yatsinzwe ku mpamvu zimwe, n'iyi yasubirishamo urwo rubanza ku mpamvu z'akarengane mu Rukiko rw'Ubujurire ku manza zaciwe n'Urukiko Rukuru cyangwa mu Rukiko rw'Ikirenga, atarenganurwa kuko izo nkiko mu gusuzuma akarengane hasuzumwa gusa urubanza rwaciwe bwa nyuma harebwa niba mu kugera ku mwanzuro inkiko zabanje zarashingiye ku mpamvu zimwe nk'uko byemejwe mu rubanza RS/INJUST/RP 00002/2019/SC Ubushinjacyaha buburana na Habimana Innocent.

[12] Basoza kuri iyo ngingo bavuga ko kuba hari imanza zisubirwamo ku mpamvu z'akarengane, bisobanuye ko inkiko zibanziriza Urukiko Rukuru, n'Urukiko rw'Ubujurire zishobora gukora amakosa mu icibwa ry'imanza. Basobanura ko mu gihe

cyose iyi ngingo ya 52, igika cya 3 y'Itegeko n° 30/2018 ryavuzwe haruguru yakomeza gukoreshwa mu buryo Urukiko rw'Ubujurire ruyikoresha, umuburanyi wavukijwe uburenganzira bwo kuburana mu mizi kandi abizi neza ko yarenganyijwe ku rwego rwa mbere n'urwa kabiri, ashobora kubifata nko kwimakaza akarengane na ruswa mu butabera.

[13] Me Gahongayire Myriam Uhagarariye Leta y'u Rwanda avuga ko amategeko u Rwanda rugenderaho yemera ihame ry'ubujurire bumwe, ariko hanateganyijwe irengayobora ku manza zimwe zishobora kujuririrwa kabiri (ingingo ya 46 n'ya 52 z'Itegeko n° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko) habanje gusuzumwa niba inkiko ebyiri ziri ku nzego zitandukanye zarafashe umwanzuro umwe zishingiye ku mpamvu zimwe cyane cyane ko inkiko zizeweho gutanga ubutabera buboneye.

[14] Avuga kandi ko ingingo ya 55 y'Itegeko n° 30/2018 ryavuzwe haruguru iteganya impamvu zishobora gutuma urubanza rwaciwe ku rwego rwa nyuma rusubirwamo ku mpamvu z'akarengane, ko umuburanyi wakumva yarenganye ariko akazitirwa n'ingingo ya 46 n'ya 52 yakwitabaza iyo nzira. Yongeraho ko, nubwo byagaragaye ko imanza 3% mu zasubirishijwemo arizo zigaragaramo akarengane, iyo ngingo yashyizweho mu rwego rwo gufasha umuturage no kumurinda kuba yavutswa uburenganzira.

[15] Avuga kandi ko ku ngingo irebana n'ubutabera buboneye, Umushingamategeko yageneye uburenganzira ku buryo bungana abafitanye ikibazo (urega n'uregwa). Ku ruhande rumwe hateganywa uburenganzira bwo kujurira k'uwatsinzwe n'urubanza, ku rundi ruhande uburenganzira bwo guhabwa ubutabera k'uwatsinze urubanza, kandi ko ibyo bihura

n'ibiteganywa n'ingingo ya 15 y'Itegeko Nshinga iteganya ko “*abantu bose bareshya imbere y'amategeko, itegeko ribarengera ku buryo bumwe.*” Asoza avuga ko igika cya 2 cy'ingingo ya 46 n' igika cya 3 cy'ingingo ya 52 z'Itegeko n° 30/2018 ryavuzwe haruguru bitanyuranye n'ingingo ya 29 y'Itegeko Nshinga.

UKO URUKIKO RUBIBONA

[16] Urukiko rusanga mbere y'uko rusuzuma niba igika cya 2 cy'ingingo ya 46 n'igika cya 3 cy'ingingo ya 52 z'Itegeko n° 30/2018 ryavuzwe haruguru binyuranyije n'ingingo ya 29 y'Itegeko Nshinga ari ngombwa kubanza gusobanura ihame rirebana n'uburenganzira ku butabera buboneye, n'uburenganzira bwo kujurira.

[17] Ingingo ya 29 y'Itegeko Nshinga iteganya ko “*huri muntu wese afite uburenganzira ku butabera buboneye*”. Iyo ngingo ikaba igaragaza bimwe mu bigize uburenganzira ku butabera buboneye. Mu rubanza n° RS/INCONST/SPEC 00003/2019/SC,² Urukiko rw'Ikirenga rwasobanuye uburenganzira ku butabera buboneye mu buryo bubiri nk'uko byagaragajwe mu gika cya 7 cy'uru rubanza.

[18] Urukiko rusanga ingingo ya 14, igika cya 1 n'icya 5, y'Amasezerano Mpuzamahanga yerekeye uburenganzira mu by'imbonezamubano no mu bya politiki (*International Covenant on Civil and Political Rights*) igaragaza uburenganzira bwo kuburanira imbere y'urukiko rubifitiye ububasha

² RS/INCONST/SPEC 00003/2019/SC haburana Me Kabasinga Florida rwaciye n'Urukiko rw'Ikirenga kuwa 4/12/2019, ku rupapuro rwa 4 n'urwa 5.

n'uburenganzira bwo kujurira nka bimwe mu bigize uburenganzira ku butabera buboneye. Uburenganzira bwo kujurira, abahanga mu mategeko babusobanura nk'uburenganzira buri muburanyi utishimiye icyemezo yafatiwe n'Urukiko, afite bwo gusaba mu Rukiko rwisumbuye guhindura cyangwa gukosora icyo cyemezo.³

[19] Undi muhanga witwa Vilard BYTYQI asobanura ko ihame ry'ubujurire rishingiye ku burenganzira bw'uregwa n'ubw'Ubushinjacyaha bwo guhabwa amahirwe yo kujuririra urubanza rwaciwe ku rwego rwa mbere kugira ngo hakosorwe amakosa ashobora kuba yarakozwe n'Urukiko rwaruciye. Uburenganzira bwo gutanga ubujurire buhamiriza ababuranyi ko ihame ryo kuburana ku nzego ebyiri rizubahirizwa.⁴

[20] Ikindi ni uko mu bisobanuro by' igika cya 5 cy'ingingo ya 14 y'Amasezerano mpuzamahanga yerekeye uburenganzira

³ Serge Guinchard, *Droit processuel: Droit commun et droit compare du procès equitable*, 4ème Ed. Dalloz 2007, Page 420, Le droit d'accès à un tribunal est l'une des deux expressions du droit à un recours. Le droit au recours est le droit de toute personne de pouvoir contester une mesure prise à son encontre, devant une instance investie d'un pouvoir de réformation de cette mesure et/ou de réparation de ses conséquences dommageables.

⁴ The Right to Appeal as a Fundamental Right under International Acts and Jurisprudence, with Special Emphasis on Criminal Procedure. *Acta Universitatis Danubius. Juridica*, Vol 13, No 1 (2017), <http://journals.univ-danubius.ro/index.php/juridica/article/view/3868/4027> - The notion of appeal refers to the right of the accused and the prosecutor (the prosecuting authority) to have the chance to appeal the judgement of the court of first instance, under the pretense of any eventual error undertaken by this level of trial. Therefore, the appeal plays the role of the instrument that fixes the eventual errors, which could have been done by the court of first instance. The right to submit the appeal guarantees the procedural parties that the principal of two instances will be respected.

mu by'imbonezamubano no mu bya politiki (*International Covenant on Civil and Political Rights*) havugwa ko umuntu wahamijwe icyaha cyaba icy'ubugome, igikomeye cyangwa cyoroheje, yemerewe gusaba Urukiko rwisumbuye k'urwafashe icyemezo kongera gusuzuma ibimenyetso n'amategeko byashingiweho. Hasobanurwa ariko ko ingingo yavuzwe haruguru idategeka ibihugu gushyiraho inzira nyinshi z'ubujurire, ko ariko mu gihe mu mategeko y'Igihugu hateganyijwe izindi nzira z'ubujurire, uwatsinzwe agomba kwemererwa kwiyambaza buri nzira mu buryo ayo mategeko abiteganyanya.⁵

[21] Abahanga mu mategeko nka Nuala Mole et Catharina Harby bavuga ko uburenganzira bwo kwiyambaza urukiko cyangwa kumvwa n'umucamanza atari ntakuka. Bagaragaza ko Urukiko rw'Umuryango w'Ubumwe bw'Ibihugu by'i Burayi mu rubanza *Golder c. Royaume-Uni*, rwasobanuye ko uburyo busanzwe bukoresha, bufatwa nk'igabanywa ryemewe ry'ubwo burenganzira ari ukuba inzira runaka y'ubujurire

⁵ Le paragraphe 5 de l'article 14 dispose que toute personne déclarée coupable d'une infraction a le droit de faire examiner par une juridiction supérieure la déclaration de culpabilité et la condamnation conformément à la loi, c'est à dire les modalités selon lesquelles le réexamen par une juridiction supérieure doit être effectué, ainsi que la détermination de la juridiction chargée de procéder au réexamen conformément au Pacte. Le Paragraphe 5 de l'article 14 n'exige pas aux Etats parties qu'ils mettent en place plusieurs instances d'appel. Toutefois si le droit interne prévoit d'autres instances d'appel, le condamné doit pouvoir utiliser effectivement chacune d'entre elles. (Nations Unies, Pacte international relatif aux droits civils et politiques, Remarques générales No. 32, 23 aout 2007, <http://hrlibrary.umn.edu/gencomm/french/f-gencom32.pdf>)

ishobora kwemerwa habanje gusuzumwa iyakirwa ryayo, ibi bigashingira ku mategeko ashwirwaho n'ibihugu.⁶

[22] Urwo Rukiko rwemeje na none ko ubwo burenganzira bushobora kugabanywa hashingiwe ku ngingo ya 6 (§ 1) y'Amasezerano y'Iburayi y'Uburenganzira bwa muntu kubera impamvu ebyiri zikurikira:

- a. Hagamijwe intego ifite ireme;
- b. Kugaragaza ko hari isano yumvikana hagati y'uburyo bwakoreshejwe n'intego igamijwe.⁷

[23] Abandi bahanga mu mategeko bakomeza bavuga ko uburenganzira ku bujurire bwa mbere bufatwa nk'uburenganzira bw'ibanze, amategeko y'ibihugu akagenda uko bukoresheha. Naho ubujurire bwa kabiri kimwe n'izindi nzira z'ubujurire biteganyijwe mu mategeko y'Igihugu bikorwa hashingiwe kubyo umuryango ukeneye, kandi Umushingamategeko akaba ashobora

⁶ Nuala Mole et Catharina Harby, *Le droit à un procès équitable*, Un guide sur la mise en œuvre de l'article 6 de la Convention européenne des Droits de l'Homme, Conseil de l'Europe 2007, p. 43. Toutefois, le droit d'accès à un tribunal n'est pas absolu. La Cour a ajouté dans l'arrêt *Golder c. Royaume-Uni* que ce droit appelle, de par sa nature même, une réglementation émanant de l'Etat (qui peut varier dans le temps et dans l'espace en fonction des besoins et des ressources de la collectivité et des particuliers), laquelle ne doit en aucun cas porter atteinte à la substance dudit droit ni se heurter à d'autres droits consacrés par la Convention.

Les juges de Strasbourg ont en outre précisé dans leur jurisprudence qu'une limitation du droit d'accès ne serait compatible avec l'article 6 qu'à la double condition de :

- a. poursuivre un but légitime ;
- b. présenter un rapport raisonnable de proportionnalité entre les moyens employés et le but visé.

⁷ Ibidem.

nabwo guteganya ibigomba kubahirizwa kugira ngo ubujurire bwakirwe.⁸

[24] Guteganya ibigomba kubahirizwa kugira ngo ubujurire bwakirwe, binagaragara mu rubanza rwaciwe n’Urukiko rw’Ikirenga rw’Ubuganda haburana *Kotak A. Mahindra Bank Pvt. Limited v Ambuj A. Kasliwal & Ors*⁹, aho Urukiko rwavuze ko bisanzwe byemewe ko iyo uburenganzira bwo kujurira buteganyijwe n’Itegeko, mu gihe itanga ubwo burenganzira, Inteko Ishinga Amategeko ishobora guteganya ibigomba kubahirizwa kugirango ubwo burenganzira bukoreshwe, igihe cyose ibyo bigomba kubahirizwa bitabangamira ugomba kubikora ku buryo ahubwo biba imbogamizi zidafite ishingiro zimuvutsa ubwo burenganzira.

[25] Urukiko rusanga Umushingamategeko wo mu Rwanda, nk’uko bimeze mu bindi bihugu, yateganyije uburyo umuburanyi ashobora kujuririra urubanza mu rukiko ruri hejuru y’urwaruciye, anateganya mu ngingo ya 46 n’iya 52 y’Itegeko n° 30/2018 ryavuzwe haruguru, uburyo ubujurire bwa kabiri bushobora gutangwamo. Aha niho yateganyije, mu gika cya 2

⁸ Tarun Jain, Limitations on Second Appeal: The Law Revisited, 18 November 2010, <http://legalperspectives.blogspot.com/2010/11/limitations-on-second-appeal-law.html>; Sabodt Asthana, Second Appeal under Civil Procedure Code: Nature, Scope, Forum and Procedure, 4 January 2020, <https://blog.iplleaders.in/second-appeal/>

⁹ *Kotak Mahindra Bank Pvt. Limited Vs Ambuj A. Kasliwal & Ors*, Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 538 of 2021, <https://indiankanoon.org/doc/56200562/>: “It is well settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory.”

cy'ingingo ya 46 n'igika cya 3 cy'ingingo ya 52 y'Itegeko ryavuzwe haruguru ko ubujurire bwa kabiri budashobora kwakirwa ku muburanyi watsinzwe mu nkiko zombi ku mpamvu zimwe.

[26] Urukiko rusanga kuba, ku mpamvu y'imigendekere myiza y'itangwa ry'ubutabera, umushingamategeko yarateganyije ko kugira ngo ubujurire bwa kabiri bwakirwe, uwajuriye agomba kuba ataratsinzwe ku mpamvu zimwe, bitamwambura uburenganzira ku butabera buboneye kuko aba yarahawe uburenganzira bwo kujuririra urubanza bwa mbere, kandi bukaba aribwo burenganzira ntayegayezwa adashobora kuvutswa, n'ubwo nabwo bushobora gushyirwaho imbibi (limitations) hagamijwe intego ifite ireme.

[27] Ku kibazo cyo kuba nta yindi nzira yatuma umuburanyi arenganurwa igihe yatsinzwe ku mpamvu zimwe kandi inkiko zombi zaramurenganyije, Urukiko rusanga kuba Urukiko rw'Ubujurire rwanze kwakira ikirego cye bitamubuza gusaba ko rwa rubanza rwamurenganyije rwasubirwamo ku mpamvu z'akarengane; apfa kutarenza iminsi mirongo itatu kuva amenyeshejwe icyemezo cy'Urukiko rw'Ubujurire nk'uko uru Rukiko rwabitanzeho umurongo mu manza zinyuranye.¹⁰

[28] Rushingiye kubisobanuro byatanzwe, Urukiko rusanga ingingo ya 46, igika cya 2 n'ingingo ya 52, igika cya 3 z'Itegeko n° 30/2018 ryo kuwa 02/06/2018 rigena ububasha bw'inkiko zitanyuranyije n'ingingo ya 29 y'Itegeko Nshinga.

¹⁰ Urugero ni nko mu rubanza No. RS/REV/INJUST/CIV 0023/16/CS, rwaciye ku wa 27/09/2019, mu gika cya 28.

[29] Urukiko rusanga ariko imyandikire y'ingingo ya 52 y'iryo Tegeko yakosorwa, igika cya 3 ntikijyane n' uduce twose tw'igika cya 2 cy'ingingo ya 52, ahubwo kikajyana gusa n'agace ka 8 n'aka 9 tw'igika cya 2. Ni nako byagenda kandi ku bireba ingingo ya 46, igika cya 2 kikajyana gusa n'agace ka 6 k'igika cya 1. Koko rero, umucamanza ntakwiye kwirengagiza inenge zivugwa m'uduce kuva ku ka 2 kugeza ku ka 7 tw'ingingo ya 52, n'uduce kuva ku ka 1 kugeza ku ka 5 tw'ingingo ya 46, kabone n'ubwo umuburanyi yaba yaratsinwe mu nkiko zombi ku mpamvu zimwe.

B. Kumenya niba kutakira ubujurire bwa kabiri ku manza z'ababuranye bemera ibyo baregwa binyuranyije n'ihame ryo kureshya imbere y'amategeko riteganyijwe n'ingingo ya 15 y'Itegeko Nshinga, bityo bikaba binanyuranyije n'uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga.

[30] Ku birebana n'imanza nshinjabyaha, Asiimwe Frank n'abunganizi be bavuga ko uburenganzira bwo kujurira k'uwahamwe n'icyaha bushimangirwa n'ingingo ya 14 y'amasezerano mpuzamahanga yerekeye uburenganzira mu by'imbonezamubano no mu bya politiki (*International Covenant on Civil and Political Rights*) u Rwanda rwashyizeho umukono. Bagasobanura ko ubundi ukwemera icyaha bigira inyungu k'uregwa mu buryo butandukanye nko kugabanya ingaruka zacyo k'uwigikorewe, kugabanya umwanya n'amafaranga agenda ku bikorwa by'iperereza n'iburanisha, by'umwihariko k'uwakoze icyaha bituma agabanyirizwa igihano nk'uko byanemejwe n'Urukiko rw'Ikirenga mu rubanza RPAA 0014/10/CS rwaciye ku wa 25 Ukwakira 2013, Ubushinjacyaha bwaregagamo Dusabeyezu Damascène.

[31] Bavuga ko igikwiye kumvikana neza mu manza nshinjabyaha, ari uko n'ubwo uwakoze icyaha aba yemeye icyaha mu nkiko zabanje, bidakwiye kumwambura uburenganzira bwo kujuririra Urukiko rw'Ubujurire mu gihe asanga Inkiko zabanje zitaramuhaye igihano gikwiye, ariko ko ibiteganywa n'igika cya 2 cy'ingingo ya 46 n' igika cya 3 cy'ingingo ya 52 z'Itegeko n°30/2018 ryavuzwe haruguru bititira uwajuriye waburanye yemera icyaha mu nkiko zabanje, mu gihe uregwa waburanye ahakana icyaha we ubujurire bwe bwemerwa harebwe gusa niba yarahanishijwe igihano cy'igifungo cy'imyaka 15, bagasanga iyo ngingo inyuranyije n'ihame ryo kureshya imbere y'amategeko rivugwa mu ngingo ya 15 y'Itegeko Nshinga.

[32] Bakomeza basobanura ko abahanga mu mategeko bavuga ko intego nkuru yo kujurira mu manza nshinjabyaha ari ukugira ngo hatangwe ubutabera. Bikumvikana ko inzitizi iyo ariyo yose ivutsa uwarenganyijwe uburenganzira bwo kujurira iba inyuranye n'amahame y'imitangire y'ubutabera.

[33] Batanga ingero z'imanza zaciwe n'Urukiko rw'Ubujurire aho rwanze kwakira ubujurire kuko uwajuriye yaburanye yemera icyaha mu nkiko zabanje. Izo manza ni izi zikurikira: urubanza n° RPAA 00147/2018/CA Ubushinjacyaha burega Munyurangabo Jean Paul wemeye icyaha cyo gusambanya umwana mu nzego zose, Urukiko rumuhanisha igihano cy'igifungo cya burundu y'umwihariko, ajurira mu Rukiko Rukuru rwemeza ko ubujurire bwe nta shingiro bufite maze anajuririye Urukiko rw'Ubujurire rwemeza ko ubujurire bwe butari mu bubasha bw'Urukiko kuko yatsinzwe kabiri ku mpamvu zimwe. Bagaragaza n'urubanza RPAA 00166/2018/CA haregwa Habimana Cedrick, urubanza RPAA 00168/2018/CA

haregwa Bizumuremyi Thadée, urubanza RPAA 00069/2018/CA haregwa Ngezahoguhora Olivier n’urubanza RPAA 00167/2018/CA Ubushinjacyaha buregamo Museruka Fabrice.

[34] Basobanura ko ingingo ya 107, igika cya 1 y’Itegeko n° 027/2019 rigenga imiburanishirize y’imanza nshinjabyaha iteganya ko ibimenyetso byemeza icyaha bitangwa n’Ubushinjacyaha n’uregera indishyi. Bashimangira ko gushingira ku kwemera icyaha konyine k’uregwa, Urukiko rukanga kwakira ubujurire bwe byaba bibangamiye ihame ryo kutishinja.

[35] Basoza bavuga ko kuba hari izindi nzira z’ubujurire zidasanzwe zateganyijwe harimo no gusubirishamo urubanza ku mpamvu z’akarengane, bidakemura ikibazo kuko n’ubundi iyo uwatsinzwe asubirishijemo urubanza ku mpamvu z’akarengane, yiyambaza Urukiko rutakiriye ubujurire, bikaba nta kizere cyo kurenganurwa aba afite. Banagaragaza ko icyo Umushingamategeko yari agamije mu gushyiraho ingingo ya 52, igika cya 3 n’iya 46, igika cya 2 z’Itegeko n° 30/2018 kwari ukugena ububasha hashingiwe ku ngano y’ikiburanwa cyangwa igihano cyatanzwe, akaba aribyo byagumaho.

[36] Me Gahongayire Myriam, uhagarariye Leta y’u Rwanda, avuga ko ingingoya 52, igika cya 3 n’ingingo ya 46, igika cya 2 z’Itegeko n°30/2018 rigena ububasha bw’inkiko zitanyuranije n’ingingo ya 29 y’Itegeko Nshinga kuko n’ubwo ubujurire bwa kabiri butakirwa kubera ko uwajuriye yaburanye yemera mu nkiko zabanje, ariko amategeko ateganya uburyo aramutse yararenganyijwe yarenganurwa.

UKO URUKIKO RUBIBONA

[37] Ingingo ya 52, igika cya 3 y'Itegeko n°30/2018 ryavuzwe haruguru igira iti: “*ubujurire bwa kabiri ntibushobora kwakirwa ku manza z'ababuranye bemera ibyo baregwa [....]*,” akaba ari nako biteganywa n'ingingo ya 46, igika cya 2 y'iryo Tegeko ku birebana n'iyakirwa ry'ubujurire bwa kabiri mu Rukiko Rukuru.

[38] Ku kibazo kijyanye n'uburenganzira bwo kujurira mu manza nshinjabyaha, Urukiko rusanga nk'uko rwabisobanuye haruguru, uburenganzira bwo kujurira ntayegayezwa ari ubujurire bwa mbere, n'ubwo nabwo bushobora gushyirwaho imbibe (*limitations*) hagamijwe intego ifite ireme. Ubwo burenganzira bushobora kugabanywa ku bujurire bwa kabiri, ariko bigakorwa hagaragazwa intego yemewe n'amategeko n'isano yumvikana ifitanye n'uburyo bwakoreshejwe nk'uko byemejwe n'Abacamanza bo mu Rukiko rw'Umuryango w'Ubumwe bw'Ibihugu by'I Burayi.¹¹

[39] Urukiko rusanga mu manza nshinjabyaha, ingingo ya 52, igika cya 2, agace ka 9 y'Itegeko n°30/2018 ryavuzwe haruguru yemerera uregwa wahamijwe icyaha n'Urukiko Rukuru cyangwa Urukiko Rukuru rwa Gisirikare, agahanishwa igifungo nibura cy'imyaka 15 kujurira mu Rukiko rw'Ubujurire.

[40] Urukiko rurasanga ariko igika cya 3 cy'ingingo ya 52 y'Itegeko n°30/2018¹² rimaze kuvugwa, giteganywa ko ubujurire bwa kabiri bw'ababuranye bemera ibyo baregwa budashobora kwakirwa, bikumvikana ko abaregwa bahamijwe icyaha kimwe

¹¹ Ibi byasobanuwe mu bika bya 21 na 22 by'uru rubanza

¹² Ibi binareba n'igika cya 2 cy'ingingo ya 46 y'Itegeko ryavuzwe haruguru ku bujurire bwa kabiri mu Rukiko Rukuru.

bagahabwa igihano kimwe gituma bemererwa kujuririra Urukiko rw'Ubujurire, umwe waburanye ahakana ashobora kwemererwa kujurira hashingiwe gusa ku gihano yahawe, undi ubujurire bwe ntibwakirwe kuko yaburanye yemera, kandi nyamara aba yaranafashije ubutabera. Ibi byaba ari ugusumbanya ababuranyi no kutabafata kimwe, bikaba binyuranyije n'ihame ryo kureshya imbere y'amategeko riteganyijwe mu ngingo ya 15 y'Itegeko Nshinga.

[41] Hashingiwe ku bisobanuro byatanzwe, Urukiko rusanga igice cy'igika cya 3 cy' ingingo ya 52 n'igice cy'igika cya 2 cy'ingingo ya 46 z'Itegeko n°30/2018 rigena ububasha bw'inkiko birebana no kutakira ubujurire bwa kabiri kubera ko uwajuriye yemeye ibyo aregwa binyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repbulika y'u Rwanda, bityo bikaba binanyuranyije n'ingingo ya 29 y'Itegeko Nshinga.

III. ICYEMEZO CY'URUKIKO

[42] Rwemeje ko ikirego cyatanzwe na Asiimwe Frank gifite ishingiro kuri bimwe.

[43] Rwemeje ko igice cy'igika cya 2 cy'ingingo ya 46 n'igice cy'igika cya 3 cy'ingingo ya 52 z'Itegeko ryo ku wa 02/06/2018 n°30/2018 rigena ububasha bw'Inkiko birebana no kutakira ubujurire bwa kabiri *“ku muburanyi watsinzwe mu nkiko zombi hashingiwe ku mpamvu zimwe”* bitanyuranyije n'ingingo ya 29 y'Itegeko Nshinga rya Repbulika y'u Rwanda. Urukiko rurajya inama ariko ko ingingo ya 52 y'iryo Tegeko yakosorwa ku buryo ibiteganyijwe mu gika cya 3 cyayo bireba gusa uduce twa 8 na 9 tw'igika cya kabiri, ndetse n'igika cya 2 cy'ingingo ya 46 kikareba gusa agace ka 6 k'igika cya 1 cy'iyi ngingo.

[44] Rwemeje ko igice cy'igika cya 2 cy'ingingo ya 46 n'igice cy'igika cya 3 cy'ingingo ya 52 z'Itegeko n°30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'Inkiko birebana no kutakira ubujurire bwa kabiri *“ku manza z'ababuranye bemera ibyo baregwa”* binyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda, bikaba nta gaciro bifite hashingiwe ku biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

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

Re. KABASINGA N’UNDI

[Rwanda URUKIKO RW’IKIRENGA – RS/INCONST/SPEC
00005/2020/CS - RS/INCONST/SPEC 00006/2020/CS –
(Mukamulisa, P.J., Cyanzayire, Hitiyaremye, Muhumuza na
Rukundakuvuga, J.) 12 Gashyantare 2020]

Itegeko inshinga –Itegeko rihana ibyaha – Itegeko rihana rigomba kwandikwa mu buryo busobanutse kandi butarimo urujijo – Si inshingano y’umucamanza kugena ibikorwa bigize icyaha bigomba guhanwa, ahubwo ibyo ni inshingano y’umushingamategeko – Itegeko rigomba kwandikwa ku buryo buri wese ashobora kumenya imbibi z’icyemewe n’ikibujijwe, n’ingaruka z’ibihano igihe akoze ikibujijwe, kugirango ashobore kucyirinda (predictability) – Itegeko niryo rigena icyaha (igikorwa gihanwa) n’igihano gihanishwa..

Itegeko Inshinga – Urubanza rutabera (fair trial) – Igihano ntayegayezwa – Kuba uwahamwe n’icyaha adashobora kujuririra igihano yahawe kugira ngo kigabanywe hashingiye ku mpamvu nyoroshiyacyaha binyuranyije n’ihame ry’uburenganzira ku butabera buboneye n’iry’ubwisanzure bw’umucamanza mu kugena igihano gikiwiye.

Itegeko Nshinga – Ubwisanzure n’ubwigenge bw’umucamanza – Igihano ntayegayezwa – Umucamanza afite ubwisanzure bwo kuburanisha no guca imanza mu nzira n’uburyo biteganywa n’amategeko, akabikora nta gitutu icyo aricyo cyose cyaba icy’inzego za Leta, n’icy’abandi – Nta wavuga ko umucamanza yigenga mu gutanga igihano mu gihe agomba gutanga igihano ntayegayezwa kitajyanye n’uburemere bw’icyaha, uburyo

cyakozwemo, n'igihe hari impamvu nyoroshyacyaha zikomeye zari gutuma agabanyirizwa igihano.

Itegeko Nshinga – Ubutabera buboneye – Imbibi ku bwisanzure bwo gutangaza ibitekerezo – N'ubwo umucamanza ashobora gufata icyemezo atitaye ku byatangajwe, abaturanyi n'abandi baturage bo bashobora gutekereza ko yabigendeyeho, bigatuma icyemezo cyose yafata kitakirwa neza, kandi ihame ari uko ubutabera butagomba gutangwa gusa ahubwo bugomba no kugaragara ko bwatanzwe.

Incamake y'ikibazo: Kabasinga na Niyomugabo buri wese yaregeye Urukiko rw'Ikirenga avuga ko zimwe mu ngingo z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange zinyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015. Ibirego byabo byahurijwe mu kirego kimwe kuko hari ingingo bahurizaho.

Abarega bavuga ko ingingo ya 92, n'ingingo ya 133 igika cya 3 ari nayo bahurizaho, z'iryo tegeko riteganywa ibyaha n'ibihano muri rusange, zibuza umucamanza kugabanya igihano kubera impamvu nyoroshyacyaha, zikaba zibangamiye ihame ryo kugira uburenganzira ku butabera buboneye riteganywa mu ngingo ya 29 y'Itegeko Nshinga, ndetse n'ihame ry'ubwisanzure bw'umucamanza riteganywa n'ingingo ya 151 y'iryo Tegeko.

Kabasinga anavuga ko igika cya 4 cy'ingingo ya 84 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ryavuzwe haruguru, kitagaragaza ibihe umucamanza ashobora guhana cyangwa kudahana icyitso iyo bireba uwashyiranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane, bikaba bibangamiye ihame ry'uburenganzira ku butabera buboneye. Avuga kandi ko ibivugwa mu ngingo ya 271 y'Itegeko N° 68/2018 ryo ku wa

30/08/2018 ko umuntu wese uhimba, ukoresha cyangwa ukwirakwiza mu buryo ubwo ari bwo bwose impapuro zivunjwamo amafaranga, aba akoze icyaha, nabyo bibangamiye ihame ry'uburenganzira ku butabera buboneye.

Indi ngingo agaragaza ko inyuranyije n'Itegeko Nshinga, ni iya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange avuga ko ibangamiye ubwisanzure bwo gutangaza ibitekerezo, bityo ikaba inyuranyije n'ingingo ya 38 y'Itegeko Nshinga.

Ku ngingo ijyanye no kumenya niba, kuba igika cya 4 cy'ingingo ya 84 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 ryavuzwe haruguru, kitagaragaza ibihe umucamanza ashobora guhana cyangwa kudahana icyitso iyo bireba uwashyingiranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane, bibangamiye ihame ry'uburenganzira ku butabera buboneye rivugwa mu ngingo ya 29 y'Itegeko Nshinga, Kabasinga avuga ko Umushingamategeko atagaragaje niba abo bantu bahanwa nk'ibitso cyangwa niba badahanwa, ibi bigaterwa no kuba yaravuze ko umucamanza ashobora kutabahana, bivuga ko ashobora no kubahana, akaba kandi atari we ukwiye kubyimenyera.

Ikindi ni uko uburyo iyi ngingo yanditse bunyuranyije n'ihame ry'uko amategeko ahana agomba kuba asobanutse, atagenekereza, kandi adateye urujijo. Mu gihe ateye urujijo, abayavugwamo ntibamenya niba bagomba kwirinda kuba ibyitso by'abo bashakanye cyangwa abo bafitanye amasano kugera ku gisanira cya kane. Asoza avuga kandi ko inyuranyije n'ingingo ya 2 agace ka mbere y'iryo Tegeko, kuko iha umucamanza urubuga rwo kuba yafata umwanzuro ashatse, ushobora kurenganya cyangwa kubererekera uwo acira urubanza kubera imiterere y'Itegeko. Kubera izi mpamvu zose akaba asaba

Urukiko ko iyi ngingo ikurwaho cyangwa rugategeka ko ihindurwa ikandikwa mu buryo budateye urujijo.

Leta y'u Rwanda ivuga ko ingingo ya 2, igika cya mbere, agace ka 5 y'iryo tegeko riteganya ibyaha n'ibihano muri rusange isobanura ufatwa nk'icyitso uwo ariwe, ko ari umuntu wafashije uwakoze icyaha mu bikorwa bitegura ikorwa ry'icyaha mbere. Bisobanuye ko uwashakanye n'uwakoze icyaha akamubera icyitso, kimwe n'abo bafitanye amasano kugera ku gisanira cya kane iyo bamubereye icyitso, bashobora guhanwa mu buryo buteganywa n'ingingo ya 84 y'Itegeko ryavuzwe haruguru. Umushingamategeko yavuze ko urukiko rushobora kubasonera ibihano bigenewe ibyitso hashingiwe ku mikorere y'icyaha, ubwo bushishozi bwo kumenya niba basonerwa cyangwa bahanwa bukaba bwarahariwe umucamanza, ibi bikaba ntaho binyuranyije n'ingingo ya 29, agace ka kane y'Itegeko Nshinga.

Ku kibazo kijyanye no kumenya niba kubuza kugabanya ibihano kubera impamvu nyoroshiyacyaha nk'uko biteganyijwe mu ngingo ya 92 n'ingingo ya 133 igika cya 3 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange binyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga, Kabasinga asobanura ko izi ngingo zituma umuntu wakoze ibyo byaha atabona ubutabera buboneye, mu gihe adashobora kugabanyirizwa igihano kabone n'ubwo haba hari impamvu nyoroshiyacyaha, ndetse zikamwima uburenganzira bwo kujuririra igihano gusa mu gihe yahamwe n'icyaha, bikaba rero bibangamiye uburenganzira bw'uregwa bwo guhabwa ubutabera buboneye. Akomeza avuga ko muri izo ngingo usanga ububasha bw'umucamanza bugarukira gusa ku kureba niba uregwa ahamwa n'icyaha, kuko igihano cyo kiba giteganyijwe n'itegeko, ibi bikaba bivuguruzwa ingingo ya 49 y'itegeko riteganya ibyaha n'ibihano muri rusange, iteganya ibyo umucamanza ashingiraho

atanga igihano. Ikindi ni uko ziniga ubwisanzure bw'umucamanza bwo gushyira mu gaciro mu gihe cyo kugena igihano, zikanabangamira ubwigenge bwe mu guca imanza zitabera, kuko zimubuza kugereranya ibyatuma atanga igihano gito cyangwa kinini. Kubera izo mpamvu zimaze kuvugwa, asaba Urukiko rw'Ikirenga kwemeza ko izo ngingo zombi zinyuranyije n'Itegeko Nshinga, rukanategeka ko zivanwaho.

Niyomugabo nawe avuga ko ingingo ya 133 igika cya 3 y'itegeko ryavuzwe haruguru iteganya igihano ntayegayezwa ku cyaha cyo gusambanya umwana utarageza ku myaka 14, kabone n'iyi haba hari impamvu nyoroshyacyaha, byazatuma atabona ubutabera buboneye yemererwa n'Itegeko Nshinga kubera ko izitira umucamanza ntashobore kumugabanyiriza igihano ndetse ikaba inyuranye n'ihame ry'uko abantu bose bareshya imbere y'amategeko bakaba bagomba gufatwa kimwe, bityo akaba asaba ko ikwiye gukurwaho.

Leta y'u Rwanda ivuga ko isanga nta mpamvu yo kubyisobanuraho kuko Urukiko rw'Ikirenga rwabifasheho icyemezo mu rubanza RS/INCONST/SPEC 00003/2019/SC ndetse runatanga inama ku zindi ngingo zifite ikibazo kimwe ariko zitaregwe.

Muri uru rubanza hasuzumwe kandi ikibazo kijyanye no kumenya niba ibivugwa mu ngingo ya 271 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, binyuranyije n'ingingo ya 29 y'Itegeko Nshinga. Kabasinga asobanura ko iyi ngingo ifite ibikorwa bitatu kandi buri cyose kikaba kigize icyaha ukwacyo, aribyo byo guhimba impapuro mvunjwafaranga, kuzikoresha no kuzikwirakwiza. Imyandikire y'iyi ngingo isa n'ibuza ikoreshwa ry'impapuro mvunjwafaranga mu Rwanda, ndetse n'ikwirakwiza ryazo, hakaba hakwiye gutandukanywa uwazikwirakwije mu buryo bunyuranyije

n'amategeko n'uwabikoze mu nyungu z'ikigo akorera. Mu bikorwa bigize iki cyaha haburamo ubushake bwo kugikora (*intention de nuire*).

Leta y'u Rwanda isobanura ko nta kibazo kiri mu myandikire y'iyi ngingo ya 271 kubera ko guhimba impapuro mvunjwafaranga, kuzikoresha zahimbwe, no kuzikwirakwiza zahimbwe mu buryo ubwo aribwo bwose, biba bigize icyaha. Bivuze ko izi mpapuro zifite uburyo zikoreshwamo bwemewe n'amategeko, kunyuranya nabyo akaba aribwo bigize icyaha giteganywa n'iyi ngingo. Kuvuga ko iyi ngingo inyuranyije n'ingingo ya 29 y'Itegeko Nshinga sibyo, kuko ibigize icyaha aribwo kuba icyaha cyagambiriwe, cyashyizwe mu bikorwa kandi gihanwa n'amategeko, bigomba kuba byuzuye kugirango umuntu afatwe nk'uwakoze icyaha.

Ku ngingo yo kumenya niba ingingo ya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 38 y'Itegeko Nshinga, Kabasinga avuga ko ibigize icyaha kivugwa muri iyo ngingo ari ugutangaza ibitekerezo ugamije kuyobya umucamanza cyangwa umutangabuhamya, ariko iyo ngingo ntisobanura aho ibyo bitekerezo bitangarizwa. Ntibisobanutse niba bigomba gutangazwa imbere mu rubanza, nyamara ibyo umucamanza ashingiraho aca urubanza ari ibintu bidatangazwa na rubanda, umuntu ku giti cye cyangwa ibitangazamakuru, kuko ashingira ku nyandiko n'ibindi bimenyetso afite muri dosiye. Bivuze ko umucamanza adashobora kuyobya n'ibyatangajwe mu buryo ubwo ari bwo bwose bitavugiwe mu iburanisha.

Akomeza avuga ko iyi ngingo ikumira buri muntu kuvuga cyangwa gutanga igitekerezo cye ku gikorwa cyabaye, mu gihe kiri gukurikiranwa mu nkiko, kugira ngo bitazitwa ko yari agamije kuyobya umucamanza, kandi nyamara uwo mucamanza

ari we ukwiye kwirinda gutwarwa cyangwa gushingira ku byo yumvise ahandi hatari mu iburanisha cyangwa muri dosiye. Iyi ngingo ibangamiye itangazamakuru kuko ibikorwa byinshi bigize ibyaha cyangwa se bikurikiranwa mu nkiko bikunze kwandikwaho n'itangazamakuru. Iyi ngingo yatuma kandi abayobozi ndetse n'inzego z'umutekano zirinda gutanga ibiganiro bifite aho bihuriye n'ibikorwa bishobora gukurikiranwa mu nkiko, ndetse bishobora no kubuza abakorera abandi ubuvugizi gutangaza ndetse no kugaragaza uko bumva ibintu kugira ngo bitazitwa ko bari bagamije kuyobya umucamanza cyangwa abatangabuhamya.

Leta y'u Rwanda ivuga ko iyi ngingo ya 256 idateye impungenge, kuko utangaje inkuru ku rubanza ruri mu rukiko ariko rutaracibwa adafatwa nk'ushaka kuyobya, keretse bigaragajwe n'inzego zishinzwe kugenza ibyaha ko aribyo yari agamije. Ntaho inyuranyije n'ingingo ya 38 y'Itegeko Nshinga, kuko itavuga abanyamakuru, kandi nabo bakaba basanzwe bagaragaza ibitekerezo byabo ku manza zikiburanishwa ntibakurikiranweho icyaha cyo gushaka kuyobya umutangabuhamya cyangwa umucamanza, kuko biba bigaragara ko ataricyo kigamijwe.

Incamake y'icyemezo: 1. Itegeko mpanabyaha rigomba kwandikwa mu buryo busobanutse kandi butarimo urujijo kandi rikandikwa ku buryo buri wese ashobora kumenya imbibi z'icyemewe n'ikibujijwe, n'ingaruka z'ibihano igihe akoze ikibujijwe, kugirango ashobore kucyirinda (predictability), bityo igika cya 4 cy'ingingo ya 84 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kitubahirije ihame ry'uko ibyaha n'ibihano bigomba kugenwa n'itegeko, bityo kikaba kibangamiye ihame ry'uburenganzira ku butabera

buboneye riteganyijwe mu ngingo ya 29 agace ka kane y'Itegeko Nshinga.

2. Kuba uwahamwe n'icyaha adashobora kujuririra igihano yahawe kugira ngo kigabanywe hashingiye ku mpamvu nyoroshyacyaha binyuranyije n'ihame ry'uburenganzira ku butabera buboneye n'iry'ubwisanzure bw'umucamanza mu kugena igihano gikwiye kuko mu manza mpanabyaha, Umucamanza afite inshingano zo gutanga igihano gishingiye ku mikorere y'icyaha, ku myitwarire n'imibereho y'uwigikoze, ku muryango cyakorewemo no ku wagikorewe.

3. Nta wavuga ko umucamanza yigenga mu gutanga igihano mu gihe agomba gutanga igihano ntayegayezwa kitajyanye n'uburemere bw'icyaha, uburyo cyakozwemo, n'igihe hari impamvu nyoroshyacyaha zikomeye zari gutuma agabanyirizwa igihano.

4. N'ubwo umucamanza ashobora gufata icyemezo atitaye ku byatangajwe, ababuranyi n'abandi baturage bo bashobora gutekereza ko yabigendeyeho, bigatuma icyemezo cyose yafata kitakirwa neza, kandi ihame ari uko ubutabera butagomba gutangwa gusa ahubwo bigomba no kugaragara ko bwatanzwe.

Igika cya 4 cy'ingingo ya 84 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kinyuranyije n'ingingo ya 29 agace ka kane y'Itegeko Nshinga kikaba nta gaciro gifite hashingiwe ku biteganywa n'ingingo ya 3 y'Itegeko Nshinga; Igice cy'ingingo ya 92 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, kigira kiti: “kidashobora kugabanywa kubera impamvu nyoroshyacyaha”, kinyuranyije n'ingingo

ya 29, n'ya 151 z'Itegeko Nshinga; icyo gice kikaba nta gaciro gifite;
Igika cya 3 cy'ingingo ya 133 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, agace kavuga ko iyo gusambanya umwana byakorewe ku mwana uri muni y'imyaka cumi n'ine (14), igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, kanyuranyije n'ingingo ya 29, n'ya 151 z'Itegeko Nshinga; ako gace kakaba nta gaciro gafite;
Ingingo ya 271 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, itanyuranyije n'Itegeko Nshinga;
Ingingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, itanyuranyije n'Itegeko Nshinga.

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 3, 29, 38 n'ya 151.
 Itegeko Ngenga n° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana mu ingingo ya 257, 326, 477 n'ya 478.
 Itegeko –Teka n° 21/77 ryo ku wa 18 AOOUT 1977 rishyiraho igitabo cy'amategeko ahana.
 Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, ingingo ya 2, 3, 49, 84, 92, 133, 256 n'ya 271.
 Itegeko n° 48/2017 ryo ku wa 23/09/2017 rigenga Banki Nkuru y'u Rwanda, ingingo ya 48.

- Itegeko n° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 62.
- Itegeko n° 09/2004 ryo ku wa 29/04/2004 ryerekeye imyitwarire mu kazi k'ubucamanza, ingingo ya 4 n'ya 5.
- Amasezerano Nyafurika ku burenganzira bwa muntu n'ubw'abaturage⁸ (Charte Africaine des Droits de l'Homme et des Peuples), u Rwanda rwemeje n'Itegeko n° 10/1983 ryo ku wa 01/07/1983, agatangazwa mu igazeti ya Leta yo ku wa 01/07/1983, ingingo ya 7.
- Amasezerano mpuzamahanga yerekeye uburenganzira mu by'imbenezamubano no mu bya politiki, u Rwanda rwemeje burundu n'Itegeko n° 8/75 ryo ku wa 6 Gashyantare 1975, agatangazwa mu igazeti ya Leta mu 1975, ingingo ya 10,15 n'ya 19.
- Amasezerano mpuzamahanga yerekeye uburenganzira bwa muntu, u Rwanda rwemeje ku wa 18/09/1962, ingingo ya 11.

Imanza zifashishijwe:

- Re Kabasinga, RS/INCONST/SPEC 00003/2019/SC rwaciwe n'Urukiko rw'Ikirenga ku wa 04/12/2019.
- R. v. Beauregard, rwaciwe n'Urukiko rw'Ikirenga rwa Canada.
- Cullen v. Toibin rwaciwe n'Urukiko rw'Ikirenga rwo muri Ireland.
- Kelly v O'Neill⁴¹ rwaciwe n'Urukiko rw'Ikirenga rwa Ireland.
- DPP v Independent Newspapers (Irl) Ltd,⁴² rwaciwe n'Urukiko rw'Ikirenga rwa Ireland.
- Attorney-General for England and Wales v Times Newspapers Ltd rwaciwe n'Urukiko rw'Ubujurire mu Bwongereza.
- Worm v. Austria, 29 August 1997, Application 22714/93, 25 EHR 454, par.50.

- The Sunday Times v. United Kingdom, 26 April 1979, Series A No. 30, 14 EHRR 229, par. 63.
- Dagenais v. Canadian Broadcasting Corp., No 23403, 1994: January 24, 1994, December 8, P.5.
- Bridges v. California, 314 US 252 (1941); Pennekamp v. Florida, 328 US 331 (1946); Craig v. Harney 331 US 367 (1946); Wood v. Georgia 370 US 375 (1962).
- South Africa Supreme Court of Appeal: The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others (425/2017) [2017] ZASCA 97 (21 June 2017), at para.37.
- South Africa Supreme Court of Appeal: Midi Television v Director of Public Prosecutions (Western Cape) 2007 (3) SA 318 (SCA) at para 19.
- Nebraska Press Association v. Hugh Stuart: (1976) 427 US 539.
- Reliance Petrochemicals v. Proprietor of Indian Express56 rwaciwe n'Urukiko rw'Ikirenga rwo mu Buhinde.
- John D. Pennekamp v. State of Florida57 rwaciwe n'Urukiko rw'Ikirenga rwo muri Amerika.

Inyandiko z'abahanga zifashishijwe :

- Santerre Christine, Étude franco-canadienne du principe légaliste: le processus qualitatif et interprétatif du texte pénal. In: Revue internationale de droit comparé. Vol. 68 N°4, 2016, p.4.
- Canadian Fondation for Children, Youth and the Law c. Canada (Procureur Général), [2004] 1 S.C.R. 76, 2004 SCC 4, Note 14, Par. 16.
- R. c. Nova Scotia Pharmaceutical Society, 9 Juillet 1992, no 22473, p.3-4.
- Déc. n° 96-377 DC du 16 juillet 1996, cons. No 3 et s., citée par Bertrand de Lamy (Professeur de Droit à L'Université

de Toulouse I), Cahiers du Conseil Constitutionnel N o 26 (Dossier la Constitution et le droit Pénal)- Aout 2009, p. 12.

See Mukong v. Cameroon, views adopted by the UN Human Rights Committee on 21 July 1994, No .458/1991, para. 9.7.

SIRACUSA Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, *op. cit.*, p. 3.

Cited by Law Commission of India, 20 Report on trial by media, Free speech and Fair trial under Criminal procedure code 1973, August 2006, p. 12 & 13.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Kabasinga Florida yaregeye Urukiko rw'Ikirenga arusaba kwemeza ko:

- a. Ingingo ya 84 igika cya 4, ingingo ya 92, ingingo ya 133 igika cya 3, ingingo ya 271 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zinyuranyije n'ingingo ya 29 y'Itegeko Nshinga.
- b. Ingingo ya 92 kimwe n'ingingo ya 133 igika cya 3 z'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya

ibyaha n'ibihano muri rusange zinyuranyije n'ingingo ya 151 y'Itegeko Nshinga.

- c. Ingingo ya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 ritaganyanya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 38 y'Itegeko Nshinga.

Ikirego cyeye cyanditswe kuri RS/INCONST/SPEC 00006/2020/SC.

[2] Niyomugabo Ntakirutimana nawe yatanze ikirego mu Rukiko rw'Ikirenga arusaba kwemeza ko ingingo ya 133 igika cya 3 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ritaganyanya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 29 n'iya 151 z'Itegeko Nshinga. Ikirego cyeye cyanditswe kuri RS/INCONST/SPEC 00005/2020/SC.

[3] Ibyo birego byombi byahurijwe mu rubanza rumwe kubera isano bifatanye, byandikwa kuri RS/INCONST/SPEC 00005/2020/SC - RS/INCONST/SPEC 00006/2020/SC, iburanishwa ryabyo rishyirwa ku wa 12/01/2021.

[4] Kuri iyo tariki, iburanisha ry'urubanza ryabereye mu ruhamwe, Kabasinga Florida yitabye yunganiwe na Me Mugabonabandi Jean Maurice, Niyomugabo Ntakirutimana ahagarariwe na Me Kayirangwa Marie Grâce na Me Gabiro David, Leta y'u Rwanda ihagarariwe na Me Cyubahiro Fiat afatanyije na Me Batsinda Aline.

[5] Ibibazo byagaragajwe n'abarega byashyirwa mu byiciro 2 by'ingenzi:

- a. Ingingo abarega bavugaga ko zibangamiye ihame ryo kugira uburenganzira ku butabera buboneye rivugwa mu ngingo

ya 29 y'Itegeko Nshinga, n'ihame ry'ubwisanzure bw'umucamanza mu kugena igihano rivugwa mu ngingo ya 151 y'Itegeko Nshinga.

- b. Ingingo umwe mu barega avuga ko ibangamiye ihame ry'ubwisanzure bw'itangazamakuru, kugaragaza ibitekerezo no guhabwa amakuru, rivugwa mu ngingo ya 38 y'Itegeko Nshinga.

[6] Mu cyiciro cya mbere hagaragaramo ingingo enye arizo:

- a. Ingingo ya 84, igika cya 4, y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange Kabasinga Florida avuga ko inyuranyije n'ingingo ya 29¹ y'Itegeko Nshinga, iyo ngingo ikaba irebana no guhana icyitso igihe bireba uwashyingiranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane (4).
- b. Ingingo ya 92 n'ya 133 igika cya 3 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 rimaze kuvugwa, abarega bavuga ko zinyuranyije n'ingingo ya 29 y'Itegeko Nshinga, ku bijyanye no kutabona uburenganzira bwo kugabanyirizwa igihano ku wakoze ibyaha bivugwa muri izo ngingo

¹ “Buri muntu wese afite uburenganzira ku butabera buboneye, burimo uburenganzira bwo:

1°.....
.....;

4° kudakurikiranwa, kudafatwa, kudafungwa cyangwa kudahanirwa ibyo yakoze cyangwa atakoze, iyo amategeko y'Igihugu cyangwa amategeko mpuzamahanga atabifataga nk'icyaha igihe byakorwaga. Ibyaha n'ibihano bijyanye na byo biteganywa n'amategeko;

5°.....
.....

kabone n'iyo haba hari impamvu nyoroshyacyaha. Bavuga kandi ko izo ngingo zinyuranyije n'ingingo ya 151² y'Itegeko Nshinga ku bijyanye n'ubwisanzure bw'umucamanza mu kugena igihano.

Ikibazo kireba ingingo ya 133 igika cya 3 nicyo gihuriweho n'abarega bombi Kabasinga Florida na Niyomugabo Ntakirutimana.

- c. Ingingo ya 271 Kabasinga Florida avuga ko inyuranyije n'ingingo ya 29 y'Itegeko Nshinga, ngo kuko itagaragaza ibikorwa bigize icyaha cyo guhimba impapuro zivunjwamo amafaranga, kuzikoresha cyangwa kuzikwirakwiza.

[7] Mu cyiciro cya kabiri hagaragaramo ingingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, ihana utangaza ibitekerezo agamije kuyobya icyemezo cy'umucamanza cyangwa umutangabuhamya. Kabasinga Florida avuga ko iyo ngingo inyuranyije n'ingingo ya 38 y'Itegeko Nshinga, yerekeye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

[8] Ibibazo bimaze kuvugwa nibyo byasuzumwe muri uru rubanza, hakurikijwe ibyiciro birimo.

² Ubucamanza bugengwa n'amahame akurikira: abacamanza bakurikiza itegeko kandi bakora umurimo wabo w'ubucamanza mu bwigenge kandi batavugirwamo n'ubutegetsu cyangwa ubuyobozi ubwo ari bwo bwose

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURA RYABYO

A. Ingingo abarega bavuga ko zibangamiye ihame ryo kugira uburenganzira ku butabera buboneye n'ihame ry'ubwisanzure bw'umucamanza mu kugena ibihano

A.1. Kumenya niba, kuba igika cya 4 cy'ingingo ya 84 y'Itegeko n°68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange, kitagaragaza ibihe umucamanza ashobora guhana cyangwa kudahana icyitso iyo bireba uwashyingiranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane, bibangamiye ihame ry'uburenganzira ku butabera buboneye rivugwa mu ingingo ya 29 y'Itegeko Nshinga

a. Ibisobanuro bitangwa na Kabasinga Florida

[9] Kabasinga Florida n'umwunganira bavuga ko igika cya 4 cy'ingingo ya 84³ kinyuranye n'agace ka kane k'ingingo ya 29

³ Ingingo ya 84 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange, igira iti: Umufatanyacyaha ahanwa nk'uwakoze icyaha.

Icyitso ntigihanwa kimwe n'uwakoze icyaha keretse igihe:

1 ° itegeko ribiteganyaga ukundi;

2 ° umucamanza abona ko uruhare rw'icyitso mu gukora icyaha rungana cyangwa ruruta urw'uwakoze icyaha.

Icyitso gishobora gukurikiranwa n'ubwo icyaha kitashoboye gukurikiranwa ku wagikoze kubera impamvu zimureba ku giti cye nk'urupfu, uburwayi bwo mu mutwe cyangwa kutamenyekana.

Icyakora, iyo abantu bavugwa mu gace ka 5 d), aka 5 e) n'aka 5 f) tw'ingingo ya 2 y'iri tegeko ari uwashyingiranywe n'uwakoze icyaha cyangwa uwo

y'Itegeko Nshinga gateganya ko igikorwa gihanwa iyo giteganyijwe n'amategeko ahana. Ibyo babishingira ku mpamvu zikurikira:

- a. icyo gika cya kane ntigisobanura igihe uwashakanye n'uwakoze icyaha akamubera icyitso, kimwe n'abo bafitanye amasano kugera ku gisanira cya kane, bahanwa. Umushingamategeko ntiyagaragaje niba abo bantu bahanwa nk'ibitso cyangwa niba badahanwa, ibi bigaterwa no kuba yaravuze ko umucamanza ashobora kutabahana, bivuga ko ashobora no kubahana.
- b. Uko gushobora cyangwa kudashobora kubahana niho hateye ikibazo, kuko binyuranyije cyane n'amahame agenderwaho mu manza nshinjabyaha yo gufata igikorwa nk'igihanwa cyangwa ikidahanwa mu mategeko. Ibyo byagira ingaruka nini ku mitangire y'ubutabera buboneye, kuko igika cya kane cy'ingingo ya 84 kitamurikira umucamanza igihe agomba guhana abavugwa muri icyo gika n'igihe atagomba kubahana, akaba kandi atari we ukwiye kubyimenyera.
- c. Uburyo iyi ngingo yanditse bunyuranyije n'ihame ry'uko amategeko ahana agomba kuba asobanutse, atagenekereza, kandi

bafitanye isano kugera ku rwego rwa kane (4) bashobora gusonerwa n'urukiko ibihano bigenewe icyitso.

adateye urujijo. Mu gihe ateye urujijo cyangwa agenekereje, abuza abantu kugera ku butabera buboneye kuko nko mu ngingo ya 84 yavuzwe haruguru, abantu bayivugwamo batamenya niba bagomba kwirinda kuba ibyitso by'abo bashakanye cyangwa abo bafitanye amasano kugera ku gisanira cya kane, mu gihe batazi niba babihanirwa cyangwa batabihanirwa.

- d. Imiterere y'ingingo ya 84, igika cya 4, y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange, inanyuranyije n'ingingo ya 2, agace ka mbere y'iryo Tegeko⁴, kuko iha umucamanza urubuga rwo kuba yafata umwanzuro ashatse, ushobora kurenganya cyangwa kubererekera uwo acira urubanza kubera imiterere y'Itegeko.

[10] Kabasinga Florida n'umwunganira bongeraho ko icyo asaba Urukiko ari uko iyo ngingo yakurwaho kuko inyuranyije n'Itegeko Nshinga, ariko ko bibaye ngombwa Urukiko rwategeka ko ihindurwa ikandikwa mu buryo budateye urujijo.

b. icyo Intumwa za Leta zibivugaho

[11] Abahagarariye Leta y'u Rwanda bavugaga ko ibivugwa n'urega nta shingiro bifite kubera impamvu zikurikira:

⁴ icyaha: igikorwa kibujijwe n'itegeko cyangwa kwanga gukora igitegetswe ku buryo bihungabanya umutekano mu bantu kandi hari itegeko ribiteganyiriza igihano.

a. Ingingo ya 2, igika cya mbere, agace ka 5° y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange isobanura ufatwa nk'icyitso⁵ uwo ariwe. Hashingiwe kuri iyo ngingo, habaho icyitso ari uko hari uwakoze icyaha, kandi hari icyaha cyakozwe giteganywa n'amategeko. Umuntu yitwa icyitso cy'uwoze icyaha ari uko yamufashije mu bikorwa bitegura ikorwa ry'icyaha mbere.

b. Hashingiwe kuri icyo gisobanuro, uwashakanye n'uwoze icyaha akamubera icyitso, kimwe n'abo bafitanye amasano kugera ku gisanira cya kane iyo bamubereye icyitso, bashobora guhanwa mu buryo buteganywa n'ingingo ya 84 y'Itegeko ryavuzwe

⁵ Icyitso: umuntu wafashije uwakoze icyaha mu byagiteguye bigaragarira muri kimwe mu bikorwa bikurikira:

- a) utuma hakorwa icyaha akoresheje igihembo, isezerano ry'igihembo, iterabwoba, agakabyo k'ubutegetsi cyangwa k'ububasha cyangwa amabwiriza agamije gukoresha icyaha;
- b) ufasha uwakoze icyaha mu byagiteguye, mu byoroheje imikorere yacyo cyangwa mu byakinonosoye kandi yarabikoze abizi, cyangwa uwashishikaje uwakoze icyaha;
- c) utuma undi akora icyaha akoresheje imbwirwaruhame, urusaku rushishikaza cyangwa iterabwoba, bibereye ahantu hateraniye abantu barenze babiri (2), inyandiko, ibitabo cyangwa ibindi byanditswe n'icapiro, biguzwe cyangwa bitangiwe ubuntu cyangwa byatangarijwe ahantu hateraniye abantu benshi, amatangazo amantse cyangwa yeretswe rubanda;
- d) uwahishe uwakoze icyaha, umufatanyacyaha cyangwa uwahishe icyitso kugira ngo ataboneka cyangwa adafatwa, umufasha kwihisha cyangwa gucika cyangwa umuha aho kwihisha cyangwa uwamufashije guhisha ibintu byakoreshejwe cyangwa byagenewe gukoreshwa icyaha;
- e) uwahishe abizi ikintu cyangwa ibikoresho byakoreshejwe cyangwa byagenewe gukoresha icyaha;
- f) uwiba, uhisha cyangwa wonona nkana ku buryo ubwo aribwo bwose ibintu byagombye gufasha kugenza icyaha, gutahura ibimenyetso cyangwa guhana abakoze icyaha.

haruguru. Umushingamategeko yavuze ko urukiko rushobora kubasonera ibihano bigenewe ibyitso hashingiwe ku mikorere y'icyaha, ubwo bushishozi bwo kumenya niba basonerwa cyangwa bahanwa bukaba bwarahariwe umucamanza, ibi bikaba ntaho binyuranyije n'ingingo ya 29, agace ka kane, y'Itegeko Nshinga.

UKO URUKIKO RUBIBONA

[12] Ingingo ya 84 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 rimaze kuvugwa, isobanura uburyo icyitso gihanwa; mu gika cyayo cya kane, igateganya irengayobora igihe uwabaye icyitso ari uwashyiranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane (4). icyo gika kigira giti: icyakora, iyo abantu bavugwa mu gace ka 5 d), aka 5 e) n'aka 5 f) tw'ingingo ya 2 y'iri tegeko ari uwashyiranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane (4) bashobora gusonerwa n'urukiko ibihano bigenewe icyitso.

[13] Abantu bavugwa mu duce twa 5 d), 5 e) na 5 f) tw'ingingo ya 2 y'iri tegeko ni aba bakurikira:

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

e. Uwahishe abizi ikintu cyangwa ibikoresho byakoreshejwe cyangwa byagenewe gukoresha icyaha;

f. Uwiba, uhisha cyangwa wonona nkana ku buryo ubwo aribwo bwose ibintu byagombye gufasha kuzenza icyaha, gutahura ibimenyetso cyangwa guhana abakoze icyaha;

[14] Ibiteganyijwe mu gika cya 4 cy'ingingo ya 84, byumvikanisha ko iyo ukoze ibikorwa bivugwa mu duce twa 5 d), 5 e) na 5 f) tw'ingingo ya 2 tumaze kuvugwa ari uwashyiriranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane (4) bashobora guhanwa cyangwa bagasonerwa ibihano. Ikibazo Kabasinga Florida yagejeje ku Rukiko, akaba ari uko umushingamategeko atamurikiye neza umucamanza ngo amenye igihe agomba guhana uwabaye icyitso uvugwa muri icyo gika cya kane cy'ingingo ya 84, n'igihe atamuhana. Agaragaza ko ibyo bibangamiye ihame ry'uko amategeko ahana agomba kuba asobanutse, atagenekereje kandi adateye urujijo, bikaba byagira ingaruka ku burenganzira bwa buri muntu ku butabera buboneye buteganywa mu ngingo ya 29 y'Itegeko Nshinga, by'umwihariko mu gace kayo ka 4.

[15] Mu gusubiza iki kibazo Kabasinga Florida yagejeje ku Rukiko, ni ngombwa gusuzuma niba ibiteganyijwe mu gika cya 4 cy'ingingo ya 84 yavuzwe haruguru bidasobanutse ku buryo byabangamira uburenganzira ku butabera buboneye buteganywa mu gace ka 4 k'ingingo ya 29 y'Itegeko Nshinga imaze kuvugwa.

[16] Amagambo "bashobora gusonerwa n'urukiko ibihano" bigenewe icyitso yakoreshejwe mu gika cya 4 cy'ingingo ya 84, yumvikana nk'aha umucamanza ububasha bwo guhana n'ubwo gusonera ibihano, ariko ingingo ntigaragaze igihe akoresha ubwo bubasha bwo guhana, cyangwa gusonera igihano. Ibyo bishobora gutuma abantu babiri bakoze ibikorwa bimwe, bagejewe imbere y'abacamanza babiri batandukanye, umwe ashobora guhanwa undi ntahanwe, bitewe n'uko buri mucamanza ariwe wigenera

iby ashingiraho (*critère d'appréciation*) mu kwemeza igikorwa kigize icyaha gihanwa n'igikorwa gisonerwa igihano. Ese ibi binyuranyije n'ihame ryo kudahana igihe nta tegeko ribiteganyana riteganyijwe mu gace ka 4 k'ingingo ya 29 y'Itegeko Nshinga?

[17] Igika cya mbere cy'ingingo ya 3 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganyana ibyaha n'ibihano muri rusange, giteganyana ko nta muntu ushobora guhanwa kubera gukora ikibujijwe cyangwa kwanga gukora igitegetswe bitari icyaha hakurikijwe amategeko y'igihugu cyangwa mpuzamahanga mu gihe byakorwaga. Ibivugwa muri iki gika, bijyanye n'ihame rusange ryemewe mu mategeko, rivuga ko nta cyaha kibaho, nta n'igihano gitangwa, iyo bitateganyijwe n'itegeko (*Nullum crimen, nulla poena, sine lege = principe de la légalité des infractions et des peines*). Iri hame riboneka mu masezerano mpuzamahanga anyuranye, by'umwihariko amasezerano mpuzamahanga u Rwanda rwashyizeho umukono.

[18] Ingingo ya 11(2) y'Amasezerano mpuzamahanga yerekeye uburenganzira bwa muntu, u Rwanda rwemeje ku wa 18/09/1962, ihura neza n'ingingo ya 3 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 yavuzwe mu gika kibanza⁶. Ihura kandi n'ingingo ya 15(1) y'Amasezerano mpuzamahanga yerekeye uburenganzira mu by'imbenezamubano no mu bya politiki, u Rwanda rwemeje burundu n'Itegeko N° 8/75 ryo ku wa 6 Gashyantare 1975, agatangazwa mu igazeti ya Leta muri uwo mwaka⁷, kimwe n'ingingo ya 7(2) y'Amasezerano Nyafurika ku

⁶ Nul ne sera condamné pour des actions ou omissions qui, au moment où elles ont été commises, ne constituaient pas un acte délictueux d'après le droit national ou international.

⁷ Nul ne sera condamné pour des actions ou omissions qui ne constituaient pas un acte délictueux d'après le droit national ou international au moment où elles ont été commises.....

burenganzira bwa muntu n'ubw'abaturage⁸ (*Charte Africaine des Droits de l'Homme et des Peuples*), u Rwanda rwemeje n'Itegeko n° 10/1983 ryo ku wa 01/07/1983, agatangazwa mu igazeti ya Leta yo ku wa 01/07/1983.

[19] Ihame riteganyijwe mu ngingo ya 3 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018, ndetse no mu masezerano mpuzamahanga amaze kuvugwa, ni ryo riteganyijwe mu ngingo ya 29, agace ka 4, y'Itegeko Nshinga, rikaba ari kimwe mu bigize uburenganzira ku butabera buboneye. Iri hame ribuza guhanira umuntu ibikorwa itegeko ritateganyije nk'ibyaha, ryasobanuwe n'abahanga mu mategeko ndetse n'inkiko zinyuranye.

[20] Umuhanga mu mategeko Bertrand de Lamy, asobanura ko ihame ry'uko ibyaha n'ibihano bigomba kugenwa n'itegeko, rishingiye ku bintu bibiri by'ingenzi: kuba itegeko ari ryo ryonyine rifite ububasha bwo kugena uburenganzira bwo guhana, no kuba iri hame ari uburyo bwo gutuma hatabaho kudafata kimwe abagomba guhanwa; buri wese agashobora kumenya imbibi z'icyemewe n'ikibujijwe (*Le principe légaliste, ainsi affirmé, repose sur deux fondements particulièrement solides: l'un, politique, tenant à la souveraineté de la loi, expression de la volonté générale, et qui, seule, a la légitimité permettant d'asseoir le droit de punir; l'autre, plus philosophique, fait de la légalité criminelle le moyen d'assurer la mise en œuvre du libre arbitre, d'éviter l'arbitraire et de garantir l'égalité devant la répression en avertissant chacun des frontières du permis et de l'interdit*)⁹.

⁸ Nul ne peut être condamné pour une action ou une omission qui ne constituait pas, au moment où elle a eu lieu, une infraction légalement punissable.

⁹ Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), *Dérives et évolution du principe de la légalité en droit pénal français* :

[21] Umuhanga mu mategeko Christine Santerre asobonura ko, ihame ry'uko ibyaha n'ibihano bigomba kugenwa n'itegeko, risaba ko itegeko rigena icyaha n'ibikigize byose, ni ukuvuga igikorwa kibujijwe n'igihano (*ce principe de la légalité des délits et des peines suborne l'existence d'une infraction à un texte de loi, lequel doit prévoir l'ensemble des composantes de celle-ci, c'est-à-dire la conduite prohibée et la peine*)¹⁰. Asobanura kandi ko iryo hame rishingiye ku bintu bibiri: icya mbere ni ugufasha umuturage kumenya ibikorwa bibujijwe n'ingaruka z'ibihano igihe bitubahirijwe. Icyamba kabiri ni ugushyira imbibi ku bubasha ntavogerwa bw'abashinzwe gushyira mu bikorwa amategeko, no kubuza ko amategeko adasobanutse aha inkiko ububasha bugari mu gusobanura itegeko (*Deux fondements de ce principe: le premier vise à formuler au citoyen un avertissement raisonnable afin qu'il soit avisé des conduites prosrites et des conséquences pénales en cas du non-respect de la loi. La clarté et la précision du texte de loi exigées par le principe légaliste assurent ainsi au justiciable une juste connaissance des interdits pénaux. Le second fondement vise à limiter le pouvoir discrétionnaire des personnes chargées de l'application de la loi. Il s'agit d'éviter que des textes flous laissent aux tribunaux un vaste pouvoir d'interprétation*)¹¹.

[22] Muri urwo rwego kandi, Urukiko rw'Ikirenga rwa Canada rwasobanuye ko itegeko ridasobanutse rituma umuturage atamenya ko ibyo agiye gukora bihanwa. Rituma kandi akazi k'abashinzwe kurishyira mu bikorwa kagorana, kimwe n'akazi

contribution à l'étude des sources du droit pénal français par Diffusion numérique : 4 mars 2010, n°2 (<https://id.erudit.org/iderudit/039334ar>)

¹⁰ Santerre Christine, Étude franco-canadienne du principe légaliste: le processus qualitatif et interprétatif du texte pénal. In: Revue internationale de droit comparé. Vol. 68 N°4, 2016, p.4.

¹¹ Ibid., p.6-7.

k'abacamanza igihe bagomba kwemeza ko icyaha cyakozwe; rikanatuma habaho impungenge ko abashinzwe kurishyira mu bikorwa bagira ububasha bwinshi budafite imbibi (*une règle de droit imprécise empêche le citoyen de se rendre compte qu'il s'aventure sur un terrain où il s'expose à des sanctions pénales. De même, elle complique la tâche des responsables de son application et des juges lorsqu'ils sont appelés à déterminer si un crime a été commis. Elle suscite également la crainte que les responsables de son application disposent d'un pouvoir discrétionnaire trop grand*)¹².

[23] Urwo Rukiko rwasobanuye kandi ko kuba amategeko ahana agomba kuba asobanutse bishingira ku ihame ry'uko abatwaga bagomba kumenya mbere y'igihe icyo babujijwe, kandi ububasha ntavogerwa bw'abashyira mu bikorwa amategeko bukagira aho bugarukira. Itegeko ryemezwa ko rinyuranyije n'Itegeko Nshinga iyo ridasobanutse ku buryo ntawe ushobora kumva icyo rishatse kuvuga hakurikijwe ibishingirwaho mu isesengura ry'amategeko (*La théorie de l'imprécision repose sur la primauté du droit, en particulier sur les principes voulant que les citoyens soient raisonnablement prévenus et que le pouvoir discrétionnaire en matière d'application de la loi soit limité. L'avertissement raisonnable aux citoyens comporte un aspect formel - la connaissance même du texte - et un aspect de fond - la conscience qu'une certaine conduite est assujettie à des restrictions légales. ... La théorie de l'imprécision peut donc se résumer par la proposition suivante: une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire, c'est-à-dire pour trancher*

¹² Canadian Foundation for Children, Youth and the Law c. Canada (Procureur Général), [2004] 1 S.C.R. 76, 2004 SCC 4, Note 14, Par. 16.

*quant à sa signification à la suite d'une analyse raisonnée appliquant des critères juridiques)*¹³.

[24] Urukiko rurinda Iremezo ry'Itegeko Nshinga rwo mu Bufaransa narwo rwasobanuye ko Umushingamategeko agomba gusobanura ibyaha mu buryo bwumvikana kandi budateye urujijo, kugira ngo hataba gufata ibyemezo bidafite icyo bishingiyeho (... *qu'il en résulte la nécessité pour le législateur de définir les infractions en termes suffisamment clairs et précis pour exclure l'arbitraire*)¹⁴.

[25] Rwasobanuye kandi ko Umushingamategeko agomba kwandika itegeko mu buryo umucamanza, usabwa kudasobanura itegeko rihana mu buryo bwagutse, adafata icyemezo kizagaragara nk'aho kidafite icyo gishingiyeho (*le législateur doit rédiger la loi « dans des conditions qui permettent au juge, auquel le principe de légalité impose d'interpréter strictement la loi pénale, de se prononcer sans que son appréciation puisse encourir la critique d'arbitraire*)¹⁵.

[26] Mu bisobanuro bitangwa n'abahanga mu mategeko ndetse n'ibyemezo by'inkiko binyuranye ku bijyanye n'ihame ry'uko ibyaha n'ibihano bigomba kugenwa n'itegeko, riteganyijwe mu ngingo ya 29 agace ka 4 y'Itegeko Nshinga, humvikanamo ibitekerezo by'ingenzi bikurikira:

¹³ R. c. Nova Scotia Pharmaceutical Society, 9 Juillet 1992, no 22473, p.3-4.

¹⁴ Cons. const., 20 janv. 1981, n° 80-127 DC. Lire en ligne: (<https://www.doctrine.fr/d/CONSTIT/1981/CONSTEXT000017665953>).

¹⁵ Déc. n° 96-377 DC du 16 juillet 1996, cons. N° 3 et s., citée par Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), Cahiers du Conseil Constitutionnel N° 26 (Dossier la Constitution et le droit Pénal)- Aout 2009, p. 12.

- a. Itegeko niryo rigena icyaha (igikorwa gihanwa) n'ibikigize byose, ni ukuvuga igikorwa kibujijwe n'igihano;
- b. Si inshingano y'umucamanza kugena ibikorwa bigize icyaha bigomba guhanwa, ahubwo ibyo ni inshingano y'umushingamategeko;
- c. Itegeko rihana rigomba kwandikwa mu buryo busobanutse kandi butarimo urujijo, kugirango hatabaho gufata ibyemezo bigaragara nk'aho bidashingiye ku bintu bisobanutse, kandi bitareba abantu bose mu buryo bumwe (*pour éviter l'arbitraire*);
- d. Itegeko rigomba kwandikwa ku buryo buri wese ashobora kumenya imbibi z'icyemewe n'ikibujijwe, n'ingaruka z'ibihano igihe akoze ikibujijwe, kugirango ashobore kucyirinda (*predictability*).

[27] Urukiko ruhuje ibimaze kuvugwa n'ibiteganyijwe mu ngingo ya 84, igika cya 4, y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, rusanga:

- a. Iyi ngingo ivuga ko umucamanza ashobora gusonera igihano kigenewe icyitso uwashyingiranywe n'uwakoze icyaha cyangwa uwo bafitanye isano kugera ku rwego rwa kane (4), ariko ntigaragaze imyitwarire igize icyaha ku bamaze kuvugwa ishobora gutuma bahanwa nk'ibytso, n'imyitwarire ishobora gutuma haba ubusonerwe bw'igihano.
- b. Kuba itegeko ritagena imyitwarire ihanirwa, ni ukuvuga ibikorwa bigize icyaha, bituma umucamanza ariwe wigenera impamvu zatuma ahana cyangwa asonera

umuntu igihano, kandi bitari mu nshingano ze, ahubwo ari inshingano z'Umushingamategeko.

c. Ibyo bishobora gutuma kandi abacamanza batandukanye bafata mu buryo butandukanye abantu bakoze ibikorwa bimwe/bagize imyitwarire imwe, kuko itegeko ritasobanuye mu buryo bwumvikana kandi budateye urujijo ushobora guhanwa n'ushobora gusonerwa igihano.

d. Abantu bavugwa mu ngingo ya 84, igika cya 4, badashobora kumenya mbere y'igihe, bahereye ku byanditse mu itegeko, imyitwarire ibujijwe bagomba kwirinda kugirango itabaviramo guhanwa, kuko igenwa na buri mucamanza mu bushishozi bwe.

[28] Urukiko rusanga, hashingiwe ku bisobanuro bimaze gutangwa, igika cya 4 cy'ingingo ya 84 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kitubahirije ihame ry'uko ibyaha n'ibihano bigomba kugenwa n'itegeko, bityo kikaba kibangamiye ihame ry'uburenganzira ku butabera buboneye riteganyijwe mu ngingo ya 29 agace ka kane y'Itegeko Nshinga. Urukiko rurasanga icyo gika nta gaciro gifite hashingiwe ku biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

[29] Harebwe amateka y'iyi ngingo, bigaragara ko Itegeko – Teka N° 21/77 ryo ku wa 18 Aout 1977 rishyiraho igitabo cy'amategeko ahana ryahinduwe n'Itegeko Ngenga n° 01/2012/OL ryo ku wa 02/05/2012, mu ngingo yaryo ya 257, ryateganyaga ko uzahisha umuntu azi neza ko yakoze icyaha cy'ubugome cyangwa icyaha gikomeye, cyangwa azi ko ashakishwa n'ubucamanza kubera icyo cyaha, cyangwa uzamuhungisha ngo adafatwa cyangwa ataboneka cyangwa uzamufasha mubyo kwihisha cyangwa gucika, azahanwa

nk'icyitso cy'icyaha gikulikiranywe. Iyo ngingo yateganyaga kandi ko abatabihanirwa ari uwashakanye na nyiri icyaha cy'ubugome cyangwa gikomeye, ababyeyi be, abavandimwe be cyangwa abo bashyingiranye kugarukira ku rwego rwa kane rukubiyemo. Iyo ngingo yaje guhindurwa n'Itegeko Ngenga N° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana mu ngingo yaryo ya 478. Iyo ngingo yagiraga iti: Mu bihe byateganyijwe mu ngingo ya 477¹⁶ y'iri tegeko ngenga, urukiko rushobora gusonera igihano cyari gikwiye abafitanye isano n'uwakoze icyaha, uwo bashyingiranywe, ababyeyi be cyangwa abo mu muryango we kugeza ku rwego rwa kane.

[30] Mu ivugurura ry'igitabo cy'amategeko ahana ryakozwe mu mwaka wa 2018, iyo ngingo ntiyahindutse cyane. Mu nyandiko Urukiko rwabonye, y'ikiganiro cyatanzwe n'umukozi wa Komisiyo ishinzwe ivugurura ry'amategeko ku mushinga w'Itegeko ryo mu 2018 riteganya ibyaha n'ibihano muri rusange rivugurura Itegeko Ngenga N° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana, basobanuraga ko igishya kiri mu mushinga ari uko uwashyingiranywe n'uwakoze icyaha adasonerwa buri gihe igihano iyo yabaye icyitso cy'uwo bashyingiranywe. Iyo nyandiko yavugaga ko asonerwa gusa iyo

¹⁶ Umuntu wese, uretse uwakoze icyaha cyangwa icyitso cyo:

1° uhisha abizi, ibintu cyangwa ibikoresho byakoreshejwe cyangwa byagenewe gukoreshwa icyaha cy'ubugome cyangwa icyaha gikomeye, kijyanye n'umudendezo w'igihugu, ibikoresho cyangwa inyandiko byabonetse bikomotse kuri bene icyo cyaha cy'ubugome cyangwa gikomeye; 2° ushwanyaguza, wiba, uhisha cyangwa uhindura nkana inyandiko zose zashoboye gufasha kugenzura icyaha cy'ubugome cyangwa gikomeye, gutahura ibimenyetso cyangwa guhana abakoze icyaha kijyanye n'umudendezo w'igihugu; ahanwa nk'uwakoze icyaha cyo guhisha nk'uko kivugwa mu ngingo ya 326 y'iri Tegeko Ngenga.

yabimuhishe (bagomba kuba barashatse kuvuga « yamuhishe »), yahishe ibyo yibye cg yononnye ibimenyetso byari gutuma hagenzwa icyaha cyakozwe n'uwo bashyingiranywe. Mu bindi bihe (utuma hakorwa icyaha akoresheje igihembo, utanga ibikoresho bigamije gukoreshwa icyaha, uwashishikarije gukora icyaha, utuma undi akora icyaha akoresheje imbwirwaruhame), uwashyingiranywe wabaye icyitso ntasonerwa. Ibikorwa inyandiko yavugaga ko byasonerwa ni nabyo bigaragara mu duce twa 5 d), 5 e) na 5 f) twavuzwe mu gika cya 2 cy'uru rubanza, tw'ingingo ya 2 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 ryavuzwe haruguru; ariko ingingo yakomeje kwandikwa nk'uko yari isanzwe imeze mu itegeko ryavuguruwe. Ibivugwa muri iyo

nyandiko bisa kandi n'ibigaragara mu mategeko ahana y'ibihugu bitandukanye nka Vanuatu¹⁷, Leta ya Nevada¹⁸, Cameroun¹⁹

¹⁷ Art.34. Accessory after the fact:

(1) An accessory after the fact shall mean a person who, knowing or having reasonable cause to suspect that another person has committed a criminal offence, shelters such person or his accomplice from arrest or investigation, or has possession of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence or used for the purpose of committing the offence.

(2) Subsection (1) shall have no application to any ascendant, descendant, sibling or the spouse of the person sheltered.

(3) An accessory after the fact shall be punished as a principal offender.

¹⁸ NRS 195.030 Accessories:

1. Every person who is not the spouse or domestic partner of the offender and who, after the commission of a felony, destroys or conceals, or aids in the destruction or concealment of, material evidence, or harbors or conceals such offender with intent that the offender may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony.

2. Every person who is not the spouse, domestic partner, brother or sister, parent or grandparent, child or grandchild of the offender, who, after the commission of a gross misdemeanor, harbors, conceals or aids such offender with intent that the offender may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a gross misdemeanor or is liable to arrest, is an accessory to the gross misdemeanor.....

¹⁹ SECTION 100: Accessory after the Fact:

(1) An accessory after the fact shall mean a person who after the commission of a felony or misdemeanour shelters an offender or his accessories from arrest or from Investigation, or who has custody of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence.

(2) This Section shall not apply as between husband and wife.

Urukiko rusanga, niba ibikubiye muri iyo nyandiko aribyo byari bigamijwe hashyirwaho igika cya kane cy'ingingo ya 84, byaragombaga kwandikwa ku buryo busobanutse.

[31] Urukiko ruratanga inama ko ingingo ya 84 igika cya 4 yakwandikwa neza ikagaragaza, mu buryo busobanutse, icyo umushingamategeko yari agamije ayishyiraho, igahuzwa n'ibiteganyijwe mu ngingo ya 29 agace ka 4 y'Itegeko Nshinga.

A.2. Kumenya niba kubuza kugabanya ibihano kubera impamvu nyoroshyacyaha nk'uko biteganyijwe mu ngingo ya 92 n'ingingo ya 133 igika cya 3 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganyira ibyaha n'ibihano muri rusange binyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga.

a. Ibisobanuro bitangwa na Kabasinga Florida

[32] Kabasinga Florida n'umwunganira bavuga ko ingingo ya 92 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganyira ibyaha n'ibihano muri rusange²⁰, n'ingingo ya 133 igika cya gatatu y'iryo Tegeko²¹, binyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga, kubera impamvu zikurikira:

a. Izo ngingo uko ari 2 zinyuranyije n'ingingo ya 29 kuko zituma umuntu uhanirwa icyaha cya Jenocide cyangwa cyo gusambanya umwana utarageza ku myaka 14 atabona ubutabera buboneye, mu gihe adashobora

²⁰ Umuntu wese ukoze kimwe mu bikorwa bivugwa mu ngingo ya 91 y'iri tegeko (iyi ngingo itanga igisobanuro cy'icyaha cya Jenocide) aba akoze icyaha. Iyo abihamijwe n'urukiko ahanishwa igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha.

²¹ Iyo gusambanya umwana byakorewe ku mwana uri muni y'imyaka cumi n'ine (14), igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha.

kugabanyirizwa igihano kabone n'ubwo haba hari impamvu nyoroshyacyaha.

b. Uwahamwe n'icyaha giteganyijwe n'imwe muri izo ngingo bimwima uburenganzira bwo kugabanyirizwa igihano mu gihe hari impamvu nyoroshyacyaha, ndetse bikamwima uburenganzira bwo kujuririra igihano gusa mu gihe yahamwe n'icyaha, bikaba rero bibangamiye uburenganzira bw'uregwa bwo guhabwa ubutabera buboneye, kuko butangirira mu iperereza, bukageza umuntu ahamwe n'icyaha agahabwa igihano.

c. Kuba umuntu yabuzwa kimwe mu bigize inzira zimaze kuvugwa, aba yimwe ubutabera n'itegeko ryagombaga kumurengera. Ibi bikaba byaremejwe n'Urukiko rw'Ikirenga rw'u Rwanda rwifashishije inyandiko z'abahanga ndetse n'ibyemezo by'inkiko zo mu bindi bihugu zasuzumye ikibazo gifitanye isano n'iki, aho rwagize ruti:” Urukiko rusanga mu manza nshinjabyaha, uburenganzira ku butabera buboneye butangirana n'ibikorwa by'iperereza, bugakomereza ku bikorwa by'ikurikiranacyaha, iby'iburanisha n'itangwa ry'ibihano ku byaha biteganyijwe n'amategeko ahana. Bivuze ko n'ibirebana n'isuzumwa ry'impamvu nyoroshyacyaha n'ibihano biri mu gice cy'iburanisha, nabyo bigomba kubahiriza amahame agize ubutabera buboneye kuri izo ngingo”.

d. Iyo urebye ingingo ya 49, igika cya mbere, y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganyira ibyaha n'ibihano muri rusange, usangamo ibyo umucamanza

akurikiza mu gutanga igihano²², ku buryo kunyuranya nabyo byaba ari ukunyuranya n'ibigize uburenganzira ku butabera buboneye mu itangwa ry'igihano.

e. Mu gusesengura ingingo ya 92 na 133 igika cya 3, usanga ububasha bw'umucamanza bugarukira gusa ku kureba niba uregwa ahamwa n'icyaha, kuko igihano cyo kiba giteganyijwe n'itegeko, ibi bikaba bivuguruzwa ingingo ya 49 iteganywa ibyho umucamanza ashingiraho atanga igihano. N'ubwo ibyaha bivugwa mu ngingo zombi ari ibyaha bikomeye kandi bikwiye koko guhanwa ku buryo bukomeye, ntihabura impamvu nyoroshyacyaha zatuma uwabikoze agabanyirizwa ibihano.

f. N'ubwo igihugu cyiyemeje gukumira no kurwanya Jenocide, icyo cyaha kiramutse kigaragaye ku munyarwanda cyangwa umunyamahanga, ubwe akishyikiriza ubutabera, cyangwa se mu gihe akurikiranywe agafasha inzego z'iperereza kumenya abacuze uwo mugambi batari bazwi, ntiyabura kugabanyirizwa igihano kubera umusanzu aba atanze mu butabera. Icyaha cya Jenocide gikorwa rwihishwa ku buryo kubona abatangabuhamya bigorana, umucamanza bikaba bitamworohera kumenya ukuri.

g. Ku bireba icyaha cyo gusambanya umwana uri muni y'imyaka 14, n'ubwo byumvikana ko ari icyaha abantu benshi bumva ko kitakwihanganirwa, n'umucamanza uca bene izo manza aba yumva uburemere bwazo, ku buryo bidakwiye gukuraho ko hashobora kubaho impamvu

²² Umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo.

zabanjirije icyaha, izagikurikiye cyangwa izagiherekeje, zagabanya ubukana bwacyo ku buryo uwagikoze yagabanyirizwa igihano mu bushishozi bw'Urukiko.

h. Izi ngingo ziniga kandi ubwisanzure bw'umucamanza bwo gushyira mu gaciro mu gihe cyo kugena igihano, zikanabangamira ubwigenge bwe mu guca imanza zitabera, kuko zimubuza kugereranya ibyatuma atanga igihano gito cyangwa kinini. Guha umucamanza igihe cyo gutekereza ku guhamya umuntu icyaha cyangwa kumugira umwere, ukamubuza gutekereza ku gihano gikwiranye n'ibikorwa byakozwe, ni ukumwambura ubwisanzure no kwambura ababuranyi uburyo bashyiriweho bwo kubona ubutabera buboneye.

i. Izi ngingo zinaburizamo ubwigenge bw'umucamanza buteganywa n'ingingo ya 4 n'iya 5 z'Itegeko n° 09/2004 ryo ku wa 29/04/2004 ryerekeye imyitwarire mu kazi k'ubucamanza²³. Ibi byashimangiwe n'Urukiko rw'Ikirenga mu rubanza RS/INCONST/SPEC 00003/2019/SC, mu gika cya 35, aho rwagize ruti: "Ihame ry'ubwigenge bw'umucamanza mu kazi ke, rijyana n'ihame ry'ubwigenge bw'Urwego rw'Ubucamanza. Rifatwa nk'ubwisanzure umucamanza afite bwo kuburanisha no guca imanza mu nzira n'uburyo biteganywa n'amategeko, akabikora nta gitutu icyo aricyo cyose cyaba icy'inzego za Leta, n'icy'abandi ».

²³ Umucamanza yigenga mu kazi ke. Asuzuma, mu bwisanzure, ibirego yashyikirijwe kandi akabifataho ibyemezo, atitaye ku bamushyiraho igitugu. Mu manza yaregewe, umucamanza agomba kwirinda ikintu cyose cyatuma afata ibyemezo byaba binyuranyije n'imiburanishirize yagenwe n'amategeko. Ategetswe guca urubanza akurikije amategeko.

j. Ubwigenge bw'umucamanza bwashobanuwe no mu rubanza R. v. Beauregard, rwaciwe n'Urukiko rw'Ikirenga rwa Canada, mu magambo akurikira: « *The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider, be it Government, pressure group, individual or even another judge should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision* ».

[33] Ashingiye ku mpamvu zimaze kuvugwa, Kabasinga Florida asaba Urukiko rw'Ikirenga kwemeza ko ingingo ya 92 n'ya 133 igika cya 3 zinyuranyije n'Itegeko Nshinga, rukanategeka ko zivanwaho.

b. Ibisobanuro bitangwa na Niyomugabo Ntakirutimana

[34] Niyomugabo Ntakirutimana n'abamuhagarariye basobanura ko kuba ingingo ya 133 igika cya 3 y'itegeko ryavuzwe haruguru iteganya igihano ntayegayezwa ku cyaha cyo gusambanya umwana utarageza ku myaka 14, kabone n'iyaha hari impamvu nyoroshyacyaha, byazatuma atabona ubutabera buboneye yemererwa n'Itegeko Nshinga mu ngingo yaryo ya 29 mu rubanza afite mu Rukiko rw'Ubujurire. Bavuga ko muri urwo rubanza akurikiranyweho icyaha cyo gusambanya umwana utarageza ku myaka 14, inkiko zikaba zidashobora kumugabanyiriza igihano kuko umucamanza azitiwe n'ingingo ya 133 igika cya 3.

[35] Niyomugabo Ntakirutimana n'abamuhagarariye bongeraho ko iyi ngingo ikwiye gukurwaho kuko idaha umucamanza ubwinyagamburiro bwo kuba yagabanya igihano,

ndetse ikaba inyuranye n'ihame ry'uko abantu bose bareshya imbere y'amategeko bakaba bagomba gufatwa kimwe. Ibindi bavuga bihura n'ibyagarutsweho na Kabasinga Florida.

c. icyo Intumwa za Leta zibivugaho

[36] Abahagarariye Leta y'u Rwanda bavuga ko basanga nta mpamvu yo kubyisobanuraho kuko Urukiko rw'Ikirenga rwabifasheho icyemezo mu rubanza RS/INCONST/SPEC 00003/2019/SC, mu bika byarwo bya 39²⁴ na 40²⁵, ndetse runatanga inama ku zindi ngingo zifite ikibazo kimwe ariko zitaregewe.

UKO URUKIKO RUBIBONA

[37] Urukiko rurasanga ikibazo gisa n'iki cyarasuzumwe mu rubanza RS/INCONST/SPEC00003/2019/SC rwaciwe ku wa 04/12/2019, mu kirego Kabasinga Florida yari yashyikirije uru Rukiko arusaba kwemeza ko ingingo ya 133, agace kayo ka 4 karebana no gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore, inyuranyije n'ingingo ya 29 n'iya 151 z'Itegeko Nshinga. Itandukaniro rihari gusa, ni uko ubu Kabasinga Florida na Niyomugabo Ntakirutimana baregera

²⁴ Igika cya 39 hashingiwe ku bisobanuro bitanzwe mu bika bibanziriza iki, ibiteganywa n'ingingo ya 133 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranye n'ingingo ya 151,5 y'Itegeko Nshinga iteganya ko abacamanza bakora umurimo wabo w'ubucamanza mu bwigenge, kuko babujijwe gushingira ku mpamvu nyoroshyacyaha batanga igihano gikwiye.

²⁵ Igika cya 40: hari izindi ngingo ziteganywa ibihano bidashobora kugabanywa, Urukiko rukaba nta cyemezo rwazifataho kuko zitaregewe. Leta yazisuzuma ikareba niba zidakwiye guhindurwa kugirango zihuzwe n'ibivugwa muri uru rubanza.

ingingo ya 133 igika cya 3, n'ingingo ya 92 ku bireba Kabasinga Florida, ariko ibibazo bagaragaza ni bimwe, aribyo kuba izo ngingo zinyuranyije n'amahame y'uburenganzira ku butabera buboneye, n'ubwigenge bw'umucamanza mu kugena igihano.

[38] Muri urwo rubanza, Urukiko rwasanze ibiteganywa n'ingingo ya 133 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranye na rimwe mu mahame agize uburenganzira ku butabera buboneye rivuga ko umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo, rwemeza ko inyuranye n'ingingo ya 29 y'Itegeko Nshinga.

[39] Urukiko rwasanze kandi, ibiteganywa n'ingingo ya 133 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranyije n'ingingo ya 151(5°) y'Itegeko Nshinga iteganya ko abacamanza bakora umurimo wabo w'ubucamanza mu bwigenge, kuko babujijwe gushingira ku mpamvu nyoroshyacyaha batanga igihano gikwiye.

[40] Mu gika cya 40 cy'urwo rubanza, Urukiko rwagaragaje ko hari izindi ngingo ziteganywa ibihano bidashobora kugabanywa, ariko rukaba ntacyo rwazivugaho kuko zitaregewe; rutanga inama ko Leta yazisuzuma, zigahindurwa kugira ngo zihuzwe n'ibivugwa muri urwo rubanza. Uru Rukiko rurasanga ingingo ya 92 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018, igice

cyayo kigira kiti “kidashobora kugabanywa kubera impamvu nyoroshyacyaha”; n’ingingo ya 133 igika cya 3, agace kavuga ko iyo gusambanya umwana byakorewe ku mwana uri muni y’imyaka cumi n’ine (14), igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, ziri mu zivugwa mu gika cya 40 cy’urubanza RS/INCONST/SPEC 00003/2019/SC. Urukiko rusanga rero, uduce tw’izo ngingo tumaze kuvugwa, natwo tunyuranyije n’amahame y’uburenganzira ku butabera buboneye n’ubwigenge bw’umucamanza mu kugena igihano, hashingiwe ku bisobanuro byatanzwe mu rubanza RS/INCONST/SPEC 00003/2019/SC bitari ngombwa kugarukaho kuko ikibazo kivugwaho ari kimwe, bityo tukaba tunyuranyije n’ingingo ya 29, n’iya 151 z’Itegeko Nshinga.

[41] Urukiko ruributsa inama yari yatanzwe mu rubanza RS/INCONST/SPEC 00003/2019/SC rwaciwe ku wa 04/12/2019, ivuga ko izindi ngingo ziteganywa ibihano bidashobora kugabanywa, Urukiko rutagize icyo ruvugaho kuko zitaregewe, Leta yazisuzuma zigahindurwa kugira ngo zihuzwe n’ibivugwa muri urwo rubanza.

A.3. Kumenya niba ibivugwa mu ngingo ya 271 y’Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n’ibihano muri rusange ko “Umuntu wese uhimba, ukoresha cyangwa ukwirakwiza mu buryo ubwo ari bwo bwose impapuro zivunjwamo amafaranga, aba akoze icyaha”, binyuranyije n’ingingo ya 29 y’Itegeko Nshinga

a. Ibisobanuro bitangwa na Kabasinga Florida

[42] KABASINGA Florida n'umwunganira batanga ibisobanuro bikurikira:

a. Ingingo ya 271²⁶ y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, ifite ibikorwa bitatu kandi buri cyose kikaba kigize icyaha ukwacyo. Ibyo bikorwa ni uguhimba impapuro mvunjwafaranga, gukoresha impapuro mvunjwafaranga, no gukwirakwiza impapuro mvunjwafaranga.

b. Igikorwa cya mbere kigize icyaha cyo guhimba impapuro mvunjwafaranga nta kibazo giteye kuko guhimba inyandiko iyo ari yo yose ari icyaha. Ibikorwa bindi bibiri nibyo byanditse mu buryo bubangamira Itegeko Nshinga, kuko gukoresha gusa impapuro mvunjwafaranga atari icyaha. Umushingamategeko akaba yaragombaga gutandukanya abakoresha impapuro mvunjwafaranga zihimbye kandi babizi, n'abazikoresha mu buryo bwemewe n'amategeko.

c. Imyandikire y'iyi ngingo isa n'ibuza ikoreshwa ry'impapuro mvunjwafaranga mu Rwanda, ndetse n'ikwirakwiza ryazo, hakaba hakwiye gutandukanywa uwazikwirakwije mu buryo bunyuranyije n'amategeko n'uwabikoze mu nyungu z'ikigo akorera. Mu bikorwa bigize iki cyaha kandi, haburamo ubushake bwo gukora icyaha (*intention de nuire*). Inyandiko zitandukanye z'abahanga mu mategeko zigaragaza ko kugira ngo

²⁶ “Umuntu wese uhimba, ukoresha cyangwa ukwirakwiza mu buryo ubwo ari bwo bwose impapuro zivunjwamo amafaranga, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari muni y'imyaka itatu (3) ariko kitarenze imyaka itanu (5) n'ihazabu y'amafaranga y'u Rwanda yikubye inshuro kuva kuri ebyiri (2) kugeza ku icumi (10) z'agaciro k'amafaranga y'amahimbano”.

habeho icyaha, uwagikoze agomba kuba yagize umutima mubi wo kwangiza cyangwa gukora ibikorwa bitemewe, bigamije kubuza umudendezo sosiyete, azi neza ko icyo akoze gifite ingaruka mbi ku wo gikorewe, ari byo byitwa *dol spécial*.

d. Hashingiwe ku ngingo ya 2, agace ka mbere, y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ryavuzwe haruguru, mu gutanga inyito y'icyaha umushingamategeko aba akwiye kugaragaza igikorwa avuga ko kigize icyaha. Iyo ngingo ivuga ko icyaha ari igikorwa kibujijwe n'itegeko, cyangwa kwanga gukora igitegetswe ku buryo bihungabanya umutekano w'abantu.

e. Ingingo ya 271 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ibangamiye ingingo ya 29 y'Itegeko Nshinga, kuko urukiko rutatanga ubutabera buboneye mu gihe ibikorwa bigize icyaha bitagaragaza icyo bibangamiyeho sosiyete.

[43] Ashingiwe ku mpamvu zimaze kuvugwa, Kabasinga Florida asaba Urukiko kwemeza ko ingingo ya 271 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ritaganyira ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 29 y'Itegeko Nshinga, ikaba yakurwa mu mategeko y'u Rwanda cyangwa ikandikwa ukundi.

b. Icyo Intumwa za Leta zibivugaho

[44] Abahagarariye Leta y'u Rwanda bavuga ko nta kibazo kiri mu myandikire y'ingingo ya 271 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 kubera impamvu zikurikira:

a. Guhimba impapuro mvunjwafaranga, gukoresha izo mpapuro mvunjwafaranga zahimbwe, no gukwirakwiza izo mpapuro mvunjwafaranga zahimbwe mu buryo ubwo

aribwo bwose, biba bigize icyaha. Impapuro mvunjwafaranga zifite uburyo zikoreshwamo bwemewe n'amategeko, kunyuranya nabyo akaba aribyo bigize icyaha giteganywa n'ingingo ya 271 y'Itegeko ryavuzwe haruguru. Gukoresha impapuro mvunjwafaranga no kuzikwirakwiza mu buryo buteganywa n'itegeko, bikaba bitashyirwa mu itegeko riteganywa ibyaha n'ibihano.

b. Ingingo ya 48 y'Itegeko n° 48/2017 ryo ku wa 23/09/2017 rigenga Banki Nkuru y'u Rwanda, iteganywa ko iyi Banki ariyo ifasha mu gukora no gushyira ku isoko inyandiko mvunjwafaranga za Leta, bikaba bidakorwa n'umuntu ku giti cye. Iyo hagize ubikora aba akoze icyaha kibangamiye sosiyete nyarwanda nk'uko biteganywa mu ngingo ya 271 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange.

c. Kuvuga ko iyo ngingo inyuranyije n'ingingo ya 29 y'Itegeko Nshinga sibyo, kuko ibigize icyaha aribyo kuba icyaha cyagambiriwe, cyashyizwe mu bikorwa kandi gihanwa n'amategeko, bigomba kuba byuzuye kugirango umuntu afatwe nk'uwakoze icyaha. Kuvuga rero ko mu bigize icyaha giteganywa n'ingingo ya 271 yavuzwe haruguru, haburamo ubushake, sibyo kuko ujya guhimba, gukoresha cyangwa gukwirakwiza impapuro mvunjwafaranga, aba yabigambiriye akanabishyira mu bikorwa.

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[45] Interuro ya mbere y'Ingingo ya 271 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 igira iti: umuntu wese uhimba, ukoresha

cyangwa ukwirakwiza mu buryo ubwo ari bwo bwose impapuro zivunjwamo amafaranga, aba akoze icyaha.

[46] Kabasinga Florida avuga ko iyo usomye iyi ngingo, usanga umushingamategeko ataratandukanyije abakoresha impapuro mvunjwafaranga zihimbye kandi babizi, n'abazikoresha mu buryo bwemewe n'amategeko.

[47] Iyi ngingo iboneka mu cyiciro cya mbere cy'umutwe wa kane w'Itegeko n° 68/2018 ryo ku wa 30/08/2018, cyitwa kwigana no guhindura ibimenyetso by'amafaranga. Inyito y'umutwe wa kane ni ibyaha bihungabanya ubwizere bw'igihugu, naho inyito y'ingingo ya 271 ikaba guhimba impapuro zivunjwamo amafaranga, kuzikoresha cyangwa kuzikwirakwiza. Ibi bihujwe n'ibikubiye mu nteruro ya mbere y'ingingo ya 271, birumvikanisha ko icyo umushingamategeko yashatse guhana, ari icyaha cyo guhimba impapuro zivunjwamo amafaranga, ugakoresha cyangwa ugakwirakwiza izo mpapuro zivunjwamo amafaranga zahimbwe. Koko rero, ntabwo umushingamategeko yari guteganya mu bikorwa bihanwa, igikorwa cyo gukoresha no gukwirakwiza impapuro zivunjwamo amafaranga, zakozwe mu buryo bwubahirije amategeko.

[48] Urukiko rwarebye uko ingingo zihana icyaha gisa n'iki mu bindi bihugu zanditse, rusanga hari amategeko agaragaza mu buryo butomoye ko hahanwa guhimba impapuro zivunjwamo amafaranga, gukoresha no gukwirakwiza izo mpapuro zivunjwamo amafaranga zahimbwe. Ibyo bihugu ni nka

Burkinafaso²⁷, Gabon²⁸, Sénégal²⁹, Cote d'ivoire³⁰(muri ibi Bihugu byose, hari ingingo ihana uhimba, hakaba n'indi yihariye ihana ukoresha cyangwa ukwirakwiza ibyahimbwe ari nayo yerekanywe hano).

[49] Urukiko rurasanga ikibazo kigaragazwa na Kabasinga Florida ku bijyanye n'ingingo ya 271 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, kidakwiye gushakirwa mu kuba yaba inyuranyije n'Itegeko Nshinga, ahubwo cyaba ari ikibazo cy'imyandikire ishobora kunozwa kugira ngo yumvikane kurushaho. Urukiko rukaba rusanga rero, iyi ngingo itanyuranyije n'ingingo ya 29 y'Itegeko Nshinga. Urukiko ruratanga ahubwo inama ko mu gihe cyo

²⁷ Article 253, al 1 code pénal de 1996:

Est puni des peines prévues aux articles 250, 251 et 252, selon les distinctions qui y sont portées, quiconque participe à l'émission, l'utilisation, l'exposition, la distribution, l'importation de signes monétaires contrefaits, falsifiés, altérés ou colorés ».

²⁸ Art. 230 code pénal de 2019:

« Quiconque aura contrefait, falsifié, altéré ou détruit des billets de banque ou pièces de monnaie ayant cours légal au Gabon, ou participé à l'émission ou à l'exposition desdites pièces ou billets contrefaits, falsifiés ou altérés ou à leur introduction sur le territoire gabonais, sera puni de la réclusion criminelle à perpétuité ».

²⁹ Article 120, al. 1 code penal de 1965:

« Quiconque aura participé à l'émission, l'utilisation, l'exposition, la distribution, l'importation ou l'exportation de signes monétaires contrefaits, falsifiés, altérés ou colorés sera puni des peines prévues aux articles ci-dessus, selon les distinctions qui y sont portées ».

³⁰ Article 293-2, al. 1 code penal de 1981:

Est passible des peines prévues ci-dessus selon les distinctions susvisées, celui qui participe à l'émission, l'utilisation, l'exposition, la distribution, l'importation ou l'exportation des signes monétaires contrefaits, falsifiés, altérés ou colorés ».

kuvugurura itegeko, iyi ngingo yakwandikwa mu buryo bwumvikana kurushaho ku bayikoresha.

B. Ingingo Kabasinga Florida avuga ko ibangamiye ihame ry'ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru

a. Kumenya niba ingingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 38 y'Itegeko Nshinga

a. Ibisobanuro bitangwa na Kabasinga Florida

[50] Kabasinga Florida n'umwunganira bavuga ko ingingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'Itegeko Nshinga bashingiye ku mpamvu zikurikira:

a. Ibigize icyaha kivugwa mu ngingo ya 256 ni ugutangaza ibitekerezo ugamije kuyobya umucamanza cyangwa umutangabuhamya, ariko iyo ngingo ntisobanura aho ibyo bitekerezo bitangarizwa. Ntibisobanutse niba bigomba gutangazwa imbere mu rubanza, nyamara ibyo umucamanza ashingiraho aca urubanza ari ibintu bidatangazwa na rubanda, umuntu ku giti cye cyangwa ibitangazamakuru, kuko ashingira ku nyandiko n'ibindi bimenyetso afite muri dosiye. Mu mahame ashingirwaho mu guca imanza, umucamanza aca urubanza adashingiye ku byo aruziho, yaba ibyo yasomye cyangwa yumvise bitangazwa, ibyo bigashimangira ko adashobora kuyobya n'ibyatangajwe mu buryo ubwo ari bwo bwose bitavugiye mu iburanisha.

b. Ingingo ya 151(5) y'Itegeko Nshinga iteganya ko abacamanza bakurikiza itegeko kandi bakora umurimo wabo mu bwigenge, batavugirwamo n'ubutegets cyangwa ubuyobozi ubwo ari bwo bwose. Kuba Itegeko Nshinga riteganya ko umucamanza atavugirwamo n'ubutegets cyangwa ubuyobozi, byumvikana ko n'umuturage atamuvugiramo.

c. Ku bijyanye no kuba ibyatangajwe byayobya umutangabuhamya, ntibyashoboka harebwe igisobanuro cy'ubuhamya giteganyijwe n'ingingo ya 62 y'Itegeko n° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo. Iyo ngingo iteganya ko ubuhamya ari ibivugwa mu rukiko n'umuntu wabibonye cyangwa wabyumvise ubwe ku byerekeye ikiburanwa. Niba rero ubuhamya ari ibyo umuntu yibonye cyangwa yiyumviye ubwe, umushingamategeko ntakwiye guterwa impungenge n'uko hari umuntu uzumva ibintu bitangazwa na rubanda cyangwa na radio ngo abikoreshe mu butabera nk'ubuhamya.

d. Kubuza abantu kugira ibyo batangaza mu itangazamakuru cyangwa mu biganiri bitewe n'uko bumva ibyabaye, byaba bibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buteganyijwe mu ngingo ya 38 y'Itegeko Nshinga.

e. Ingingo ya 256 y'Itegeko ryavuzwe haruguru ikumira buri muntu kuvuga cyangwa gutanga igitekerezo cye ku gikorwa cyabaye, mu gihe kiri gukurikiranwa mu nkiko, kugira ngo bitazitwa ko yari agamije kuyobya umucamanza, kandi nyamara uwo mucamanza ari we ukwiye kwirinda gutwarwa cyangwa gushingira ku byo

yumvise ahandi hatari mu iburanisha cyangwa muri dosiye.

f. Iyi ngingo ibangamira n'itangazamakuru kuko ibikorwa byinshi bigize ibyaha cyangwa se bikurikiranwa mu nkiko bikunze kwandikwaho n'itangazamakuru. Umunyamakuru watangaza inkuru ku kibazo kiri mu nkiko, ashobora kutagira ubwisanzure buhagije mu gihe nta buryo bwo kumenya ibyitwa ko biyobya umucamanza cyangwa umutangabuhamya.

g. Iyi ngingo yatuma kandi abayobozi ndetse n'inzego z'umutekano zirinda gutanga ibiganiro bifite aho bihuriye n'ibikorwa bishobora gukurikiranwa mu nkiko, ndetse bishobora no kubuza abakorera abandi ubuvugizi gutangaza ndetse no kugaragaza uko bumva ibintu kugira ngo bitazitwa ko bari bagamije kuyobya umucamanza cyangwa abatangabuhamya.

h. Kuba umutururwanda yatangaza uko atekereza ibintu bifite aho bihuriye n'ibibazo biri mu nkiko, ndetse n'itangazamakuru uko ryabitangaza kose, ntibyatumye umucamanza cyangwa umutangabuhamya bahindura umurongo bakwiye gufata ku mwanzuro batanga cyangwa ku buhamya batanga, kandi si ngombwa ko ibyatangajwe n'abandi bantu bihura n'icyemezo cy'urukiko cyangwa n'ubuhamya butangwa. Urega atanga urugero ku rubanza rwatambutse mu itangazamakuru, n'abantu bakarutangaho ibitekerezo bitandukanye, aho ibitangazamakuru byavugaga ko itsinda ry'abakobwa bakubise mugenzi wabo, bagamije kumwica, bakanamwangiza imyanya ndangagitsina. Nyamara mu rubanza hakaba nta na hamwe byagaragaye ko uwo mukobwa yangijwe imyanya ndangagitsina.

[51] Kabasinga Florida n'umwunganira bavuga ko bashingiye ku mpamvu zavuzwe haruguru, basanga ingingo ya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 38 y'Itegeko Nshinga, bakaba basaba Urukiko ko yakurwa mu mategeko ahana ibyaha mu Rwanda.

b. icyo Intumwa za Leta zibivugaho

[52] Abahagarariye Leta y'u Rwanda bavuga ko ingingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 idateye impungenge, kuko utangaje inkuru ku rubanza ruri mu rukiko ariko rutaracibwa adafatwa nk'ushaka kuyobya, keretse bigaragajwe n'inzego zishinzwe kugenza ibyaha ko aribyo yari agamije.

[53] Bavuga ko ntaho iyo ngingo inyuranyije n'ingingo ya 38 y'Itegeko Nshinga, kuko itavuga abanyamakuru, kandi nabo bakaba basanzwe bagaragaza ibitekerezo byabo ku manza zikiburanishwa ntibakurikiranweho icyaha cyo gushaka kuyobya umutangabuhamya cyangwa umucamanza, kuko biba bigaragara ko ataricyo kigamijwe. Urugero rw'urubanza rw'itsinda ry'abakobwa bakubise mugenzi wabo hagatangazwa ibintu byinshi mu itangazamakuru bitagira aho bihuriye n'ukuri, rugaragaza ko ingingo ya 256 yavuzwe itanyuranyije n'iya 38 y'Itegeko Nshinga kuko ibitari ukuri abanyamakuru batangaje, bitafashwe nko kuyobya umucamanza cyangwa abatangabuhamya mu gihe atari cyo cyari kigamijwe hatangazwa izo nkuru.

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[54] Ingingo ya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko umuntu wese utangaza ibitekerezo agamije kuyobya abatangabuhamya cyangwa icyemezo cy'umucamanza mbere y'uko urubanza rucibwa, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kuva ku mwaka umwe (1) kugeza ku myaka ibiri (2) n'ihazabu y'amafaranga y'u Rwanda kuva kuri miliyoni imwe (1.000.000 FRW) kugeza kuri miliyoni ebyiri (2.000.000 FRW).

[55] Icyaha giteganyijwe mu ngingo imaze kuvugwa, kiri mu byaha bivugwa mu cyiciro cya 5 cy'umutwe wa 3 w'Itegeko N° 68/2018 ryo ku wa 30/08/2018, cyerekeye gutambamira imigendekere myiza y'ubutabera. Ibyaha bigamije gutambamira imigendekere myiza y'ubutabera bihabwa inyito zitandukanye bitewe n'ibihugu. Mu bihugu bikoresha common law³¹, hari ibyo bita *contempt of court* bigaragara mu mategeko y'u Rwanda

³¹ In common law jurisdictions, contempt of court has traditionally been classified as either in facie curiae (in front of the court) or ex facie curiae (outside the court). Examples include yelling in the court room, publishing matters which may prejudice the right to a fair trial ("trial by media"), or criticisms of courts or judges which may undermine public confidence in the judicial system ("scandalizing the court")

The common law doctrine of contempt of court does not exist in civil law jurisdictions in such a broad, encompassing sense, but there are undoubtedly functional equivalents, particularly in matters relating to freedom of expression; Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, London, United Kingdom, 29-30 November 2000, p 1-2 (<https://www.article19.org/data/files/pdfs/publications/freedom-of-expression-and-internet-regulation.pdf>).

n'ubwo byose bidahabwa iryo zina, bisobanurwa mu byiciro bitatu bukurikira:

a. Ibyaha bikorewe mu rukiko, birimo imyitwarire ituma iburanisha ritagenda neza, bikabangamira imigendekere myiza y'ubutabera. [*contempt in the face of the court (contempt in facie curiae), which comprises conduct that deliberately disrupts or obstructs court proceedings and is prejudicial to the course of justice*)]³². Ibi byafatwa nk'ibyaha bibereye mu iburanisha (délits d'audience) bivugwa mu ngingo ya 80 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu.

b. Ibyaha byo gutesha agaciro urukiko, gutangaza ibintu bitari byo ku rukiko cyangwa ku mucamanza bishobora gutuma abantu batera icyizere urwego rw'ubucamanza (scandalizing the court, making or publishing untrue allegations about a court or judge that would undermine public confidence in the judiciary)³³. Bene ibi byaha biboneka mu Itegeko n° 68/2018 ryo ku wa 30/08/2018, mu cyiciro cy'ibyaha byitwa gutesha agaciro ubutabera no gusagarira abakora mu nzego z'ubutabera.

c. Ibyaha byo kwivanga mu migendekere myiza y'ubutabera, hakoreshejwe gutangaza ibirebana n'urubanza rukiburanishwa mbere y'uko ricibwa (*sub*

³² Law Reform Commission of Ireland, Contempt of Court and other Offences and Torts Involving the Administration of Justice, 2016, p. 11 (<https://www.lawreform.ie/news/issues-paper-on-contempt-of-court-and-other-offences-and-torts-involving-the-administration-of-justice.644.html>)

³³ Law Reform Commission of Ireland, Contempt of Court and Other Offences and Torts Involving the Administration of Justice, op. cit, p. 11.

*judice contempt*³⁴, publishing prejudicial material about pending court proceedings that would interfere with the administration of justice³⁵). Ibiteganyijwe mu ngingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018, bihura n'ibivugwa muri iki cyiciro.

[56] Nyuma y'ibi bisobanuro rusange, Urukiko rurasuzuma niba ibivugwa mu ngingo ya 256 yavuzwe haruguru bibangamiye ihame ry' ubwisanzure bwo gutangaza ibitekerezo riteganyijwe mu ngingo ya 38 y'Itegeko Nshinga. Iyi ngingo igira iti: ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buremewe kandi bwubahirizwa na Leta. Ubwisanzure bwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ntibugomba kubangamira ituze rusange rya rubanda n'imyifatire mbonezabupfura, ukurengera urubyiruko n'abana, n'uburenganzira bw'umwenehugu bwo kugira icyubahiro n'agaciro, ubwo kutagira uwivanga mu mibereho ye bwite n'iy'umuryango we. Uko ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo biteganywa n'amategeko.

[57] Muri urwo rwego, hifashishijwe inyandiko zinyuranye, hararebwa niba ihame ry'ubwisanzure bwo gutangaza ibitekerezo ari ihame ndakuka (*absolu*), cyangwa niba ari ihame rifite imbibi rigarukiraho (limitations), izo arizo n'uburyo zisobanurwa n'izindi nkiko kimwe n'abahanga mu mategeko, hanyuma hasuzumwe niba ibiteganyijwe mu ngingo ya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 birebwa cyangwa bitarebwa n'izo mbibi.

³⁴ Sub *judice contempt*”, or contempt in connection with pending proceedings, relates to publications concerning pending proceedings that are intended to interfere with the administration of justice”; *Ibid.*, p. 11.

³⁵*Ibid.*, p. 11.

[58] Ihame ry'ubwisanzure bwo gutangaza ibitekerezo ryagiye rigarukwaho n'amasezerano mpuzamahanga anyuranye u Rwanda rwashyizeho umukono akinjizwa mu rwego rw'amategeko Iguhugu kigenderaho, by'umwihariko Amasezerano mpuzamahanga yerekeye uburenganzira mu by'imbonezamubano no mu bya politiki, mu ngingo yayo ya 19³⁶.

[59] Nk'uko bigaragara mu ngingo ya 38 y'Itegeko Nshinga kimwe no mu ngingo ya 19 y'Amasezerano mpuzamahanga yerekeye uburenganzira mu by'imbonezamubano no mu bya politiki, ubwisanzure bwo gutangaza ibitekerezo si ihame ndakuka; rifite imbibi. Ingingo ya 38 y'Itegeko Nshinga igaragaza uburenganzira iryo hame ritagomba kubangamira, ikongeraho ko uburyo ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo bigenwa n'amategeko. Ingingo ya 19,3 y'Amasezerano mpuzamahanga yerekeye uburenganzira mu by'imbonezamubano no mu bya politiki, iteganya ko ubwisanzure bwo gutangaza ibitekerezo bugira ibyo bugomba kubahiriza, bukaba bugomba kugira aho bugarukira mu buryo

³⁶ Art. 19:

1. Nul ne peut être inquiété pour ses opinions.
 2. Toute personne a droit à la liberté d'expression; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix.
 3. L'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut en conséquence être soumis à certaines restrictions qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires:
 - a) Au respect des droits ou de la réputation d'autrui;
- A la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publique.

buteganywa n'itegeko kandi buri ngombwa mu rwego rwo kubahiriza uburenganzira bw'abandi.

[60] Hakurikijwe aya masezerano mpuzamahanga, kugabanya ubwisanzure bwo gutangaza ibitekerezo bigomba kuba biteganyijwe n'itegeko, bikaba bigamije imwe mu mpamvu zifite ireme zivugwa mu mu ngingo ya 19 (3), kandi biri ngombwa mu rwego rwo kurengera iyo mpamvu (*Under the ICCPR, restrictions must meet a strict three-part test*³⁷. *First, the interference must be provided for by law. Second, the interference must pursue one of the legitimate aims listed in Article 19 (3). Third, the interference must be necessary to secure that aim*). Ibi byanagarutsweho mu mahame ya SIRACUSA yerekeye imbibi n'irengayobora ku biteganyijwe mu masezerano mpuzamahanga yerekeye uburenganzira mu by'imbenezamubano no mu bya politiki, mu ngingo yayo ya 10 (*Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation..... pursues a legitimate aim, and is proportionate to that aim*)³⁸

[61] Mu burenganzira bw'abandi buvugwa mu ngingo ya 19, 3 (a) nk'imwe mu mpamvu zifite ireme ishobora gutuma habaho gushyira imbibi ku bwisanzure bwo gutangaza ibitekerezo, humvikanamo uburenganzira ku butabera buboneye, burimo n'uburenganzira ku rubanza ruboneye (*The "rights of others" referred to in Article 19(3) (a) undoubtedly includes rights linked*

³⁷ See *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, N°.458/1991, para. 9.7.

³⁸ Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, op. cit., p. 3.

*to the administration of justice, such as the right to a fair trial and the presumption of innocence)*³⁹.

[62] Ibijyanye n'imbibi zishyirwa ku bwisanzure bwo gutangaza ibitekerezo mu rwego rwo kurengera uburenganzira ku butabera buboneye, byagiye bisobanurwa n'izindi nkiko mu buryo bukurikira:

a. Mu rubanza Cullen v. Toibin rwaciwe n'Urukiko rw'Ikirenga rwo muri Ireland, hemejwe ko uburenganzira bwo gutangaza ibitekerezo buteganywa n'Itegeko Nshinga ry'icyo Gihugu, butari ndakuka. Bukaba bushobora kutubahirizwa mu rwego rwo kurengera uburenganzira ku butabera buboneye. Urwo rubanza rusobanura kandi ko inkuru zitangajwe mu gihe urubanza rukirimo kuburanishwa, zishobora kubangamira uburenganzira ku rubanza ruboneye; kubera iyo mpamvu, bikaba byaba ngombwa kugabanya ubwisanzure bwo gutangaza ibitekerezo hagamijwe kurengera uburenganzira ku rubanza ruboneye no kwimakaza ubutabera buboneye (*The right to freedom of expression is also protected by Article 40.6.1° of the Constitution of Ireland. This right is not absolute, however, and is subject to limitation. For example, the right may be restricted so as to uphold the right to a fair trial of an accused person and to protect the administration of justice. In cases where a prejudicial publication has been made, this clearly has the potential to impede an accused person's right to a fair trial. Therefore, it may be necessary to*

³⁹ SIRACUSA Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

*restrict the right to freedom of expression so as to protect the right to a fair trial and to maintain the administration of justice. Freedom of the press can, however, only be restricted where this is necessary for the administration of justice)*⁴⁰

b. Mu rubanza Kelly v O'Neill⁴¹ rwaciwe n'Urukiko rw'Ikirenga rwa Ireland, Urukiko rwasobanuye ko ubwisanzure bwo gutangaza ibitekerezo atari ndakuka, ko bushobora gushyirwaho imbibi mu manza zirebana no kubangamira imigendekere myiza y'ubutabera (*the court stated that the protection of freedom of expression is not absolute and may,, be subject to limitation in line with public order and the common good, which applies to cases concerning contempt*).

c. Na none mu rubanza DPP v Independent Newspapers (Irl) Ltd,⁴² rwaciwe n'urwo Rukiko, hasobanuwe ko mu manza zirebana n'ibyaha byo kwivanga mu migendekere myiza y'ubutabera, ikibazo ari ukumenya niba ibyatangajwe byari bigamije kwivanga mu migendekere myiza y'ubutabera, cyangwa gutuma abantu bakeka ko habaye kwivanga (*the Supreme Court (Dunne J) explained that the test for sub judice contempt is whether the material published was intended to interfere with the administration of justice, or created the perception of such interference*). Naho mu rubanza *Attorney-General for England and Wales v Times Newspapers Ltd* rwaciwe n'Urukiko rw'Ubujurire mu Bwongereza, hasobanuwe ko

⁴⁰ Cullen v Toibín [1984] ILRM 577 at 582, referred to in Contempt of Court and Other Offences and Torts involving the Administration of Justice, op. cit., p. 53.

⁴¹ 1999] IESC 81, [2000] 1 IR 354, at 374.

⁴² [2005] IEHC 353, [2006] 1 IR 366, at paragraph 34.

imanza zirebana n'ibyaha byo kwivanga mu migendekere myiza y'ubutabera, ari uburyo bwo gukumira imanza ziciriwe mu itangazamakuru; itangazamakuru rikaba ritagomba kuvuga ku manza zikiburanishwa mu buryo bushobora kuyobya abatangabuhamyi cyangwa abaca imanza (*Sub judice contempt developed as another means to protect the administration of justice, by preventing a "trial by media". The media should not attempt to "prejudge" the issues in a certain case in a way that would influence would-be witnesses or jurors*)⁴³.

d. Mu rubanza *Worm v. Austria*⁴⁴, Urukiko rw'Umuryango w'Ubumwe bw'u Burayi ku bijyanye n'uburenganzira bwa muntu, rwasobanuye ko kutubahiriza ubwisanzure bwo gutangaza amakuru byari ngombwa mu rwego rwo kurengera uburenganzira ku butabera buboneye, no kwimakaza icyizere rubanda bagomba kugira mu migendekere y'ubutabera (*the interference with freedom of expression was "necessary in a democratic society" in order to protect the right to a fair trial and to maintain public confidence in the administration of justice.....*).

e. Mu rubanza *Sunday Times v. United Kingdom*⁴⁵. Urukiko rw'Umuryango w'Ubumwe bw'u Burayi ku bijyanye n'uburenganzira bwa muntu rwasobanuye kandi ko, mu gihe ibibazo biri mu rubanza bivuzwe mu buryo bugamije gutuma abantu babyifatiraho umwanzuro mbere

⁴³ Attorney-General for England and Wales v Times Newspapers Ltd [1974] AC 273 at 300; referred to in Contempt of Court and Other Offences and Torts involving the Administration of Justice, op. cit, p. 52.

⁴⁴ 29 August 1997, Application 22714/93, 25 EHRR 454, par.50.

⁴⁵The Sunday Times v. United Kingdom, 26 April 1979, Series A No. 30, 14 EHRR 229, par. 63.

y'uko urubanza rucibwa, bishobora gutuma batakaza icyizere bafitiye inkiko (*If the issues arising in litigation are ventilated in such a way to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts*).

f. Urukiko rw'Uburujire rwa New Zealand, mu rubanza Gisborne Herald Co. Ltd. v. Solicitor General⁴⁶, rwasobanuye ko igihe ubwisanzure bwo gutangaza ibitekerezo n'uburenganzira ku rubanza ruboneye bidashobora kubahirizwa byombi, igikwiye ari ukuba hagabanyijwe ubwisanzure bwo gutangaza ibitekerezo kugirango hashobore kubaho urubanza ruboneye (...*The present rule is that, where on conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial*).

g. Urukiko rw'Ikirenga rwa Canada, rwasobanuye ko icyemezo cyo kubuza gutangaza inkuru gishobora gufatwa iyo ari ngombwa mu rwego rwo gukumira ko habaho kubangamira mu buryo bugaragara kandi bukomeye imigendekere myiza y'urubanza, kandi icyo cyemezo kikaba kiri buramire ibirenze ingaruka cyagira ku bo gifatiwe (... *A publication ban should only be ordered when:*

(a) Such ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because

⁴⁶ [1995] 3 NZLR 563; referred to in Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, o. cit., p. 10.

reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to freedom of expression of those affected by the ban)⁴⁷.

h. Muri Leta Zunze Ubumwe z'Amerika, ububasha bwo guhana icyaha cyo kwivanga mu migendekere myiza y'ubutabera hakoreshejwe gutangaza ibitekerezo bukoreshwa gake cyane. Umurongo rusange ni uko icyo cyaha gihanwa igihe hari impungenge ko habaho kubangamira mu buryo bugaragara kandi bukomeye imigendekere myiza y'ubutabera (*the power of the courts to punish for contempt by publication is extremely limited. The general rule is that a publication cannot be punished for contempt unless there is a "clear and present danger" to the administration of justice⁴⁸. The test requires that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished)*⁴⁹.

Uretse muri Leta Zunze Ubumwe z'Amerika na Canada, hari ibindi Bihugu byemeje ko kugirango habeho gukurikirana icyaha cyo kwivanga mu migendekere myiza y'ubutabera, ibyatangajwe bigomba kuba bibangamiye mu buryo bugaragara kandi bukomeye imigendekere y'urubanza. Ibyo ni nka England and Wales

⁴⁷ Dagenais v. Canadian Broadcasting Corp., N° 23403, 1994: January 24, 1994, December 8, P.5.

⁴⁸ Bridges v. California, 314 US 252 (1941); Pennekamp v. Florida, 328 US 331 (1946) Craig v. Harney 331 US 367 (1946); Wood v. Georgia 370 US 375 (1962).

⁴⁹ Bridges v. California, Ibid., p. 263.

(the test for sub judice contempt in section 2(2) of the Contempt of Court Act 1981 is that there is “a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced”); New Zealand (the test for “publication” is whether there is a “real risk” that the publication will interfere with the right to a fair trial⁵⁰); na South Africa (the Supreme Court of Appeal held that “a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice may occur if the publication takes place)⁵¹.

[63] Mu bimaze kugaragazwa biteganyijwe n’Itegeko Nshinga, Amasezerano mpuzamahanga, hamwe n’ibisobanuro byagiye bitangwa by’umwihariko n’inkiko ku bijyanye n’imbibi zemewe ku ihame ry’ubwisanzure bwo gutangaza ibitekerezo, humvikanamo ibintu by’ingenzi bikurikira:

- a. Ubwisanzure bwo gutangaza ibitekerezo si ihame ndakuka; rifite imbibi;
- b. Imbibi ku ihame ry’ubwisanzure bwo gutangaza ibitekerezo zigomba kugenwa n’itegeko;

⁵⁰ New Zealand Law Commission, Issues Paper on Contempt in Modern New Zealand (IP36 2014) at paragraph 4.9 (https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZ_LC%20IP36.pdf).

⁵¹ South Africa Supreme Court of Appeal: The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others (425/2017) [2017] ZASCA 97 (21 June 2017), at para.37; and South Africa Supreme Court of Appeal: *Midi Television v Director of Public Prosecutions (Western Cape)* 2007 (3) SA 318 (SCA) at para 19.

c. Gushyira imbibi ku bwisanzure bwo gutangaza ibitekerezo bigomba kuba ari ngombwa mu rwego rwo kubahiriza uburenganzira bw'abandi, kandi bigamije impamvu zifite ireme. Mu burenganzira bw'abandi bufatwa nk'imwe mu mpamvu zifite ireme, harimo uburenganzira ku butabera buboneye, burimo n'uburenganzira ku rubanza ruboneye;

d. Bigomba kandi kuba ari ngombwa mu rwego rwo kurengera iyo mpamvu;

e. Gushyira imbibi ku bwisanzure bwo gutangaza ibitekerezo bigomba no kuba ari ngombwa mu rwego rwo kwimakaza icyizere rubanda bagomba kugira mu migendekere y'ubutabera;

f. Ibyatangajwe ku rubanza rukiburanishwa si ko byose bikurikiranwa. Biba ngombwa gukurikirana icyaha cyo kwivanga mu migendekere myiza y'ubutabera, mu rwego rwo kurengera uburenganzira ku rubanza ruboneye, iyo ibyatangajwe bibangamiye mu buryo bugaragara kandi bukomeye imigendekere myiza y'urubanza.

[64] Urukiko, ruhuje ibi bitekerezo by'ingenzi n'ibiteganywa mu ngingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange, mu rwego rwo gusuzuma niba ibyo iteganywa birebwa cyangwa bitarebwa n'imbibi zishyirwa ku bwisanzure bwo gutangaza ibitekerezo, rusanga:

a. Ingingo ya 256 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 ishyira imbibi ku bwisanzure bwo gutangaza ibitekerezo iyo ibyo bitekerezo bigamije kuyobya abatangabuhamyaga cyangwa icyemezo cy'umucamanza mbere y'uko urubanza rucibwa.

b. Umuntu utangaza ibitekerezo agambiriye kuyobya umutangabuhamba cyangwa icyemezo cy'umucamanza, aba agamije kubangamira imigendekere myiza y'ubutabera n'uburenganzira ku rubanza ruboneye.

c. Kubangamira imigendekere myiza y'ubutabera n'uburenganzira ku rubanza ruboneye, ari imwe mu mpamvu zifite ireme zishobora gutuma biba ngombwa gushyira imbibi ku bwisanzure bwo gutangaza ibitekerezo.

Urukiko rusanga icyakora, ibitekerezo byose byatangajwe ku rubanza rukiburanishwa bitakurikiranwa hashingiwe ku bateganywa n'iyi ngingo, kuko kugirango bikurikiranwe, hagomba kugaragazwa ko uwabatangaje yari agambiriye kuyobya kandi ko ibyatangajwe bibangamiye mu buryo bugaragara kandi bukomeye imigendekere myiza y'urubanza.

[65] Ku bijyanye n'ibivugwa na Kabasinga Florida ko umucamanza aca urubanza ashingiye ku byo afite muri dosiye, akaba adashobora kuyobya n'ibyatangajwe mu buryo ubwo ari bwo bwose bitavugiwe mu iburanisha, Urukiko rurabisubiza rwifashishije izindi manza zagize icyo zibivugaho. Hari inkiko zagaragaje ko umucamanza adashobora kuyobya n'ibyatangajwe, ariko hakaba n'izindi zavuze ko bishoboka.

[66] Imanza zagaragaje ko umucamanza adashobora kuyobya n'ibyatangajwe zirimo:

a. Urubanza rwaciwe n'Urukiko Rukuru rwo mu Bwongereza, Vine Products Ltd. v. MacKenzie & Co.

Ltd⁵², rwavuze ko abacamanza b'umwuga baba bafite amahugurwa ahagije ku buryo, mu gihe bafata icyemezo, badashobora kuyobywa n'ibyatangajwe ku rubanza (*It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing [a prejudging of the issues] to influence them in deciding the case*).

b. Urubanza *Akinrinsola v. Attorney-General of Anambra State*⁵³ rwaciwe n'Urukiko rwo muri Nigeria, rukemeza ko ibifatwa nk'icyaha cyo kwivanga mu migendekere myiza y'ubutabera mu rubanza rurimo abacamanza batari ab'umwuga, ari gake byafatwa bityo mu rubanza rurimo abacamanza b'umwuga (*a statement that was regarded as contempt in a jury trial would rarely be contempt in a trial by judge-alone*).

c. Urubanza *Nebraska Press Association v. Hugh Stuart*⁵⁴, aho Urukiko rw'Ikirenga rwa Amerika rwemeje ko, icyemezo cyafashwe n'umucamanza w'Urukiko rwo hasi cyo guhagarika inyandiko y'itangazamakuru ku rubanza rwari rukiburanishwa ku mpamvu y'uko cyayobya abacamanza (batari ab'umwuga), ntacyo gishingiyeho (*the American Supreme Court vacated a prior-restraint order passed by the trial Judge in a multiple murder case while that case was pending, on the ground that the view*

⁵² 1965] 3 All ER 58, referred to in Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, op.cit., p. 11.

⁵³ (1980) 2 NCR 17, referred to in Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized International Mandates p.11.

⁵⁴ *Nebraska Press Association v. Hugh Stuart*: (1976) 427 US 539.

of the trial Judge that Jurors are likely to be influenced by the press publications, was speculative).

d. Urubanza Attorney General v. BBC⁵⁵, rwaciwe n'Urukiko rw'Ubujurire rwo mu Bwongereza, umacamanza akavuga ko abacamanza b'umwuga bahuguwe badashobora kuyobywa ku buryo bworoshye n'ibyangajwe (*Lord Denning in the Court of Appeal had observed that professionally trained Judges are not easily influenced by publications*).

[67] Imanza zagaragaje ko umucamanza ashobora kuyobywa n'ibyangajwe zirimo izi zikurikira:

a. Urubanza Reliance Petrochemicals v. Proprietor of Indian Express⁵⁶ rwaciwe n'Urukiko rw'Ikirenga rwo mu Buhinde, rwemeza ko nta tandukaniro hagati y'umucamanza w'umwuga n'utari uw'umwuga ku bijyanye no kuba bayobywa n'ibyangajwe ku rubanza rukiburamishwa (*No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges*).

b. Ibisobanuro byatanzwe na Justice Frankfurter (concurrent opinion) mu rubanza *John D. Pennekamp v. State of Florida*⁵⁷ rwaciwe n'Urukiko rw'Ikirenga rwo muri Amerika:

⁵⁵ Attorney General v. BBC: 1981 A.C 303 (HL), p.312

⁵⁶ Reliance Petrochemicals v. Proprietor of Indian Express : 1988(4) SCC 592.

⁵⁷ John D. Pennekamp v. State of Florida (1946) 328 US 331.

- Ubucamanza ntibushobora gukora neza mu gihe itangamakuru ryakora ibintu bigamije kubangamira urubanza ruburanishwa (*The Judiciary could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court*).
- Nta mucamanza wagombye kuyobywa, abizi, n'ibindi bitari ibyo yabonye cyangwa yumvise mu Rukiko. icyakora, abacamanza nabo ni abantu bashobora kuyobywa bidaturutse ku bushake bwabo, akazi kabo kakaba katagombye kubangamirwa n'ibitangazwa n'abadafite icyo bitayeho. Ikiba kigamijwe mu guhana icyaha cyo kwivanga mu migendekere myiza y'ubutabera, si ukurengera umucamanza nk'umuntu ahubwo ni ukurengera umurimo akora (*No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. It is a condition of that function - indispensable in a free society - that in a particular controversy pending before a court and*

waiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence Judges and Jurors".

c. *Mu rubanza Attorney General v. BBC: 1981 A.C 303 (HL)*⁵⁸ rwavuzwe haruguru, Lord Dilhorne ntiyemeranyijwe n'igitekerezo cya Lord Denning cy'uko abacamanza b'umwuga badashobora kuyobywa n'ibyangajwe, asobanura ko bidashobora kubayobya babishaka, ariko ko nta muntu ushobora kuvana mu bwenge bwe ibyo yabonye, yumvise cyangwa yasomye, bishobora kumuyobya atabigizemo ubushake (*It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it*).

⁵⁸ *Attorney General v. BBC: 1981 A.C 303 (HL)*, p. 335

[68] Ibyavuzwe na Justice Frankfurter na Lord Dilhorne byagiye binagarukwaho na zimwe muri Komisiyo zishinzwe kuvugurura amategeko, zikongeraho ko guhana icyaha cyo kwivanga mu migendekere myiza y'ubutabera binagamije kurengera uburyo abaturage babona ukutabogama mu ibyemezo bifatwa n'abacamanza:

a. Komisiyo ishinzwe kuvugurura amategeko ya New South Wales muri Australia yasobanuye ko umucamanza ashobora kuyobya atabizi – n'ibyo yabonye, yumvise cyangwa yasomye -, kandi ko ari ngombwa gukumira ikibazo cyo kuba abantu batekereza ko umucamanza yabogamye (first, it is always possible that a Judicial officer may be subconsciously influenced; and secondly, it is just as important to protect the public perception of Judges' impartiality as to protect against risk of bias)⁵⁹.

b. Komisiyo ishinzwe kuvugurura amategeko muri Canada nayo yasobanuye ko n'ubwo muri rusange abacamanza badashobora kugira ikibayobya, ariko ko hadakwiye kwirengagizwa ko byanashoboka, kandi guhana icyaha cyo kwivanga mu migendekere myiza y'ubutabera binafite akamaro kanini ko abaturage batekereza ko umucamanza yabogamye (*while Judges may generally be impervious to influence, the possibility of such influence could not be ruled out altogether, and that in the case of Judicial officers, the sub-judice rule served an important function of protecting public perception of impartiality*)⁶⁰.

⁵⁹ The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on 'Contempt by Publication,

para

⁶⁰ Canadian Law Reform Commission, Contempt of Court: Offences against Administration of Justice {Working Paper 20, 1977, p 42-43} and Report 17

[69] Ibimaze kuvugwa binagarukwaho n'Intumwa yihariye y'Umuryango w'Abibumbye ku byerekeye ubwisanzure bwo gutangaza ibitekerezo (*The UN Special Rapporteur on Freedom of Expression and Opinion*), ku kibazo yari yashyikirijwe kireba abitwa Mrs. Bernadette na Mr. Michael McKevitt baharaniraga ubwigenge bwa Ireland, ibitangamakuru bikandika ko bafite aho bahuriye na bombe yatewe ikica abantu bagera kuri 29 kandi na Polisi itaragira icyo ibabaza. Intumwa yihariye y'Umuryango w'Abibumbye yagaragaje ko ibyatangajwe n'itangamakuru byatumye nta muntu n'umwe ushobora kwakira icyemezo cyagaragaza ko Bernadette na Michael McKevitt ari abere. Byatumye nabo bumva ko nibakurikiranwa, nta kizere ko bagira uburenganzira ku rubanza ruboneye(*...In the case of Bernadette and Michael McKevitt, the media have created a situation where almost no one in Ireland is prepared to countenance the possibility that they may be innocent.....They create such certainty of their guilt in the minds of the public that, if these persons are even actually charged and tried, they have no hope of obtaining a fair trial*)⁶¹.

[70] Ibireba by'umwihariko kuyobya abatangabuhamya, byavuzwe mu rubanza rwa Attorney General v. Mirror Newspapers (*The premature publication of evidence may have a tendency to influence the evidence of witnesses or potential witnesses*)⁶².

(1982) at p 30), cited by Law Commission of India, 20 Report on trial by media, free speech and fair trial under criminal procedure code 1973, August 2006, p.57 (<https://lawcommissionofindia.nic.in/reports/rep200.pdf>).

⁶¹ Cited by Law Commission of India, 20 Report on trial by media, Free speech and Fair trial under Criminal procedure code 1973, August 2006, p. 12 & 13.

⁶² Attorney General v Mirror Newspapers Ltd [1980] 1 NSWLR 374; Referred to in civil Trials Bench Book, Contempt Generally(https://www.judcom.nsw.gov.au/publications/benchbks/civil/contempt_generally.html#p10-0360)

[71] Mu manza no mu nyandiko zavuzwe mu bika bibanza, hagaragaramo ibitekerezo bitatu by'ingenzi. Icyamba mbere ni abavuga ko umucamanza w'umwuga adashobora kuyobywa n'ibyangajwe hanze y'iburanisha, icyamba kabiri ni abavuga ko bishoboka. Icyamba gatatu ni abavuga ko n'ubwo muri rusange umucamanza w'umwuga ashobora kutita ku byatangajwe mu gihe afata icyemezo, ariko ko bishobora kumuyobya atabizi; hakaba n'ikibazo cy'uko ababonye cyangwa abumvise ibyangajwe bashobora gukuka ko yabigendeyeho, bigatuma badaha agaciro icyemezo cyose cyafatwa, bikagira ingaruka mbi ku migendekere myiza y'ubutabera. Urukiko rwemeranya n'iki gitekerezo cyamba nyuma.

[72] Koko rero, umucamanza w'umwuga agomba guca urubanza mu buryo abona bukwiye akurikije ibyavugiye mu iburanisha n'ibyo afite muri dosiye, atitaye ku byo yabonye cyangwa yumvise byatangajwe. Icyakora, nawe ni umuntu kandi mu miterere ya buri muntu, ibyinjijye mu bwenge bwe bishobora kugira ingaruka mu byiyumviro bye atabigizemo uruhare. N'ubwo kandi muri rusange umucamanza ashobora gufata icyemezo atitaye ku byatangajwe, ababuranyi n'abandi baturage bo bashobora gutekereza ko yabigendeyeho, bigatuma icyemezo cyose yafata kitakirwa neza. Kandi rero, nk'uko byavuzwe na Komisiyo ishinze kuvugurura amategeko ya New South Wales (Australia)⁶³, igendeye ku ihame ryemejwe mu rubanza *R v. Sussex Justices: Ex parte McCarthy: 1924 (1) KB 256* rikababurikigenderwaho, ubutabera ntibugomba gutangwa gusa bigomba no kugaragara ko bwatanzwe (*"Justice should not only be done, it should manifestly and undoubtedly be seen to be done"*).

⁶³ The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on 'Contempt by Publication', <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Other-Publications/Discussion-Papers/DP43>, p.70.

[73] Urukiko rurasanga rero, hashingiwe ku mategeko no ku masezerano mpuzamahanga u Rwanda rwasinye, hashingiwe kandi ku bisobanuro byose byatanzwe hifashishijwe by'umwihariko ibyemezo byafashwe n'inkiko, ibiteganyijwe mu ngingo ya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange byemewe nk'imbibi zigamije impamvu ifite ireme ku ihame ry'ubwisanzure bwo gutangaza ibitekerezo, bikaba rero bitabangamiye iryo hame, bityo bikaba bitanyuranyije n'ingingo ya 38 y'Itegeko Nshinga.

ICYEMEZO CY'URUKIKO

[74] Rwemeje ko ikirego cyatanzwe na Kabasinga Florida gifite ishingiro kuri bimwe.

[75] Rwemeje ko ikirego cyatanzwe na Niyomugabo Ntakirutimana gifite ishingiro.

[76] Rwemeje ko igika cya 4 cy'ingingo ya 84 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kinyuranyije n'ingingo ya 29 agace ka kane y'Itegeko Nshinga, kiba nta gaciro gifite hashingiwe ku biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

[77] Rwemeje ko igice cy'ingingo ya 92 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, kigira kiti: “kidashobora kugabanywa kubera impamvu nyoroshyacyaha”, kinyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga; icyo gice kikaba nta gaciro gifite.

[78] Rwemeje ko igika cya 3 cy'ingingo ya 133 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, agace kavuga ko iyo gusambanya umwana byakorewe

ku mwana uri muni y'imyaka cumi n'ine (14), igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, kanyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga; ako gace kakaba nta gaciro gafite.

[79] Rwemeje ko ingingo ya 271 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, itanyuranyije n'Itegeko Nshinga.

[80] Rwemeje ko ingingo ya 256 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, itanyuranyije n'Itegeko Nshinga.

[81] Rutegetse ko uru rubanza rutangazwa mu igazeti ya Leta ya Repubulika y'u Rwanda.

**IMANZA ZEREKERANYE
N'IMIBURANISHIRIZE Y'IMANZA**

**URUBANZA RWEREKERANYE
N'IMIBURANISHIRIZE Y'IMANZA
ZASABIWE GUSUBIRISHAMO KU
MPAMVU Z'AKARENGANE**

NTEGEYE v ECOBANK RWANDA LTD N’UNDI

[Rwanda URUKIKO RW’IKIRENGA – RCOMAA
00001/2019/SC (Ntezilyayo, P.J., Rukundakuvuga na
Cyanzayire, J.) 24 Mutarama 2020]

Amategeko agenga imiburanishirize y’imanza zasabiwe gusubirwamo ku mpamvu z’akarengane – Gusubirishamo urubanza ingingo nshya – Gusubirishamo urubanza ku mpamvu z’akarengane ni inzira idasanzwe idashobora gufungura izindi nzira z’ubujurire kuko ziba zararangiyeye – Urubanza rwaciye ku kirego cyo gusubirishamo urubanza ku mpamvu z’akarengane ruba ari urwa nyuma ndetse ntirushobora gusubirishwamo ingingo nshya.

Incamake y’ikibazo: BCDI (Ecobank) yahaye Ntegeye Bernard inguzanyo, maze ananirwa kwishyura mu bihe bumvikaniyeho, biba ngombwa ko ayegurira umutungo we utimukanwa ugizwe n’inzu mu rwego rwo kuyishyura, ariko mu masezerano bemeranywa na Banki ko niramuka ishatse kugurisha iyo nzu, ko ariwe uzaba ufite uburenganzira bwo kuyigura mbere y’abandi baguzi mu gihe cy’imyaka 10 (Droit de preemption).

Inzu iza kugurishwa muri cyamunara, ariko yegukanwa na BNR, ariko umwenda ntiwishyurwa wose. Ntegeye yaje kurega Ecobank mu bukemurampaka, avuga ko inzu ye yagurishijwe mu buryo bunyuranyije n’amategeko. Inteko y’Ubukemurampaka ryemeza ko BCDI itishe amasezerano ko bugure bwari bufite agaciro.

Urega yajuririye mu Rukiko Rukuru, rwemeza ko amasezerano yiswe *acte de cession d'immeuble* BCDI yagiranye n'urega aseswa, maze agasubirana inzu ye.

BCDI yajuririye mu Rukiko rw'Ikirenga ivuga ko urubanza rwajuririwe rwaciwe ku cyo rutasabwe kuko rwategetse ko amasezerano y'ubugure aseswa kandi ataribyo byari byaregewe. Uru rukiko rwemeje ko ubujurire bufite ishingiro, bityo ko Ntegeye agomba kwishyura umwenda remezo n'inyungu zawo.

Ntegeye yasubirishijemo urubanza ku mpamvu z'akarengane, nyuma yaho impande zombi zakoranye amasezerano yo kwikiranura. Mu gufata icyemezo, Urukiko rw'Ikirenga rwemeje ko ikirego cyo gusubirishamo urubanza ku mpamvu z'akarengane kitakiriwe kuko amasezerano yo kwikiranura yakozwe agira agaciro kamwe n'akurubanza rwabaye itegeko, bityo ko ikirego kitariwe.

Ntegeye yatanze ikindi kirego asaba ko urubanza rusubirishwamo ingingo nshya, ashingiye ku ngingo ya 83 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, avuga ko itamubuza gusubirishamo urubanza rw'akarengane ingingo nshya, avuga ko iyi ngingo ikumira gusa imanza zaburanishijwe n'Urukiko rw'Ikirenga rugasangamo akarengane, avuga ko ikirego cye kitari mu byakumiriwe niyi ngingo kuko ari ikirego kitigeze cyakirwa ngo gisuzumwe.

Ecobank Rwanda Ltd na National Bank of Rwanda bavuga ko ingingo ya 83 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga yamuzitiraga ku kuba yakongera kuregera icyemezo cyafashwe ku rubanza rwasubirishijwemo ku mpamvu z'akarengane kuko interuro ya kabiri y'iyi ngingo ivuga

icyemezo gifashwe icyo ari cyo cyose mu manza zasubirishijwemo ku mpamvu z'akarengane kidashobora kujuririrwa.

Urukiko rw'Ikirenga rwafashe icyemezo rushingiye ku ngingo ya 53 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 ryerekeye ububasha bw'Inkiko, ivuga ko umucamanza washikirijwe urubanza rw'akarengane ashobora gufata kimwe mu byemezo akemeza ko habaye akarengane, cyangwa nta karengane gahari, ashobora kutakira ikirego. Icyemezo cyose umucamanza yafata muri ibi, ntigishobora gusubirwaho, bityo ko urubanza rwaciwe ku kirego cyo gusubirishamo ku mpamvu z'akarengane rudashobora gusubirishwamo ingingo nshya kuko ruba rwarabaye itegeko.

Incamake y'icyemezo: 1. Urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane ruba ari urwa nyuma ndetse ntirushobora gusubirishwamo ingingo nshya kuko gusubirishamo urubanza ku mpamvu z'akarengane ni inzira idasanzwe idashobora gufungura izindi nzira z'ubujurire kuko ziba zararangiyeye.

**Ikirego gisaba gusubirishamo urubanza ingingo nshya
nticyakiriwe.**

Amategeko yashingiweho:

Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, ingingo ya 53

Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 83.

Imanza zifashishijwe:

Kabango v Leta y'u Rwanda, RAD 00001/2019/SC

Urubanza**I. IMITERERE Y'IKIBAZO**

[1] Mu mwaka wa 1998, Ntegeye Bernard yahawe inguzanyo na BCDI SA (ubu yitwa Ecobank Rwanda Ltd) ingana na 50.000.000 Frw, akuramo 42.485.087Frw yo kwishyura inguzanyo yari yarahawe na BACAR SA mu mwaka wa 1993 mu rwego rwo kubaka inzu iri mu kibanza No 1200 Kacyiru – Nord. Ntegeye Bernard ntiyishyuye umwenda yahawe na BCDI SA, ukomeza kwiyongera ugera kuri 73.839.942Frw, bituma ku wa 09/02/ 2001 agirana nayo amasezerano yo kuyegurira ya nzu iri mu kibanza No 1200 Kacyiru - Nord yari imaze kugira agaciro ka 41.484.288Frw. Kuri ayo mafaranga hiyongeraho 4.122.750Frw y'ibikoresho byarimo, byose hamwe bikaba 45.607.038Frw, bivuga ko yari asigaranye umwenda wa 28.232.904Frw. Mu ngingo ya 6 y'ayo masezerano, bemeranyijwe ko Banki iramutse ishatswe kugurisha iyo nzu, Ntegeye Bernard afite uburenganzira bwo kugura mbere y'abandi (Droit de préemption/préférence) mu gihe cy'imyaka icumi (10). Ntegeye Bernard yananiwe kwishyura amafaranga yari asigaye, agenda arushaho kwiyongera. Ku wa 11/04/2003, BCDI SA yagurishije mu cyamunara inzu yari yareguriwe, yegukanwa na National Bank of Rwanda.

[2] Ntegeye Bernard yareze BCDI SA (yahindutse Ecobank Rwanda Ltd) mu Rukiko Nkemurampaka, agobokesha National Bank of Rwanda, avuga ko inzu ye iri mu kibanza No 1200

Kacyiru-Nord yatejwe cyamunara hatubahirijwe amategeko, kandi hirengagijwe ingingo ya 6 y'amasezerano bari baragiranye. Ku wa 02/12/2005, Urukiko Nkemurampaka rwemeje ko BCDI SA itishe amasezerano, ko rero ubugure bwa National Bank of Rwanda bufite agaciro, rutegeka Ntegeye Bernard kwishyura 28.232.000Frw avugwa mu masezerano yo ku wa 09/02/2001. Ku bijyanye na « droit de préférence », Urukiko rwasobanuye ko ibyo Ntegeye Bernard avuga ari amagambo gusa, kuko atavuga ko yari kugura mbere inzu yagurishijwe 100.000.000Frw kandi yarananiwe kwishyura 28.232.000Frw. Rwasanze icyakora Banki yarateshutse ku nshingano yo kumumenyeshya iby'iryogurisha, ruyitegeka kubitangira indishyi zingana na 5.000.000Frw.

[3] Ntegeye Bernard ntiyishimiye icyemezo cy'Abakemurampaka, akijuririra mu Rukiko Rukuru rwa Repubulika. Ku wa 31/05/2007, mu rubanza RCOMA 0020/05/HCKIG, uru Rukiko rwemeje ko amasezerano Ntegeye Bernard yagiranye na BCDI SA bise "Acte de cession d'immeuble" asheshwe, kandi ko nta mwenda Ntegeye Bernard abereyemo iyo Banki hashingiwe kuri « extrait bancaire » ya konti N° 110-2534703-9. Rwategetse ko Ntegeye Bernard asubirana inzu ye, agahabwa 6.000.000Frw y'indishyi mbonezamusaruro, na 5.000.000Frw y'indishyi z'akababaro.

[4] BCDI SA na National Bank of Rwanda bajuririye urwo rubanza mu Rukiko rw'Ikirenga. Ku wa 30/07/2010, mu rubanza RCOMAA 0005/07/CS, Urukiko rwemeje ko ubwo bujirire bufite ishingiro, rutegeka Ntegeye Bernard kwishyura Ecobank Rwanda Ltd (yari BCDI SA mbere) 48.102.687Frw aturuka ku mwenda wa 28.232.000Frw n'inyungu zawo. Urukiko rwasobanuye ko :

- a. Urukiko Rukuru rwa Repubulika rwaciye urubanza ku cyo rutasabwe, kuko rwerekanye ko amasezerano y'ubugure hagati ya BCDI SA na National Bank of Rwanda yabayemo uburiganya, ariko rugasesa amasezerano yabaye hagati ya BCDI SA na Ntegeye Bernard atari byo byari byaregewe;
- b. Amasezerano yo ku wa 09/02/2001 yiswe « acte de cession d'immeuble » yujuje ibisabwa byose kugirango abe amasezerano y'ubugure, bityo inzu yarebwaga n'ayo masezerano ikaba yarinjiye mu mutungo wa BCDI SA, bivuga ko yari ifite uburenganzira bwo kuyigurisha National Bank of Rwanda;
- c. Hashingiwe kuri raporo y'umuhanga washyizweho n'Urukiko, Ntegeye Bernard atishyuye umwenda yari asigaje kwishyura BCDI SA.

[5] Ntegeye Bernard yasubirishijemo urubanza ku mpamvu z'akarengane, Urwego rw'Umuvunyi rugaragaza ko Urukiko rw'Ikirenga rutafashe umwanzuro ku bijyanye n'iyubahirizwa ry'ingingo ya 6 y'amasezerano yiswe « acte de session d'immeuble », ntirwagira n'icyo rubivugaho kandi biri mu byari byaregewe. Dosiye yashyikirijwe Urukiko rw'Ikirenga, ikirego cyandikwa kuri RS/REV/INJUST/COM 0001/16/CS. Muri urwo rubanza, Ecobank Rwanda Ltd yatanze inzitizi yo kutakira ikirego cya Ntegeye Bernard, ivuga ko nyuma y'uko agejeje ikibazo ku Rwego rw'Umuvunyi, bagiranye amasezerano y'uburyo urubanza ruzarangizwa, impande zombi zemeranywa ku kwikiranura.

[6] Ku wa 09/09/2016, Urukiko rw'Ikirenga rwemeje ko inzitizi yatanzwe na Ecobank Rwanda Ltd ifite ishingiro, rwemeza ko ikirego cya Ntegeye Bernard cyo gusubirishamo

urubanza ku mpamvu z'akarengane kitakiriwe, rumutegeka kwishyura Ecobank Rwanda Ltd na National Bank of Rwanda amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka. Urukiko rwafashe umwanzuro rushingiye ku ngingo ya 591 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano, yateganyaga ibi bikurikira : « amasezerano yo kwikiranura agira hagati y'abayagiranye agaciro kamwe n'ak'urubanza rwakemuwe ku buryo budasubirwaho mu rwego rwa nyuma. Ntawe ushobora gusaba ko ateshwa agaciro yitwaje ko yibeshye ku byo amategeko ateganya, cyangwa se yitwaje ko yahenzwe ».

[7] Urukiko rw'Ikirenga rwasobanuye ko, Ntegeye Bernard na Ecobank Rwanda Ltd bagiranye amasezerano ku wa 06/03/2014, avuga ko impande zombi zumvikanye ku irangizwa ry'urubanza RCOMAA 0005/07/CS rwaciwe ku wa 30/07/2010. Ingingo ya mbere y'ayo masezerano igaragaza ko Ntegeye Bernard yiyemeje kwishyura 34.000.000Frw mu rwego rwo kurangiza ibibazo afitanye na Ecobank Rwanda Ltd¹, naho ingingo ya 3 ikavuga ko impande zombi zemeye nta gahato gukora amasezerano yo kwikiranura bazi ingaruka zabyo, bakaba biyemeje kudakemanga ishyirwa mu bikorwa ryayo no kuyubahiriza nta buryarya².

¹ « Monsieur Ntegeye Bernard s'engage à verser la somme de 34.000.000 Frw à Ecobank Rwanda en vue de liquider tous ses engagements qu'il a envers Ecobank Rwanda Ltd en rapport avec le jugement (RCOMAA 0005/07) ».

² « les parties s'engagent à clôturer la mise en application de l'arrêt RCOMAA 0005/07 de la Cour Suprême et à exécuter de bonne foi la transaction. Les parties s'interdisent de remettre en cause la mise en application de la transaction et de ce fait les parties rappellent connaître pleinement la portée de leur engagement volontaire auquel elles ont donné un consentement libre et éclairé ».

[8] Urukiko rw'Ikirenga rwasobanuye kandi ko, Ntegeye Bernard yakoranye amasezerano yo kwikiranura na Ecobank Rwanda Ltd nyuma yo gushyikiriza Urwego rw'Umuvunyi ikirego cye cy'akarengane kuko yagitanze mu 2012, amasezerano agakorwa ku wa 06/03/2014 ; muri ayo masezerano akaba yemera ko akiranutse na Banki mu ngingo zose z'urubanza, harimo n'izo yari yaregeye akarengane. Urukiko rwagaragaje ko yikiranura na Banki, yemeraga ko nta karengane yakorewe, kuko iyo bitaba ibyo yari kugaragaza ingingo yikiranuyeho n'izo atikiranuyeho ku mpamvu y'uko atemera imikirize y'urubanza kuri zo.

[9] Ntegeye Bernard yatanze ikindi kirego asaba gusubirishamo ingingo nshya urubanza N° RS/REV/INJUST/COM 0001/16/CS rwaciwe ku wa 09/09/2016, Ubwanditsi bw'Urukiko bwemeza ko icyo kirego kitakiriwe ngo cyandikwe mu bitabo by'Urukiko, kubera ko kinyuranye n'ibiteganywa n'ingingo ya 83 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga. Ntegeye Bernard yatakambiye Perezida w'Urukiko rw'Ikirenga. Mu cyemezo cyo ku wa 08/06/2018, Perezida w'Urukiko rw'Ikirenga yemeje ko ikirego cya Ntegeye Bernard cyandikwa mu bitabo by'Urukiko, Inteko ikazasuzuma niba urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane, rushobora gusubirishwamo ingingo nshya, icyemezo cyafatwa kikazifashishwa n'izindi nkiko.

[10] Impamvu Ntegeye Bernard ashingiraho asaba ko urubanza rusubirishwamo ingingo nshya, ni amahame yo mu rwego rw'amategeko avuga ko yirengagijwe n'Urukiko, ariyo : «

contra proferentem »³, na «*Parol evidence rule* »⁴, akaba avuga ko yayamenye nyuma y'aho urubanza rusabirwa gusubirwamo ruciriwe. Mu myanzuro yabo, abaregwa bavuga ko ayo mahame asanzwe mu mategeko, akaba atari impamvu yatuma urubanza rusubirishwamo ingingo nshya kuko nta cyamubujije kuyifashisha aburana urwo rubanza.

[11] Abaregwa bagaragaza kandi ko Ntegeye Bernard atubahirije ibihe byo gutanga ikirego, kuko urubanza RS/RV/INJUST/COM 0001/16/CS rwaciwe ku wa 09/09/2016, ikirego gisaba kurusubirishamo ingingo nshya kigatangwa ku wa 09/09/2017 nyuma y'umwaka ruciwe, mu gihe itegeko riteganywa igihe cy'amezi abiri. Ntegeye Bernard asobanura ko ihame rya « *contra proferentem* » yarimenye ku wa 14/08/2017, ikirego akagitanga ku wa 27/09/2017, igihe cy'amezi abiri kitararangira.

[12] Urubanza rwaburanishijwe mu ruhamwe ku wa 06/01/2020, Ntegeye Bernard ahagarariwe na Me Zawadi Stephen, Me Mubangizi Frank na Me Umutangana Aimée Jacqueline, Ecobank Rwanda Ltd ihagarariwe na Me Munyaneza Remy, naho National Bank of Rwanda ihagarariwe na Me Murego Jean Leonard na Me Byiringiro Jacques. Ababuranyi babanje kujya impaka ku kibazo cyo kumenya niba urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane, rushobora gusubirishwamo ingingo nshya, hemezwa ko ari nacyo kizabanza gufatwaho umwanzuro

3 Ihame risobanura ko iyo mu masezerano hari amagambo atera urujijo, harebwa ibiri mu nyungu z'uruhande rutagize uruhare mu kuyategura

4 Ihame risobanura ko mu gihe hari amasezerano yanditse yasinnye n'impande zose areba, bidashoboka kuyahindura n'ibyavugwa mu magambo binyuranye n'ibiyanditsemo.

n'Urukiko. Urukiko rwamenyesheje ababuranyi ko icyemezo kuri icyo kibazo kizasomwa ku wa 24/01/2020. Mu gihe Urukiko rwakwemeza ko urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane rushobora gusubirishwamo ingingo nshya, akaba aribwo haburanishwa ku bindi bibazo biri mu rubanza aribyo:

- a. Kumenya niba ibihe byo gusubirishamo urubanza ingingo nshya byarubahirijwe;
- b. Kumenya niba kudakurikiza ihame ry'amategeko byaba impamvu yatuma urubanza rusubirishwamo ingingo nshya.

[13] Hashingiwe ku byagaragajwe mu bika bibanza, ikibazo cy'ingenzi cyasuzumwe muri uru rubanza, ni ukumenya niba urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane, rushobora gusubirishwamo ingingo nshya.

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURA RYACYO

- a. **Gusuzuma niba urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane rushobora gusubirishwamo ingingo nshya**

[14] Abahagarariye Ntegeye Bernard bavuga ko ingingo ya 83 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, itamubuza gusubirishamo urubanza RS/RV/INJUST/COM 0001/16/CS ingingo nshya. Babisobanura mu buryo bukurikira:

a. Bavuga ko iyi ngingo ikumira gusa imanza zaburanishijwe n'Urukiko rw'Ikirenga rugasangamo akarengane, kuko ruba rwarakosoye amakosa yose yaba yarakozwe mu rwego rw'amategeko, rugatanga umurongo ngenderwaho, ariyo mpamvu itegeko ryavuze ko icyo cyemezo kidasubirwaho; ibyo bikaba bitareba urubanza RS/RV/INJUST/COM 0001/16/CS kuko rutasuzumwe ngo hemezwe ko rwabayemo akarengane;

b. Bavuga ko ikirego cya Ntegeye Bernard kitari mu byakumiriwe n'ingingo yavuzwe haruguru, kuko ari ikirego kitigeze cyakirwa ngo gisuzumwe, bivuze ko akarengane Urwego rw'Umuvunyi rwabonye mu mikirize y'urubanza RCOMAA 0005/07/CS rwaciwe n'urukiko rw'Ikirenga ku wa 30/07/2010, ntaho kagiye. Bongeraho ko inzitizi yatanzwe na Ecobank Rwanda Ltd n'akarengane kabonywe n'Urwego rw'Umuvunyi byari gusuzumirwa hamwe, mu guca urubanza byose bigafatwaho icyemezo;

c. Bavuga kandi ko ibyo ababuranira Ecobank Rwanda Ltd na National Bank of Rwanda bavuga ko ingingo ya 53 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'Inkiko yakemuye impungenge zari mu ngingo ya 83 y'Itegeko Ngenga ryavuzwe haruguru atari byo, kuko yagiyeho nyuma y'uko ikirego gitangwa.

[15] Abahagarariye Ecobank Rwanda Ltd na National Bank of Rwanda bavuga ko ingingo ya 83 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga yamuzitiraga ku kuba yakongera kuregera icyemezo cyafashwe ku rubanza

rwasubirishijwemo ku mpamvu z'akarengane. Babisobanura mu buryo bukurikira:

a. Interuro ya kabiri y'iyo ngingo ivuga "icyemezo gifashwe", bivuze ko icyemezo icyo ari cyo cyose cyafatwa mu manza zasubirishijwemo ku mpamvu z'akarengane kidashobora kujuririrwa. Ibyo bikaba byarashimangiwe n'umushingamategeko mu ngingo ya 53 agace ka nyuma y'Itegeko rishya rigenga ububasha bw'inkiko ryatangajwe mu 2018⁵, naryo rikaba ryakwifashishwa kugira ngo ingingo ya 83 yavuzwe haruguru isobanuke neza ;

b. Indi mpamvu ituma ikirego cya Ntegeye Bernard kidashobora kwakirwa ishingiyeye ku nyungu z'ubutabera ziha agaciro k'ukuri ntabanduka (vérité irrefragable) icyemezo cy'Urukiko cyafashwe burundu (autorité de la chose jugée/stare decisis). Niyo mpamvu hateganyijwe inzira zisanzwe n'izidasanzwe z'ubujurire, uburyo zikoreshwa ndetse n'igihe zikorwamo. Kutabyubahiriza, byabangamira ihame riha agaciro imanza zaciwe burundu, umuntu watsinze agahorana impungenge ku cyo yatsindiye, cyangwa n'abaturanyi bakirara bibwira ko igihe cyose no ku mpamvu iyo ari yo yose bashobora gusubira mu nkiko;

c. Bavuga ko uburyo abahagarariye Ntegeye Bernard basobanuramo ingingo ya 83 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 ataribwo, kuko bashakaga gutandukanya ibyo umushingamategeko

5 « Imanza zasubiwemo ku mpamvu z'akarengane ntizishobora kongera kujuririrwa »

atatandukanyije kandi bitemewe mu bijyanye no gusesengura amategeko, hakaba hagomba kurebwa ingingo yose aho kureba agace kamwe ; ibyo kandi bigahuzwa n'umutwe w'iyi ngingo ureba icyemezo icyo aricyo cyose cyafatwa, ni ukuvuga igihe hagaragajwe akarengane, igihe nta karengane kagaragajwe, n'igihe ikirego kitakiriwe.

[16] Bongeraho ko impungenge Perezida w'Urukiko rw'Ikirenga yari yagaragaje yemera ko ikirego cya Ntegeye Bernard cyandikwa zitagihari, kuko zakuweho n'ingingo ya 53 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 ryerekeye ububasha bw'Inkiko, bivuze ko umurongo w'Urukiko utagikenewe.

UKO URUKIKO RUBIBONA

[17] Mu cyemezo N° 0022/2019 cyo ku wa 08/06/2018 kirebana n'itakamba rya Ntegeye Bernard ku iyakirwa ry'ikirego gisaba gusubirishamo urubanza ingingo nshya, Perezida w'Urukiko rw'Ikirenga yasanze mu nyungu z'ubutabera, iki kirego cyakwandikwa mu bitabo by'Urukiko kugirango hazatangwe umurongo wafasha izindi nkiko ku kibazo cyo kumenya niba urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane, rushobora gusubirishwamo ingingo nshya, hashingiwe ku biteganywa n'ingingo ya 83 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga(ryakoreshwaga igihe ikirego cyatangwaga) .

[18] Mu gihe urubanza rwari rutegereje kuburanishwa, hatangajwe Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, ibyataganywaga n'ingingo ya 83 y'Itegeko

Ngenga No 03/2012/OL ryo ku wa 13/06/2012 ryavuzwe haruguru, bisimburwa n'ibiteganywa mu ngingo ya 53 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018. N'ubwo ariko ingingo ya 83 y'Itegeko Ngenga No 03/2012/OL ryo ku wa 13/06/2012 itakiriho, Urukiko rurasanga ari ngombwa ko hatangwa umurongo ku byo yateganyaga ababuranyi batumva kimwe, kuko ikomeza gukoreshwa mu manza zikiri mu nkiko, zaregewe mbere y'uko Itegeko N° 30/2018 ryo ku wa 02/06/2018 ritangazwa, hashingiwe ku biteganywa n'ingingo ya 280 y'iri Tegeko⁶.

[19] Ingingo ya 83 y'Itegeko Ngenga No 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga yagiraga iti : « Iyo Urukiko rw'Ikirenga rusanze urubanza rwari rwaraciwe harabayemo akarengane, rukosora amakosa yakozwe mu ica ry'urwo rubanza kandi rugatanga umurongo ngenderwaho wo mu rwego rw'amategeko mu gukemura bene ibyo bibazo. icyemezo gifashwe ntigishobora gusubirwaho ».

[20] Mu gusobanura ibiteganywa n'iyi ngingo, ni ngombwa kubanza kureba icyari kigamijwe hashyirwaho inzira yo gusubirishamo urubanza ku mpamvu z'akarengane. Imanza zisabirwa gusubirwamo ku mpamvu z'akarengane, ziba zaramaze gucibwa ku rwego rwa nyuma⁷. icyari kigamijwe n'umushingamategeko, ni ugukosora akarengane gashobora kuba

6 "Imanza zikiburanishwa mu nkiko igihe iri tegeko ritangiye gukurikizwa, ziburanishwa mu buryo bukurikije iri tegeko, ariko ntacyo rihinduye ku mihango y'iburanisha yakozwe mbere y'uko ritangazwa".

7 Ingingo ya 78 y'Itegeko Ngenga No 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga; Ingingo ya 53 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko.

mu rubanza, bitewe no kwibeshya cyangwa amakosa y'umucamanza bigaragarira buri wese, kandi nta yindi nzira yo kugakosora igishoboka. Ni inzira rero idasanze, idashobora gufungura izindi nzira z'ubujurire, kuko ziba zarangiyeye.

[21] Umucamanza washyikirijwe ikirego cyo gusubirishamo urubanza ku mpamvu z'akarengane, aba ashobora gufata kimwe mu byemezo bikurikira:

- a. Iyo asanze harabaye akarengane, aragakosora, agatanga umurongo mu rwego rw'amategeko iyo ari ngombwa;
- b. Iyo asanze nta karengane kabaye, arabisobanura, akavuga ko ikirego cy'akarengane nta shingiro gifite, urubanza rwari rwaciwe mbere rukagumaho;
- c. Ashobora kutakira ikirego, iyo asanga ibisabwa n'itegeko kugirango urubanza rusubirwemo ku mpamvu z'akarengane bituzuye; muri icyo gihe akavuga ko ikirego cy'akarengane kitakiriwe.

[22] icyemezo cyose umucamanza yafata muri ibi uko ari bitatu bimaze kuvugwa, ntigishobora gusubirwaho. Ibi nibyo byumvikana mu nteruro ya nyuma y'ingingo ya 83 y'Itegeko Ngenga No 03/2012/OL ryo ku wa 13/06/2012 ryavuzwe haruguru, irebwe hamwe n'umutwe w'iyo ngingo. Umutwe w'iyo ngingo uvuga « icyemezo gifatwa mu rubanza rusubiramo urwaciwe ku rwego rwa nyuma », ibi bikaba bitareba gusa icyemezo kigaragaza ko habaye akarengane, ahubwo bireba icyemezo cyose cyafatwa mu rubanza rwasabiwe gusubirishwamo ku mpamvu z'akarengane. Bitagenze bityo, urubanza rwose rugaragaje ko nta karengane kabaye, cyangwa rutakiriye ikirego, rwajya rwongera gufungura inzira zisanze n'izidasanzwe z'ubujurire, bigatuma urubanza rutagira iherezo

mu nkiko; ibyo kandi akaba ataribyo umushingamategeko yari agendereye.

[23] Mu nteruro ya mbere y'ingingo ya 83 imaze kuvugwa, Urukiko rusanga umushingamategeko yarashatse gusobanura uko bigomba kugenda igihe Urukiko rw'Ikirenga rusanze harabaye akarengane, kugirango rutagarukira gusa ku gukemura akarengane rudatanze umurongo wafasha izindi nkiko zihuye na bene ibyo bibazo. Ibi bikaba bitari bikenewe igihe Urukiko rwasanze nta karengane kabaye cyangwa ikirego kidashobora kwakirwa, ari nayo mpamvu byo bitavuzwe, kuko byumvikana ko hagumaho urubanza rwasabirwaga gusubirwamo.

[24] Urukiko rurasanga igikwiye kumvikana rero, ari uko mu ngingo ya 83 y'Itegeko Ngenga No 03/2012/OL ryo ku wa 13/06/2012, umushingamategeko atashatse ko imanza zitarangira mu nkiko, ariyo mpamvu interuro ya nyuma y'iyi ngingo itareba gusa icyemezo cyagaragaje ko habaye akarengane, ahubwo ireba n'icyemezo cyagaragaje ko nta karengane kabaye, kimwe n'icyemezo cyo kutakira ikirego. Ni nayo mpamvu, mu ngingo ya 53 y'Itegeko No 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, umushingamategeko yakosoye urujijo rwaterwaga n'imyandikire y'ingingo ya 83 y'Itegeko Ngenga No 03/2012/OL ryo ku wa 13/06/2012, ibyari interuro ya nyuma y'iyi ngingo bikaba igika kihariye giteganywa ko: "Imanza zasubiwemo ku mpamvu z'akarengane zidashobora kongera kujuririrwa".

[25] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga urubanza rwaciwe ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane, rudashobora gusubirishwamo ingingo nshya. Muri uru rubanza, Ntegeye Bernard yasabye gusubirishamo ingingo nshya urubanza

RS/RV/INJUST/COM 0001/16/CS rwari rwaraciwe n'Urukiko rw'Ikirenga ku wa 09/09/2016, ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane. Bivuga rero ko, ikirego cyo gusubirishamo urubanza ingingo nshya, cyatanzwe na Ntegeye Bernard, kidashobora kwakirwa ngo gisuzumwe. Kubera iyo mpamvu, Urukiko rurasanga bitakiri ngombwa ko ibindi bibazo byari byagaragajwe byasuzumwa.

b. Gusuzuma indishyi zasabwe na Ecobank Rwanda Ltd na National Bank of Rwanda

[26] Abahagarariye National Bank of Rwanda bavuga ko kubera igihombo iyo Banki iterwa no kuba Ntegeye Bernard ayihoza mu manza z'amaherere, basaba Urukiko ko rwamutegeka kuyishyura indishyi zo gushorwa mu manza nta mpamvu, igihembo cy'Avoka no gukurikirana urubanza, zose hamwe zingana na miliyoni ebyiri (2.000.000Frw).

[27] Uhagarariye Ecobank Rwanda Ltd asaba Urukiko gutegeka Ntegeye Bernard kuyishyura indishyi zo gukomeza kuyishora mu manza zingana na miliyoni icumi (10.000.000Frw), rukanamutegeka kuyishyura amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka angana na miliyoni ebyiri (2.000.000Frw).

[28] Abahagarariye Ntegeye Bernard bavuga ko indishyi zo gushorwa mu manza Ecobank Rwanda Ltd na National Bank of Rwanda basaba nta shingiro zifite, kuko ari uburenganzira Ntegeye Bernard ahabwa n'itegeko bwo gusubirishamo urubanza ingingo nshya kugirango arenganurwe. Bavuga kandi ko amafaranga y'ikurikiranarubanza n'igihembo cy' Avoka Ecobank Rwanda Ltd isaba ariyo igomba kuyirengera, kuko ariyo yatumye Ntegeye Bernard ajya mu manza.

UKO URUKIKO RUBIBONA

c. Ku bijyanye n'indishyi zo gushorwa mu manza nta mpamvu

[29] Urukiko rurasanga indishyi zo gushorwa mu manza nta mpamvu Ecobank Rwanda LTD na National Bank of Rwanda basaba ntazo bahabwa, kuko Ntegeye Bernard yatanze ikirego agamije kurengera inyungu ze, bikaba ari uburenganzira yemererwa n'amategeko.

[30] Urukiko rurasanga Ecobank Rwanda Ltd ikwiye guhabwa amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka kuko byabaye ngombwa ko ikurikirana urubanza yarezwemo na Ntegeye Bernard, ikishyura n'Abavoka bayihagararira muri urwo rubanza. Urukiko rurasanga ariko itahabwa 2.000.000Frw isaba kuko itayagaragarije ibisobanuro kandi akaba ari menshi, rukaba mu bushishozi bwarwo, ruyigeneye 300.000Frw y'ikurikiranarubanza, na 500.000Frw y'igihembo cy'Avoka. Ni ukuvuga ko Ecobank Rwanda Ltd igenewe amafaranga yose hamwe $300.000\text{Frw} + 500.000\text{Frw} = 800.000\text{Frw}$.

[31] Urukiko rurasanga amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka National Bank of Rwanda isaba itayahabwa, kuko urubanza rwakurikiranywe rukanaburanwa n'abakozi bayo bahemberwa ako kazi, bakagenerwa n'ibibafasha kugakora ku ngengo y'imari itangwa na Leta. Ibyo ni nabyo byemejwe mu rubanza RAD 00001/2019/SC rwaciwe n'uru Rukiko ku wa 31/05/2019, haburana Kabango Antoine na Leta y'u Rwanda.

III. ICYEMEZO CY'URUKIKO

[32] Rwemeje ko ikirego cyatanzwe na Ntegeye Bernard kitakiriwe, kubera ko cyatanzwe mu nzira zidakurikije amategeko;

[33] Rwemeje ko imikirize y'Urubanza RS/RV/INJUST/COM 0001/16/CS, rwaciwe n'Urukiko rw'Ikirenga ku wa 09/09/2016, igumyeho;

[34] Rutegetse Ntegeye Bernard guha Ecobank Rwanda Ltd 800.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka;

[35] Rutegetse ko ingwate y'amagarama y'urubanza Ntegeye Bernard yatanze arega ihwanye n'ibyakozwe mu rubanza.

**URUBANZA RWEREKERANYE
N'IMIBURANISHIRIZE Y'IMANZA
Z'IMBONEZAMUBANO,
IZ'UBUCURUZI, IZ'UMURIMO
IZ'UBUTEGETSI**

ACCESS BANK RWANDA LTD v RUHANDO

[Rwanda Urukiko rw'Ikirenga – RCOMAA 00051/2017/SC
(Kayitesi Z, P.J., Kayitesi R na Cyanzayire, J.) 23 Mata 2019]

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Gusubirishamo urubanza ingingo nshya – Kwitiranya ibintu uko byagenze – Kwitiranya uko ibintu byagenze ni ukutumva neza ikibazo giteje impaka hagati y'ababuranyi ndetse n'ibyashingirwaho mu kugikemura, ibi bigatuma umucamanza agera ku mwanzuro atagombaga kugeraho iyo asobanukirwa neza cyangwa abona neza uko ibintu byari biri.

Incamake y'ikibazo: Kuwa 02/05/2013 Ruhando Ndatira Ernest yasabye Access bank Rwanda Ltd kohereza kuri konti ya sosiyete yitwa Aluzinc Asia Pte Ltd amadolari angana na 76.835 mu buryo bwa *international transfer* kuri konti N°503149270301 yanditse ku mazina ya sosiyete West Atlantic Pte Ltd, anyuze muri Bank yitwa OCBC yo muri Singapore, ku mpamvu yo kwishyura amabati. Amafaranga yaje kugera kuri konti yavuzwe hejuru ariko ahabwa sosiyete West Atlantic Pte Ltd kuko ariwe wari wanditse kuriyo konti.

Nyuma yaho haje kuvuka ikibazo aho Ruhando yavuze ko banki itubahirije inshingano yahawe kuko aya madolari atageze k'uwo yari agenewe, avuga ko uwo yashakaga kwishyura ari sosiyete Aluzinc Asia Pte Ltd, ariko amafaranga ahabwa West Atlantic Pte Ltd, avuga kandi ko yasanze fagitire(facture) yoherejwe nabishyuzaga ari impimbano. Ruhando yaje kurega banki mu Rukiko rw'Ubucuruzi rwa Nyarugenge ayisaba gusubizwa ayo

mafaranga avuga ko itubahirije ubutumwa yayihaye kandi ari inshingano zayo. Uru Rukiko rwaciye urubanza, rwemeza ko banki isubiza Ruhando ayo mafaranga.

Access Bank Rwanda Ltd yajuririye Urukiko Rukuru rw'Ubucuruzi ivuga ko Urukiko rubanza rwafashe ibintu uko bitari, rwirengagiza ibimenyetso yatanze. Uru rukiko rwemeje ko banki yubahirije inshingano yahawe, bityo ko nta kosa yakoze, kandi ko kuba fagitire yashingiweho yari impimbano nk'uko Ruhando Ndatira abivuga, Access Bank Rwanda Ltd atariyo yabiryoza, maze urukiko rwemeza ko urubanza rwajuririwe ruhindutse mu ngingo zarwo zose, bityo ko banki itabiryoza.

Ruhando ntiyishimiye imikirize y'urubanza, ajuririra Urukiko rw'Ikirenga, avuga ko Urukiko rutasobanukiwe n'imikorere ya *SWIFT* nk'inzira yo kohereza amafaranga mu buryo bwa *international transfer*, rutesha agaciro *payment order* yatanze nta mategeko rushingiyeho. Uru rukiko mu gukora isesengura ry'urubanza, rwasanze banki itarashyize mu bikorwa *mandat* yahawe uko bikwiye kuko yohereje ama dolari kuwo itagomba kwohereza, bityo ikaba igomba kubiryoza, ikayasubisa hamwe n'indishyi zikomoka ku kutarangiza uko bikwiye ubutumwa yahawe.

Banki yatanze ikirego gisubirishamo urubanza ingingo nshya ivuga ko habayeho amakosa akabije yo kwitiranya uko ibintu byagenze no kuba kandi habonetse ikimenyetso gishya gishimangira ikirego cyayo gisaba gusubirisha urubanza ingingo nshya. Mu iburanisha, Ruhando yatanze inzitizi yo kutakira ikirego kuko banki itagaragaza impamvu zatuma urubanza rusubirishwamo ingingo nshya nk'uko amategeko abiteganyaga. Urukiko rwanzuye ko inzitizi izaburanishwa hamwe n'urubanza mu mizi.

Mu iburanisha, banki yisobanura ivuga ko isaba urukiko kwakira ikirego cyayo gisaba gusubirishamo urubanza ingingo nshya ivuga ko habaye amakosa akabije kuko urukiko rwitiranyije ibintu uko byagenze rwitiranya *contrat de mandat* n'uburyo bwo kwoherezanya amafaranga mu rwego mpuzamahanga bwitwa SWIFT.

Ruhando we avuga ko banki yatanze ikirego gisubirishamo urubanza ingingo nshya ishingiye ku ngingo yavuyeho no ku nyandiko yitwa *Agreement of Participation in Automated Transfer System* ivuga ko ari ikimenyetso gishya kandi cyari gisanzwe kiriho urubanza rusubirishwamo ingingo nshya ruburanwa mu bujire, bityo ko ikirego kidakwiye kwakirwa kuko iyo nyandiko itatangwa nk'impamvu cyangwa nk'ikimenyetso gishya.

Access bank ivuga ko icyemeza ko yubahirije ubutumwa yahawe ari n'in'yemezabwishyu (facture) Ruhando ubwe yayihereye ariyo igaragaza ko uwagombaga kwishyurwa ari sosiyete Aluzinc asia pte ltd, ariko konti yatanze yo kwishyuriraho ikaba yari yanditse ku mazina ya sosiyete West Atrantic pte ltd (account name), ibyo bikaba aribyo byatumye Ruhando avuga ko amafaranga tahawe uwo yari agenewe.

Ruhando we akavuga ko nubwo banki ivuga ko yashingiye ku nyemezabwishyu yashingiweho yishyura yakozwe nawe, bitayikuraho uruhare mu iyoba ry'amafaranga yagombaga kohereza avuga ko banki yihaye guhindura izina ry'uwo yagombaga kwoherezwa, avuga kandi ko ariyo ifite ikosa kuko yagombaga gukora ibyo yasabwe nta kintu ihinduye.

Mu kirego cyuririye ku kindi cyatanzwe na Ruhando, yasabye ko indishyi zikomeza kubarwa kugeza igihe urubanza ruciriwe kandi zikabarwa mu gaciro k'amafaranga hashingiwe ku gaciro

k'idorari. Access Bank Rwanda yo ivuga ko izi ndishyi nta shingiro zahabwa ivuga ko ahubwo Access Bank Rwanda Ltd ariyo ikomeje gutakaza amafaranga kubera kuyihoza mu manza nta mpamvu.

Incamake y'icyemezo: 1. Kwitiranya uko ibintu byagenze ni ukutumva neza ikibazo giteje impaka hagati y'ababuranyi ndetse n'ibyashingirwaho mu kugikemura, ibi bigatuma umucamanza agera ku mwanzuro atagombaga kugeraho iyo asobanukirwa neza cyangwa abona neza uko ibintu byari biri, bityo kwitiranya ibintu uko byagenze nimwe mu mpamvu yatuma urubanza rusubirishwamo ingingo nshya kuko umucamanza aba yafashe icyemezo kitari gufatwa iyo hatabaho kwitiranya ibintu.

**Ikirego cyo gusurubishamo urubanza ingingo nshya gifite
ishingiro.**

**Banki ntigomba kwishyura amadolari hamwe n'indishyi.
Ingwate y'amagarama ihwanye n'ibyakozwe mu rubanza.**

Amategeko yashingiweho:

Itegeko N^o21/2012 ryo ku wa 14/06/2012 ryerekeye
imiburanishirize y'imanza z'imbonezamubano,
iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, ingingo ya
186, agace ka 6.

Igitabo cya gatatu cy'urwunge rw'Amategeko
y'imbonezamubano (CCLIII), ingingo ya 532.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Urubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, aho Ruhando Ndatira Ernest yatanze ikirego avuga ko yasabye Access Bank Rwanda Ltd kwishyura (international transfer) sosiyete yitwa Aluzinc Asia Pte Ltd, kuri Konti N° 503-149270-301, ariko amafaranga ntiyayigeraho. Mu rubanza RCOM 1218/14/TC/NYGE rwaciwe ku wa 13/03/2015, Urukiko rwasanze Access Bank Rwanda Ltd yari yemeye ubutumwa (mandat) yari yahawe na Ruhando Ndatira Ernest, ariko ntiyabwubahiriza, ruyitegeka gusubiza kuri Konti N°1002150200663201 ya Ruhando Ndatira Ernest amadolari 76.835 yakuye kuri iyo konti ye kuko atageze k'uwo yari agenewe, kumuha amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka yose hamwe angana na 2.000.000Frw no kumusubiza 50.000Frw y'ingwate y'amagarama y'urubanza.

[2] Access Bank Rwanda Ltd yajuririye Urukiko Rukuru rw'Ubucuruzi ivuga ko Urukiko rubanza rwafashe ibintu uko bitari, rwirengagiza ibimenyetso yatanze, rwanga no guhamagaza mu rubanza Banki Nkuru y'u Rwanda cyangwa umukozi w'icyitwa *SWIFT (Society for Worldwide Interbank Financial Telecommunication)* kugira ngo arusobanurire uburyo kohererezanya amafaranga hagati y'amabanki ku rwego mpuzamahanga bikorwa.

[3] Mu rubanza RCOMA 0179/15/HCC rwaciwe ku wa 20/07/2015, Urukiko Rukuru rw'Ubucuruzi rwasanze Access Bank Rwanda Ltd yarubahiriye inshingano yahawe na Ruhando Ndatira Ernest kuko amadolari 76.835 yoherejwe muri Singapore

nk'uko yari yabisabye hakoreshejwe uburyo bwa *SWIFT*, anyura ku izina na nimero ya konti byari byatanzwe na Ruhando Ndatira Ernest bityo ko banki nta kosa yakoze kandi ko kuba fagitire yashingiweho yari impimbano nk'uko Ruhando Ndatira Ernest yabiyemereye, Access Bank Rwanda Ltd atariyo yabiryoza, rwemeza ko urubanza rwajuririwe ruhindutse mu ngingo zarwo zose, ko nta madorali banki igomba kumusubiza.

[4] Ruhando Ndatira Ernest ntiyishimiye imikirize y'urubanza, ajuririra Urukiko rw'Ikirenga, avuga ko Urukiko rutasobanukiwe n'imikorere ya *SWIFT* nk'inzira ya *international transfer*, rutesha agaciro *payment order* yatanze nta mategeko rushingiyeho, rufata icyemezo rushingiye ku kimenyetso (inyemezabuguzi) cyaje nyuma y'uko iburanisha ripfundikiwe bituma rugera ku mwanzuro udasobanutse mu mategeko, kuko rwamuvukije amadolari 76.835 n'inyungu zayo ruyaha banki nk'indonke nta mpamvu.

[5] Mu rubanza RCOMAA 0054/15/CS rwaciwe ku wa 21/04/2017, Urukiko rw'Ikirenga rwasanze Access Bank Rwanda Ltd itarashyize mu bikorwa *payment order* yatanzwe na Ruhando Ndatira Ernest uko bikwiye, yoherereza amadolari 76.835 sosiyete yitwa WEST ATLANTIC Pte Ltd itari iyagenewe aho kuyohereza ALUZINK ASIA Pte Ltd wari wanditse kuri *payment order*, rwanzura ko banki yagize uruhare mu ibura rya 76.835USD ya Ruhando Ndatira Ernest, bityo ko hashingiwe ku biteganywa n'ingingo ya 532 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano, ikwiye kuryozwa ayo madolari n'indishyi zikomoka ku kutarangiza uko bikwiye ubutumwa yahawe. Urukiko rwategetse Access Bank Rwanda Ltd gusubiza Ruhando Ndatira Ernest amadolari ye angana na 76.835 hiyongereyeho inyungu zingana na 33.950.919Frw na

2.700.000Frw akubiyemo amafaranga y'ikurikiranarubanza n'igihembo cya Avoka.

[6] Ku wa 13/06/2017, Access Bank Rwanda Ltd yatanze ikirego gisubirishamo ingingo nshya urubanza RCOMAA 0054/15/CS, ivuga ko habayeho amakosa akabije yo kwitiranya uko ibintu byagenze, bituma Urukiko rugera ku mwanzuro utariwo, cyane cyane ko n'ibimenyetso Access Bank Rwanda Ltd yari yatanze byagaragazaga ko yubahirije inshingano zayo.

[7] Urubanza rwaburanishijwe mu ruhamwe ku wa 06/02/2018, Ruhando Ndatira Ernest aburanirwa na Me Zitoni Pierre Claver, naho Access Bank Rwanda Ltd iburanirwa na Me Rukangira Emmanuel hamwe na Me Buzayire Angèle. Iburanisha rigitangira, Me Zitoni Pierre Claver yibukije inzitizi yatanze yo kutakira ikirego kuko Access Bank Rwanda Ltd itagaragaza impamvu zatumye urubanza rusubirishwamo ingingo nshya nk'uko biteganywa n'ingingo ya 186 y'Itegeko N^o 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi yubahirizwaga icyo gihe.

[8] Urukiko, rushingiye ku biteganywa n'ingingo ya 78, igika cya 4, y'Itegeko N^o 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, rwafashe icyemezo cy'uko inzitizi izasuzumirwa hamwe n'urubanza mu mizi, ababuranyi bahabwa umwanya wo kwisobanura ku nzitizi no ku ngingo zigize ikirego gisubirishamo urubanza ingingo nshya, urubanza rurapfundikirwa, ababuranyi bamenyeshwa ko ruzasomwa ku wa 02/03/2018.

[9] Uwo muni urubanza ntirwasomwe kuko Urukiko rwari rugisuzuma inyandiko zigize dosiye, ari no muri icyo gihe rwasanze Me Rukangira Emmanuel, uburanira Access Bank Rwanda Ltd, yarandikiye Perezida w'Inteko iburanisha ku wa 12/02/2018 avuga ko nyuma y'iburanisha yabonye ikindi kimenyetso cyitwa *Agreement of Participation in Automated Transfer System* gishimangira ikirego cyayo, isaba ko iburanisha rifungurwa.

[10] Mu rubanza rubanziriza urundi rwaciwe ku wa 16/03/2018, Urukiko rwasanze inyandiko yitwa *Agreement of Participation in Automated Transfer System* itaraburanweho kandi banki ivuga ko ije gushimangira ibyo yaburanishaga, rutegeka ko iburanisha risubukurwa ku wa 08/05/2018 kugira ngo ababuranyi bagire icyo bavuga kuri iyo nyandiko.

[11] Uwo muni iburanisha ntiryabaye kuko inteko itari yuzuye, urubanza rwimurirwa ku wa 26/06/2018. Kubera impinduka zari ziteganyijwe mu nzego z'ubutabera, iburanisha ryigijwe imbere, rishyirwa ku wa 19/06/2018. Kuri iyo tariki, urubanza rwaraburanishijwe rurapfundikirwa isomwa ryarwo rishyirwa tariki ya 29/06/2018, ariko ubwo rwari mu mwiherero ngo rufate icyemezo, Urukiko rwasanze ari ngombwa gukora iperereza muri Banki Nkuru y'Igihugu kugira ngo rusobanukirwe ibikubiye mu nyandiko yitwa *Agreement of participation in Automated Transfer System*, imikoreshereze y'inyandiko yitwa *Payment Order* n'imikorere ya *SWIFT*, rutegeka ko iperereza rizakorwa tariki ya 11/07/2018.

[12] Urubanza rwongeye guhamagazwa tariki ya 27/11/2018, ariko rugenda rwimurwa ku mpamvu zitandukanye zemewe n'amategeko, ruza kuburanishwa rurapfundikirwa tariki ya 02/04/2019, Ruhando Ndatira Ernest aburanirwa na Me Zitoni

Pierre Claver, naho Access Bank Rwanda Ltd iburanirwa na Me Rukangira Emmanuel. Isomwa ry’urubanza ryashyizwe ku wa 23/04/2019.

II. IBIBAZO BIGIZE URUBANZA N’ISESENGURA RYABYO

[13] Ibibazo bigomba gusuzumwa muri uru rubanza ni ukumenya niba ikirego cya Access Bank Rwanda Ltd cyo gusubirishamo ingingo nshya urubanza RCOMAA 0054/15/CS rwaciwe n’Urukiko rw’Ikirenga ku wa 21/04/2017 cya kwakirwa, Urukiko rwasanga cyakwakirwa, rugasuzuma niba Access Bank Rwanda Ltd itarubahirije ubutumwa (mandat) yahawe na Ruhando Ndatira Ernest bwo kohereza amadolari 76.835USD, ku buryo yabiryoza ikayasubiza, ikabitangira n’indishyi.

a. Kumenya niba ikirego cya Access Bank Rwanda Ltd cyo gusubirishamo ingingo nshya urubanza RCOMAA 0054/15/CS cya kwakirwa.

[14] Me Rukangira Emmanuel na Me Buzayire Angèle, baburanira Access Bank Rwanda Ltd, bavuga ko icyatumye batanga ikirego gisubirishamo urubanza ingingo nshya ari uko mu gika cya 34 cy’urubanza rwasabiwe gusubirishwamo ingingo nshya, Urukiko rwitiranyije *contrat de mandat* n’uburyo bwo kwoherezanya amafaranga mu rwego mpuzamahanga bwitwa *SWIFT*, ko rwavuze ko Ruhando Ndatira Ernest atari we wazanye inyemezabuguzi yashingiweho bituma amafaranga atagera kuri nyirayo, ariko ntirwagaragaza aho iyo nyemezabuguzi yaturutse.

[15] Basobanura ko Urukiko rwemeje ko amafaranga yoherejwe mbere y'uko iyo nyemezabuguzi iboneka kandi ataribyoye, kuko *carnet* ya banki igaragaza ko *payment order* yasinywe inyemezabuguzi ihari, ariyo mpamvu basaba uru Rukiko kwemeza ko habayeho amakosa akabije yo kwitiranywa uko ibintu byagenze, rukemeza ko hashingiwe ku biteganywa n'ingingo ya 186,6^o y'Itegeko N^o 21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, ikirego cyakiriwe. Basobanura ko Urukiko rwitiranyije ibintu aho rwavuze ko fagitire igaragaza izina West Atlantic Pte Ltd wohererejwe amafaranga, yaje nyuma yuko Ruhando Ndatira Ernest akora *OP*, nyamara iyo fagitire yarayibonye ku wa 26/04/2013, *transaction* iba ku wa 02/05/2013, bivuga ko yari ayifite mbere hose, aha akaba ariho hari ikosa rikomeye ryo kwitiranywa ibintu.

[16] Me Rukangira Emmanuel na Me Buzayire Angèle bavuga kandi ko inyandiko yitwa “*Agreement of Participation in Automated Transfer System*” ari ikimenyetso gishya babonye gisobanura uburyo *transfer* y'amafaranga hagati y'amabanki ikorwa, kigaragaza ko Urukiko rwagombaga gushingira kuri *compte* aho gushingira kuri *intitulé de compte*, kuba rutarabikoze bikaba bishimangira ikirego cyabo cy'uko rwitiranyije ibintu uko byagenze. Basoza bavuga ko inyandiko yitwa *Agreement of Participation in Automated Transfer System* itareba ama banki gusa nk'uko bivugwa n'uburanira Ruhando Ndatira Ernest, kuko irengera n'abakiliya b'amabanki, bitewe n'uko irimo amabwiriza ya Banki Nkuru y'Igihugu, kandi iyi akaba ariyo banki ishinze gushyiraho umurongo andi ma banki agenderaho (*banque de régulation*), ariyo mpamvu ikirego cya Access Bank Rwanda Ltd gikwiye kwakirwa.

[17] Me Zitoni Pierre Claver, uburanira Ruhando Ndatira Ernest, avuga ko gusubirishamo urubanza ingingo nshya byemerwa gusa iyo hagaragajwe nibura imwe mu mpamvu ziteganywa n'ingingo ya 186 y'Itegeko N^o 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu. Asobanura ko Access Bank Rwanda Ltd ivuga ko ishingira ikirego cyayo ku gace ka gatandatu k'iyi ngingo bitewe n'uko Urukiko rwaba rwaritanyije *contrat de mandat* n'uburyo bwo kwohererezanya amafaranga bwitwa *SWIFT* ariko ntigaragaze aho byitanyijwe, ko Urukiko rwirengagije ko inyemezabuguzi yashingiweho amafaranga yoherezwa yari yashyikirijwe banki mbere y'uko amafaranga yoherezwa, nyamara iyo nyemezabuguzi yarazanywe nayo hagati mu iburanisha, atari Ruhando Ndatira Ernest wayitanze kuko atazi aho yaturutse, kubera ko yagaragajwe mu Rukiko bwa mbere tariki ya 29/06/2015 itanzwe na Me Rukangira Emmanuel. Asobanura ko Access Bank Rwanda Ltd ivuga ko Urukiko rwitanyije inyemezabuguzi na *payment order* kandi ntabyabaye, uretse ko bibaye ari nabyo byafatwa nko kunenga imikirize y'urubanza, ariyo mpamvu asaba uru Rukiko kwemeza ko ikirego kitakiriwe, kuko nta mpamvu n'imwe urega agaragaza yatuma urubanza rusubirishwamo ingingo nshya.

[18] Me Zitoni Pierre Claver avuga kandi ko inyandiko yitwa *Agreement of Participation in Automated Transfer System* Access Bank Rwanda Ltd yashyizwe muri dosiye nyuma yari isanzwe iriho urubanza rusubirishwamo ingingo nshya ruburanwa mu bujirire, kandi ko Access Bank Rwanda Ltd itabihakana, iyo nyandiko ikaba itatangwa nk'impamvu cyangwa nk'ikimenyetso gishya cyatuma urubanza rusubirishwamo ingingo nshya. Avuga ko iyo nyandiko yatanze na Banki Nkuru

y'u Rwanda, akaba atabona aho ihuriye n'abakiliya ba Access Bank Rwanda Ltd, nabyo bikaba bigaragaza ko ikirego cya Access Bank Rwanda Ltd kidakwiye kwakirwa.

[19] Me Zitoni Pierre Claver asoza avuga ko Access Bank Rwanda Ltd yatanze ikirego gisubirishamo urubanza ingingo nshya ishingiyeye ku ngingo ya 186, agace ka 6 y'Itegeko N^o21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu kavuga "ukwitiranyaga uko ibintu byagenze" kandi ko ako gace kavanyweho n'Itegeko rishya N^o22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, bityo hagendewe ku biteganywa n'ingingo ya 280 yaryo iteganywa ko imanza zikiburanishwa mu nkiko igihe iri tegeko ritangiye gukurikizwa, ziburanishwa mu buryo bukurikije iri tegeko, ariko ntacyo rihinduye ku mihango y'iburanisha yakozwe mbere y'uko ritangazwa, akaba ari ryo rigomba gukoreshwa, ibi nabyo bikaba ari impamvu ituma ikirego cya Access Bank Rwanda Ltd kidakwiye kwakirwa.

UKO URUKIKO RUBIBONA

[20] Urukiko rurasanga mbere yo gusesengura ingingo ijyanye n'iyakirwa ry'ikirego bishingiyeye ku kwitiranyaga ibintu uko byagenze nkuko biteganywa n'ingingo ya 186, agace ka 6 y'Itegeko N^o21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, hagomba kubanza gusuzuma ikibazo cyatanze n'uburanira Ruhando Ndatira Ernest avuga ko Access Bank Rwanda Ltd yatanze ikirego gisubirishamo urubanza

ingingo nshya ishingiyeye kuri iyo ingingo ya 186, agace ka 6, nyamara ako gace karavanyweho n'Itegeko rishya N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'ianza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu hagendewe ku biteganywa n'ingingo ya 280 yaryo iteganya ko: “ianza zikiburanishwa mu nkiko igihe iri tegeko ritangiye gukurikizwa, ziburanishwa mu buryo bukurikije iri tegeko, ariko ntacyo rihinduye ku mihango y'iburanisha yakozwe mbere y'uko ritangazwa.

[21] Urukiko rurasanga ibyo uburanira Ruhando Ndatira Ernest avuga bitahabwa ishingiro kuko aha igisobanuro kitari cyo ingingo ya 280 y'Itegeko rishya N° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru mu gihe ahubwo ariyo igomba gushingirwaho ngo ibirego byatanze iri Tegeko ritarajyaho bishobore kwakirwa ngo bisuzumwe hashingiwe ku Itegeko ryariho inkiko ziregerwa, bityo iki kirego kikaba kigomba gusuzumwa hashingiwe ku ingingo ya 186 agace ka 6 y'Itegeko No 21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, kuko ikirego cyatanze ariryo rikurikizwa.

[22] Ku bijyanye no gusubirishamo urubanza ingingo nshya, ingingo ya 186 agace ka 6 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012, ryavuzwe haruguru, ryakurikizwaga Access Bank Rwanda Ltd itanga ikirego, ari naryo ishingiraho isaba gusubirishamo urubanza ingingo nshya, iteganya ko :,urubanza rusaba gusubirishwamo ingingo nshya iyo mu icibwa ryarwo hakozwe amakosa akabije yo kwitiranya uko ibintu byagenze cyagwa hashingiwe ku Itegeko ritakiriho“.

[23] Urukiko rurasanga kwitiranya uko ibintu byagenze ari ukutumva neza ikibazo giteje impaka hagati y'ababuranyi ndetse

n'ibyashingirwaho mu kugikemura, ibi bigatuma umucamanza agera ku mwanzuro atagombaga kugeraho iyo asobanukirwa neza cyangwa abona neza uko ibintu byari biri.

[24] Urukiko rurasanga mu kiga cya 34 cy'urubanza RCOMAA 0054/15/CS rwaciye ku wa 21/04/2017 rusabirwa gusubirishwamo, Urukiko rugaragaza ko Ruhando Ndatira Ernest atigeze yemera ko ari we wahaye Access Bank Rwanda Ltd inyemezabuguzi (fagitiri), kubera ko amakuru yuko amadorali ye atageze kuwo agenewe yayabwiwe na Access Bank Rwanda Ltd, iyi Bank kandi ikaba itaragaragaje uko yayihaye iyo fagitiri, ndetse ko ntakigaragaza ko mbere yuko yohereza amadorali yari yakabonye iyo fagitiri.

[25] Urukiko rurasanga iyo nyemezabuguzi (fagitiri) ivugwa ari igaragara muri dosiye (Cote c 29), yakozwe na Aluzing Asia Pte Ltd kuwa 26.04.2013, igenewe Rwatole Entreprises (Customer name) yerekana ko Bank izishyurirwaho (Beneficiary Bank ari OCBC Bank Singapore, izina rya Konti izishyurirwaho (Account Beneficiary Name) rikaba West Atlantic Pte Ltd, Nimero ya konti ikaba No 503149270301. Rurasanga iyo nyemezabuguzi (fagitiri) ivugwa mu baruwa yo ku wa 06/05/2013 yashyizweho umukono na Ruhando Ndatira Ernest nka Perezida wa Rwatole Entreprises, yandikiye uwitwa Mr Bala, asobanura ko habaye kohereza amafaranga kuri West Atlantic Pte Ltd, ko iyo fagitiri ari impimbano (Cote 28), ibi bikaba bigaragaza ko yanditse iyi baruwa ayizi kandi ayifite, ku bwizo mpamvu, iyo nyandiko ye ikaba igomba guhabwa agaciro, hashingiwe ku ngingo ya 28 y'Itegeko N° 47/2017 ryo ku wa 23/09/2017 iteganya ko ibaruwa umuntu yandikiye undi itsindisha uwayanditse....”.

[26] Urukiko rurasanga kuba Ruhando Ndatira Ernest yari azi iyo nyemezabuguzi (fagitiri) kandi ayifite mbere yuko akora *OP* ku wa 02/05/2013, bigaragaza ko nta wundi waba warayigejeje muri Access Bank Rwanda Ltd, cyane cyane ko ikoresha nk'umugereka kuri *OP* isobanura impamvu amafaranga yoherezwa nkuko bisanzwe bikorwa kubohereza amafaranga abandi muri ubwo buryo.

[27] Naho ibyo uhagarariye Ruhando Ndatira Ernest avuga ko iyo nyemezabwishyu itakoreshejwe mu nzego zibanza, ikaba yaragarajwe ku rwego rw'ubujurire mu rubanza rusabirwa gushubirishwamo ingingo nshya, ntiyaba impamvu yabuza Access Bank Rwanda Ltd kuyikoresha ku rwego rw'ubujurire nk'ikimenyetso gishimangira imiburanire yayo, kuko ikibujijwe ku rwego rw'ubujurire ari ingingo nshya ariko ikimenyetso gishya kitabujijwe mu gihe gishobora gufasha umuburanyi gushimangira ingingo aburanisha.

[28] Urukiko rurasanga kwitiranya ibintu uko byagenze gushingiye ku kuba Urukiko rwarafashe ko igihe Ruhando Ndatira Ernest yakoraga *OP* yishyuriweho amafaranga 76.835USD yari atarabona inyemezabuguzi (fagitire) igaragaramo West Atlantic Pte Ltd, ko atari nawe waba warayigejeje muri Access Bank Rwanda Ltd, nyamara mu ibaruwa yo ku wa 06/05/2013 yavuzwe haruguru yiyemerera ubwe ko yakiriye iyo nyemezabuguzi (fagitire).

[29] Kuba rero mu gufata icyemezo Urukiko rwarashingiye ku kibazo cy'iyo nyemezabuguzi (fagitire) rwitiranya igihe yabonekeye, uwayakiriye n'uko yageze muri Access Bank Rwanda Ltd nk'uko bigaragara mu gika cya 34 cy'urubanza RCOMAA 0054/15/CS rusabirwa gushubirishwamo ingingo nshya, Urukiko rurasanga harabayeho amakosa akomeye yo

kwitiranya ibintu uko ibintu byagenze, bituma hafatwa icyemezo kitari gufatwa iyo hatabaho uko kwitiranya ibintu.

[30] Hashingiwe kuri ibyo bisobanuro no ku ngingo ya 186, 6 nk'uko yasobanuwe haruguru, Urukiko rurasanga habayeho kwitiranya uko ibintu byagenze ku bijyanye n'inyemezabwishyu (fagitire), bikaba ari imwe mu mpamvu ituma ikirego cya Access Bank Rwanda Ltd cyo gusubirishamo urubanza RCOMAA 0054/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/04/2017 ingingo nshya cyakirwa.

[31] Urukiko rurasanga kandi mu gihe rusanze ikirego cya Access Bank Rwanda Ltd cya kwakirwa hashingiwe ku mpamvu yo kwitiranya ibintu uko byagenze, atari ngombwa gusuzuma indi mpamvu yatanzwe na Access Bank Rwanda Ltd yo gusubirishamo urubanza RCOMAA 0054/15/CS ingingo nshya ishingiyeye ku kimenyetso gishya, cyane cyane ko mu gusobanura iyo ngingo yo ubwayo yivugira ko icyo kimenyetso gishimangira ikirego cyabo cy'uko rwitiranya ibintu uko byagenze, kuko gisobanura uburyo *transfer* y'amafaranga hagati y'amabanki ikorwa, cyerekana ko hashingirwa kuri *compte* aho gushingira kuri *intitulé de compte*.

b. Kumenya niba Access Bank Rwanda Ltd itarubahirije ubutumwa (mandat) yahawe na Ruhando Ndatira Ernest zo kohereza amadorari 76.835 ku buryo yayaryozwa ikabitangira n'indishyi.

[32] Me Rukangira Emmanuel na Me Buzayire Angel baburanira Access Bank Rwanda Ltd bavuga ko Ruhando Ndatira Ernest yagiye muri Access Bank ubwe yuzuzura *bordereau de transfert/ordre de payement (OP)* y'amadorali 76.835 n'intoki, bivuga ko *informations* yashyize kuri iyo bordereau

zirebana n’uwagombaga kohererezwa amafaranga ari we wazitangiye, ko na *code* yoherejweho nayo igaragaza ko yoherejwe na Ruhando Ndatira Ernest, bityo kuba amafaranga atarageze k’uwo yagombaga kohererezwa nta makosa Access Bank Rwanda Ltd yakoze.

[33] Basobanura ko inyemezabwishyu (fagitiri) Ruhando Ndatira Ernest ubwe yihereye Access Bank Rwanda Ltd igaragaza ko uwagombaga kwishyura ari sosiyete yitwa Aluzinc Asia Pte Ltd, ariko konti yayo Ruhando Ndatira yatanze ari nayo yanditse kuri *Ordre de Payement* yanditse kuri West Atrantic Pte Ltd, kuba rero amafaranga yaroherejwe kuri iyo konti ya Aluzinc Asia Pte Ltd iri muri OCBC (OVERSEAS CHINESE BANKING CORPORATION) nk’uko yari yabisabwe, yubahirije ubutumwa (mandat) yahawe na Ruhando Ndatira Ernest.

[34] Bakomeza bavuga ko Ruhando Ndatira Ernest adasobanura icyatumye ayo madolari atagera k’uwo yari agenewe kubera ko yaje gusanga inyemezabwishyu (facture) yahaye Access Bank Rwanda Ltd ari y’impimbano, kandi ko nyuma yo gukora *operation* yo kuyohereza Ruhando Ndatira Ernest yandikiye uwitwa Mr Bala amusaba kuvugana na Banki (OCBC) yoherejwemo ayo madolari kugira ngo amufashe igikorwa cya *transfert* gihagarare, ariko bamubwira ko yakererewe, ko *transfert* yarangiye, ndetse na Ruhando Ndatira Ernest ubwe ajya muri Singapore gukurikirana icyo kibazo.

[35] Bavuga ko mu rwego rwo kumufasha, Access Bank Rwanda Ltd nayo yandikiye Correspondant Bank yayo (CITI BANK NEW YORK) iyisaba guhagarika igikorwa cyo kuyohereza muri bank OCBC, ariko bayisubiza ko cyarangiye bitagishobotse, ndetse inandikira na OCBC iyisaba gusubiza ayo madolari kubera ko yoherejwe k’uwo atari agenewe, ariko

ntiyasubizwa. Bavuga ko Ruhando Ndatira Ernest ashaka gutwera Access Bank Rwanda Ltd amakosa kandi ari aye bwite, kuko fagitiri (facture) yakoreshejwe niwe ubwe wayitangiye.

[36] Ku byerekeye umubare w'amadorari ari ku nyemezabwishyu adahura n'ayari kuri *ordre de payement* bavuga ko kuba imibare itandukanye biterwa n'imikoranire hagati ye n'uwo yayoherezaga, ibyo bikaba bitatuma havugwa ko ubutumwa Access Bank Rwanda Ltd itabwubahirije. Naho kucyo Access Bank Rwanda Ltd yakozwe imaze kubona ko uwagombaga kwishyura ugaragara kuri *ordre de payement* atandukanye n'ugaragara kuri *facture*, asubiza ko kuri *ordre de payement* hari handitseho ALUZINC ASIA Pte Ltd kandi ko ari yo yari yatanze iyo nyemezabwishyu igaragaraho ko uwanditse kuri iyo konti ari West Atlantic Pte Ltd, bityo ko Access Bank Rwanda Ltd yarebye numero ya konti yatanzwe na Ruhando Ndatira Ernest kuri *Ordre de Payement* ireba na numero ya konti yari ku nyemezabwishyu yatanzwe na Aluzinc Asia Pte Ltd isanga birahura, kandi ko umuntu umwe ashobora kugira konti nyinshi muri banki imwe ariko zifite inyito (intitulées) zitandukanye.

[37] Bavuga ko iperereza Urukiko rwakoze muri Banki Nkuru y'u Rwanda rihuzwa n'ibisobanuro byatanzwe na Access Bank Rwanda Ltd kuva urubanza rwatangira, kuko byagaragaye ko mu gihe hari contradiction hagati ya intitulé na numero ya konti ubwayo, ikitabwaho ari konti, kandi ko mu gihe usaba ko amafaranga yoherezwa yujuje *ordre de payement*, bank igakora operation yo kohereza amafaranga, ibisigaye gukorwa kugira ngo amafaranga agere ku wo agenewe bikorwa na banki zindi.

[38] Naho kubyerekeye ibyo uhagarariye Ruhando Ndatira Ernest anenga iperereza ryakozwe n'Urukiko avuga ko itsinda

ryabajijwe ritarahiye kandi ko imyironodoro y'ababajijwe ituzuye, ko n'ababajijwe batari bafite ubumenyi buhagije ku mikorere ya SWIFT ndetse ko na Banki Nkuru y'u Rwanda idafite aho ihuriye n'imikorere yayo, bavuga ko nta handi amakuru yari akenewe n'Urukiko yagombaga gushakirwa usibye muri Banki Nkuru y'u Rwanda kuko ariyo ikurikirana imikorere y'amabanki (regulator), ko nibyo banenga byose bigaragara kuri iyo raporo.

[39] Me Zitoni Pierre Claver uburanira Ruhando Ndatira Ernest avuga ko ikosa ryakozwe ryatumye Access Bank Rwanda Ltd itishyura uwo yagombaga kwishyura, ariyo yarikoze, kuko n'ubwo ivuga ko inyemezabwishyu (fagitiri) yashingiweho yishyura ari Ruhando Ndatira Ernest wayitanze atari ukuri kuko atazi aho yaturutse, kubera ko yagaragajwe mu Rukiko bwa mbere tariki ya 29/06/2015 itanzwe na Me Rukangira Emmanuel. Akomeza avuga ko umubare wa 71.241,12USD uyigaragaraho utandukanye n'ugaragara kuri *ordre de payement* yatanzwe na Ruhando Ndatira Ernest ya 76.835 USD, ikanagaragaraho ko *account beneficiary name* ari West Atlantic Pte Ltd, mu gihe *ordre de payement* yo igaragaza ko *beneficiary name* ari Aluzinc Asia Pte Ltd, bityo Access Bank Rwanda Ltd ikaba ifite uruhare mu iyoba ry'amadolari yagombaga kohereza, kubera ko yihaye guhindura *beneficiary name* inyuranije n'uwo yabwiwe na Ruhando Ndatira Ernest kwishyura.

[40] Me Zitoni avuga ko iperereza ryakozwe n'Urukiko muri Banki Nkuru y'Igihugu ritakurikije amategeko kuko ababajijwe batabanje kurahira, ko n'imyironodoro yabo ituzuye, kandi ko n'itsinda ryabajijwe nta makuru afatika ryashoboraga gutanga kuko ridafite aho rihuriye n'imikorere ya SWIFT, hakaba haragombaga kubazwa abakozi bo mu ishami rishinzwe *external transaction* ribarizwa muri *banking operations department* kuko

aribo bashoboraga gutanga amakuru ya nyayo ku mikorere ya *SWIFT* system, ko *SWIFT* system ari uburyo bwo kohererezanya amafaranga bwigenga budafite aho buhuriye na Bank Nkuru, usibye kumenya ko buriho, ikaba ntacyo yabukoraho.

[41] Akomeza avuga ko mu iperereza ryakozwe n'Urukiko rw'Ikirenga itsinda ryabajijwe ryasobanuye ko iyo izina ry'umukiriya ritandukanye na konti ye, igihe cy'iyishyurwa bahitamo konti, nyirayo akaba ariwe wishyurwa, ariko ko ibyo bishoka igihe ari ukwishyurana hagati y'amabanki ubwayo, bitandukanye n'uburyo bwo kwishyurana hakoreshejwe SWIFT, ko ikizwi ari uko mu gihe banki isanze izina ry'umukiriya ritandukanye na konti ye kwishyura bihita bihagarara, umuntu akaba yakwibaza impamvu Access Bank Rwanda Ltd yo yahisemo guhindura uwo yari yasabwe kohereza ayo madolari.

[42] Me Zitoni Pierre asoza avuga ko Access Bank Rwanda Ltd ariyo ifite ikosa kuko yagombaga gukora ibyo yasabwe nta kintu ihinduye, ibyo abayiburanira bavuga ko inyemezabwishyu (fagitiri) yari umugereka (annexe) ya *Ordre de payement* akaba atari ukuri, kuko nta bisobanuro uwohereza amafaranga asabwa guha banki, kandi ko no ku nyandiko yuzuzwa ntaho ayo makuru yateganyirijwe. Akomeza asobanura ko igishimangira ko ikosa ryayo ari uko nyuma y'uko amadolari yagombaga koherezwa abuze, Access Bank Rwanda Ltd yanditse inyandiko zitandukanye zigamije guhagarika *transfert* harimo na Email umukozi wayo witwa Aline yagiye yandika, ko n'ibaruwa Ruhando Ndatira Ernest yanditse yayandikishijwe nayo, kandi hakurikijwe context ibintu byakozwemo impande zombi zarafatanyaga gukemura ikibazo, ko iyo baruwa yanditse itavanaho inshingano za Access Bank Rwanda Ltd. Abajijwe niba banki ishobora kohereza amafaranga itabajije impamvu

yoherezwa, avuga ko bikorwa iyo hishyurwa umwenda, ariko ko atari ngombwa mu gihe cyo kohereza amafaranga.

UKO URUKIKO RUBIBONA

[43] Urukiko rurasanga nkuko dosiye y’urubanza ibigaragaza, tariki ya 02/05/2013 Ruhando Ndatira Ernest yasabye Access Bank Rwanda Ltd kohereza amadolari 76.835 kuri konti N°503149270301, iri muri Bank OCBC yo muri Singapore uwo yari agenewe akaba ari Aluzinc Asia Pte Ltd, impamvu yo kohereza ayo madolari akaba ari ukwishyura amabati (achat tôles) nk’uko bigaragazwa n’inyandiko (OP- ordre de payement) yakozwe na Ruhando Ndatira Ernest. Rurasanga kandi tariki ya 24/03/2013 Aluzinc Asia Pte Ltd yari yarakoze fagitiri iyohereza uruganda rukora amabati rwitwa Rwatole Enterprises, sosiyete yanditse kuri Ruhando Ndatira Ernest, iriho konti numero 503149270301 yanditse ku izina rya West Atlantic Ltd.

[44] Urukiko rurasanga mu idosiye y’urubanza harimo inyandiko yitwa Payment TT197013 Details, yujujwe na Access Bank Rwanda Ltd igaragaza ko Access Bank Rwanda Ltd yishyuye 76.835.00 USD, yakozwe ku wa 30/12/2014 (saa 12:03:53 (Cote ya 6), ikaba yanditseho ko Value date ari ku wa 02/05/2013, uyishyuye (Ordering Party) akaba Ruhando Ndatira Ernest, Konti yishyuweho (Beneficiary account or ID) ikaba konti N° 503149270301, uwishyuwe (Beneficiary Name) akaba West Atlantic Pte Ltd, naho Bank yishyuwe (Beneficiary Bank Account other ID) ikaba OCBC CENTER, SINGAPORE, uyu wishyuwe akaba atandukanye na Aluzinc Asia Pte Ltd wari wanditse kuri “Ordre de payement“ yakozwe na Ruhando Ndatira Ernest.

[45] Urukiko rurasanga ariko nubwo ruri bwibande ku nyandiko imaze kuvugwa mu gika kibanza gusa, kuko ariyo Ruhando Ndatira Ernest ashingiraho avuga ko amafaranga ye yoherejwe utari wanditse kuri *OP*, muri dossiye hagaragaramo indi nyandiko nayo yitwa *Payment TT197013 Details* yo ku wa 02/05/2013 yanditswe ku wa 02/05/2013 saa 16:55:05, yuzujwe na Access Bank Rwand Ltd igaragaza ko Access bank yishyuye 76.835.00 USD, yanditseho ko *Value date* ari ku wa 02/05/2013, uyishyuye (Ordering Party) akaba Ruhando Ndatira Ernest, Konti yishyuweho (Beneficiary account or ID) ikaba konte N^o503149270301, Bank yishyuwe (Beneficiary Bank Account) ikaba OCBC CENTER, SINGAPORE, naho uwishyuwe (Beneficiary Name) akaba ALUZINC ASIA Pte Ltd, bihura n'uwari wanditse kuri *Ordre de payement* yakozwe na Ruhando Ndatira Ernest (Cote ya 4).

[46] Urukiko rurasanga kandi muri dosiye y'urubanza harimo inyandiko zitandukanye zerekana ko nyuma yo gusabwa kohereza amadolari 76.835, Access Bank Rwanda Ltd yayohereje kuri Konti numero 503149270301 iri muri OCBC Bank i Singapore, murizo hakabamo iyiswe Start of message, ibaruwa yo ku wa 06/05/2013 ya Ruhando Ndatira Ernest yandikiye uwitwa Bala amusaba kumufasha gukurikirana kugira ngo ayo madolari adakurwa kuri Konti kuko mu kuyishyura yashingiye kuri fagitire y'impimbano (Cote 28), inyandiko yitwa *Account statement details* igaragaza uburyo ayo madolari yoherejwe n'inzira yanyuzemo kugira ngo agere kuri konti yagomba gushyirwaho, ibi bikaba bigaragaza ko ayo madolari yageze kuri Konti numero 503149270301; bikanashimangirwa na intermediary bank (New York CITI Bank) mu butumwa yoherereje Access Bank Rwanda Ltd iyimenesha ko amadolari

yageze kuri iyo konti ariko ko *operation* idashoboka guhagarikwa kuko yarangiye.

[47] Urukiko rurasanga mu iperereza ryakozwe n’Urukiko rw’Ikirenga ku wa 11/07/2018 muri Banki Nkuru y’Igihugu, abakozi babihereye ububasha n’Ubuyobozi bwayo basorabanuriye Urukiko imikorere ya *SWIFT* (uko kohererezanya amafaranga hagati y’amabanki ku rwego mpuzamahanga bikorwa), n’uburyo iyo havutse ikibazo cy’amazina y’uwohererejwe amafaranga gikemuka, bagaragaza ko iyo banki yohereza amafaranga imaze kuyohereza, ibikorwa bindi bikorwa n’izindi banki (*intermediary bank-correspondant bank and receiving bank*), bityo ikaba idashobora kubona amakuru yose kuri konti yoherejweho amafaranga harimo no kuba yahuza ikonti yoherejweho n’izina yanditseho kugira ngo imenye koko ko ari nyirayo. Raporo yiryo perereza igaragaza ko iyo havutse ikibazo cy’uko nimeru ya konti igaragaraho amazina atandukanye ya nyiri konti, ikirebwa ari nimeru ya konti aho kuba amazina ya banyirayo.

[48] Urukiko rurasanga uwunganira Ruhando Ndatira Ernest adahakana ko amadolari 76.835 yageze kuri konti N°503149270301 yatanzwe na Ruhando Ndatira Ernest ubwe kuri OP yashyikirije Access Bank Rwanda Ltd, ahubwo icyo ahakana ari uko izina ALUZINC ASIA Pte Ltd ryanditse kuri iyo OP ritandukanye n’izina WEST ATLANTIC PTE LTD rigaragara kuri iyo konti muri *Bank Oversea Chinese Banking Corporation Limited Singapore (OCBC)* yafunguwemo, kandi akaba atemera na fagitiri igaragaramo WEST ATLANTIC PTE LTD nk’uwari kwoherezwa ayo madorali.

[49] Urukiko rurasanga nkuko byasobanuwe haruguru, inyemezabwishyu (fagitiri) igaragaramo izina WEST

ATLANTIC PTE LTD ryari kuri konti N°503149270301 Ruhando Ndatira Ernest yujuje kuri *OP* ngo yoherezweho amadorali ye ariwe yari yakorewe kandi nta wundi wayigejeje muri Access Bank Rwanda Ltd atari we, bivuga ko Access Bank Rwanda Ltd yohereje amadorali kuri konti no kuri numero Ruhando Ndatira Ernest yatanze; bityo ikaba yarujuje inshingano yayo.

[50] Urukiko rurasanga na none hashingiwe kuri raporo y'iperereza ry'Urukiko rw'Ikirenga ryakozwe muri Banki Nkuru y'Igihugu yavuzwe haruguru, kuba Access Bank Rwanda Ltd yarohereje amadorali 76.835 akagera kuri konti N°503149270301 yari yahawe na Ruhando Ndatira Ernest, iri muri Bank Oversea Chinese Banking Corporation Limited Singapore (OCBC), nabyo bishimangira ko yari yakoze inshingano yayo, kubera ko iyo havutse ikibazo ku mazina ya nyiri konti ikigomba kurebwa ari numero ya konti aho kuba amazina y'uwohererejwe. Ibi kandi niko bimeze mu nyandiko yitwa “*Agreement of Participation in Automated Transfer System*”, mu gika cyayo ya 39.2. aho bavuga ko iyo hari itandukaniro hagati ya numero ya konti n'izina rya nyirayo, numero ya konti niyo irebwa (*Where there is discrepancy between a beneficiary account number and beneficiary name and address in a message, the account number will take precedence*).

[51] Ku bijyanye nuko umubare w'amadorali uri kuri iyo nyemezabwishyu utandukanye n'umubare uri kuri *OP* yujijwe na Ruhando Ndatira Ernest nabyo ntacyo byafasha mu kumenya nyiri konti yoherejweho amafaranga kuko icyari gikenewe mu kohereza amafaranga ari numero ya konti yagombaga koherezwaho, nk'uko byagaragajwe haruguru, kuba Ruhando Ndatira Ernest yohereje make cyangwa menshi bikaba byaba

ikibazo kimureba we n'uwo yari yoherereje ayo madolari, kitareba banki yagombaga kuyohereza.

[52] Urukiko rurasanga rero rushingiye kuri ibyo bisobanuro, no ku biteganywa n'ingingo ya 532 y'Igitabo cya gatatu cy'urwunge rw'Amategako y'imbonezamubano, iteganya ko: „Intumwa itegetswe kurangiza ubutumwa yahawe mu gihe cyose ikibushinzwe kandi iryozwa indishyi zikomoka ku kutarangiza ubutumwa yahawe. Itegetswe kurangiza ibintu yatangiye gukora, kabone n'iyo uwamutumye yaba yarapfuye, niba hari ibishoboka kwangirika “; Access Bank Rwanda Ltd yarubahirije inshingano yahawe *Mandat*, ikaba itaryozwa kwishyura 76.835 USD n'indishyi zijyanye nayo; ku bw'izo mpamvu urubanza RCOMAA0054/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/04/2017 rukaba rugomba guhinduka mu ngingo zarwo zose.

c. Kumenya niba izindi ndishyi zisabwa muri uru rubanza zikwiye

[53] Uhagarariye Ruhando Ndatira Ernest yatanze ikirego cyuririre ku kindi asaba ko indishyi zikomeza kubarwa kugeza igihe urubanza ruciriwe nk'uko byemejwe n'Urukiko rw'Ikirenga mu rubanza RCOMAA 0054/15/CS, kandi zikabarwa mu gaciro k'amafaranga hashingiwe ku gaciro k'idorari kangana na 890Frw. Bityo indishyi basaba zikabarwa mu buryo bukurikira: $76,835 \text{ USD} \times 890 \text{ Frw} = 68.383.150 \text{ Frw}$. Access Bank Rwanda Ltd ikaba kuva muri Gicurasi 2013 kugeza muri Gashyantare 2019 hashize imyaka 5 n'amezi 8 ni ukuvuga iminsi 1860. Inyungu zikaba ari: $(68.383.150 \times 17,56\% \times 1860/360) = 62.041.557 \text{ FRW}$, zikazatangwa hamwe n'umwenda remezo wa 76.835USD.

[54] Ababuranira Access Bank Rwanda Ltd bavuga ko indishyi Ruhando Ndatira Ernest asaba nta shingiro zifite, ahubwo kugeza ubu Access Bank Rwanda Ltd ariyo ikomeje gutakaza amafaranga kubera kuyihoza mu manza nta mpamvu, ariko mu myanzuro yabo ntibagaragaza ingano yizo ndishyi.

UKO URUKIKO RUBIBONA

[55] Urukiko rurasanga indishyi zisabwa n'uhagarariye Ruhando Ndatira Ernest zidakwiye kuko ntacyo atsindiye muri uru rubanza, byongeye kandi Access Bank Rwanda Ltd yari ifite uburenganzira bwo kugana inkiko igihe yumva ko hari uburenganzira bwayo igomba guharanira.

III. ICYEMEZO CY'URUKIKO

[56] Rwemeje ko ikirego cyo gusubirishamo ingingo nshya urubanza RCOMAA0054/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/04/2017 cyatanzwe na Access Bank Rwanda Ltd cyakiriwe kandi ko gifite ishingiro;

[57] Rwemeje ko urubanza RCOMAA0054/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 21/04/2017 ruhindutse mu ngingo zarwo zose;

[58] Rwemeje ko Access Bank Rwanda Ltd itagomba kwishyura Ruhando Ndatira Ernest 76.835 USD n'indishyi zijyana nayo;

[59] Ruvuze ko ingwate y'amagarama yatanzwe ihwanye n'ibyakozwe muri uru rubanza.

IMANZA ZACIWE MU MIZI

URUBANZA MBONEZAMUBANO

NTAGANZWA v MUNYANTORE N'UNDI

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RC
00002/2019/SC (Ntezilyayo, P.J, Nyirinkwaya, Cyanzayire,
Rukundakuvuga, na Hitiyaremye, J.) 28 Gashyantare 2020]

*Amategeko agenga imanza z'imbonezamubano – Cyamunara –
Kwegukana umutungo uguzwe muri cyamunara – Mu gihe
uberewemo umwenda yitabiriye cyamunara y'igurisha
ry'umutungo w'umubereyemo umwenda akaba ari we
uyitsindira, ntibimuhesha uburenganzira bwo kuwegukana
atishyuye ikiguzi yitwaje umwenda aberewemo, kuko iyo
yitabiriye iyo cyamunara afatwa nk'abandi baguzi bose.*

Incamake y'ikibazo: Urubanza rwatangiriye mu Rukiko rw'Ibanze rwa Kacyiru Ntaganzwa arega Umuhesha w'Inkiko Munyantore ndetse na Uwitonze, asaba Urukiko ko rwatesha agaciro cyamunara y'inzu ye kubera ko yakozwe mu buryo bunyuranije n'amategeko kuko inzu ye yateshejwe agaciro, ko imihango yo gutangaza cyamunara y'inzu ye itakozwe kuko nta matangazo yamanitswe kandi ko amafaranga yavuye muri cyamunara atashyizwe kuri konti y'urukiko nk'uko amategeko abiteganyaga. Urukiko rw'Ibanze rwafashe icyemezo rwemeza ko ikirego cye nta shingiro gifite ko cyamunara yakozwe ikurikije amategeko.

Urega ntiyishimiye imikirize y'Urukiko ajuririra Urukiko Rwisumbuye rwa Gasabo narwo rwemeza ko bujurire bwe nta shingiro bufite kuko Urukiko rw'Ibanze rwagaragaje ko

cyamunara yabaye yakurikije amategeko, rushingiye kubimenyetso rwahawe.

Urega ntiyishimiye imikirize y'urubanza maze yandikira Perezida w'Urukiko Rukuru asaba ko rwasubirwamo kumpamvu z'akarengane, Perezida amaze kubisuzuma yandikira Perezida w'Urukiko rw'Ikirenga avuga ko rushobora kuba rurimo akarengane ko byasuzumwa; Perezida w'Urukiko rw'Ikirenga yemeza ko urubanza rusubirwamo ku mpamvu z'akarengane.

Urubanza rwo gusubirishamo ku mpamvu z'akarengane rwaburanishirijwe mu Rukiko rw'Ikirenga, aho Ntaganzwa yavuze ko Urukiko Rwisumbuye rutasuzumye agaciro nyakuri k'umutungo nk'uko kari kemejwe mu rubanza rwasabirwaga kurangizwa ahubwo abaregwa bumvikanye n'umugenagaciro batesha agaciro inzu ye; yanavuze ko cyamunara itamenyekanishijwe mu buryo bukurikije amategeko kuko itangazo rya cyamunara ritamanitswe ahategetswe hose nk'uko bigaragazwa nibimenyetso batanze, asoza avuga kandi ko Uwitonze yegukanye inzu ya Ntaganzwa mu buryo bunyuranije n'amategeko kuko Munyantore yafashe inzu ye ayiha Uwitonze atayiguze muri cyamunara kuko ntakigaragaza aho yishyuye ikiguzi cy'inzu nk'uko biteganywa n'amategeko.

Abaregwa bavuga ko ibyo urega avuga ko umutungo we wateshejwe agaciro bafatanije n'impuguke ataribyho kuko iyo mpuguke yashyizweho na Perezida w'Urukiko rw'Ibanze bo ntaho bahuriye nawe, naho kugaciro avuga ko kari karagenwe mu rubanza rwarangizwaga ataribyho kuko iryo genagaciro ariwe ubwe wariyikoreshereje akaritanga mu Rukiko ntaho Urukiko rwigeze rurisaba cyangwa ngo rurishingireho, kubijyanye no kuba cyamunara itamenyekanishijwe mu buryo bukurikije amategeko bavuze ko ataribyho kuko byose byakozwe ndetse akaba ariyo mpamvu yanitabiriwe inshuro enye zose, ku kuba

urega avuga kandi ko Uwitonze yegukanye inzu mu buryo bunyuranije n'amategeko nabyo sibyo kuko Uwitonze nawe yari yemerewe gupiganwa nk'abandi akaba yari kuri liste y'abapiganwa akaba ari nawe watanze amafaranga menshi kurusha abandi bitabiriye cyamunara.

Incamake y'icyemezo: 1. Mu gihe uberewemo umwenda yitabiriye cyamunara y'igurisha ry'umutungo w'umubereyemo umwenda akaba ari we uyitsindira, ntibimuhesha uburenganzira bwo kuwegukana atishyuye ikiguzi yitwaje umwenda aberewemo, kuko iyo yitabiriye iyo cyamunara afatwa nk'abandi baguzi bose. Bityo kuba Uwitonze yaregukanye inzu ya Ntaganzwa mu buryo bunyuranyije n'amategeko kuko yayegukanye nta bwishyu atanze yitwaje umwenda aberewemo bikaba ari impamvu ituma cyamunara iseswa.

2. Mu gihe imenyekanisha rya cyamunara ritubahirije ibiteganya n'amategeko, cyamunara igomba guseswa kuko iba yakozwe mu buryo bunyuranije n'amategeko.

**Gusubirishamo urubanza ku mpamvu z'akarengane bifite
ishingiro;
Imikirize y'urubanza rwasabiwe gusubirirwamo ihindutse
kuri byose.**

Amategeko yashingiweho :

Itegeko N° 12/2013 ryo ku wa 22/03/2013 rigenga umurimo w'Abahesha b'Inkiko, ingingo ya 60

Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, ingingo ya 147, 263, 295, 306, 307, 312 n'iya 315

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA:

[1] Mu rubanza RCA 0175/15/HC/KIG rwaciwe ku wa 30/12/2015, Uwitonze Innocent yaregagamo Ntaganzwa Faustin na Kabahire Louise asaba ko bategekwa kumuha inzu baguze iri mu kibanza gifite UPI 1/02/02/05/583, kiri mu Kagari ka Nyamugali, Umurenge wa Gatsata, Akarere ka Gasabo, Umujyi wa Kigali, nk'uko babyemeranyijweho mu masezerano bakoranye ku wa 28/10/2013, Urukiko Rukuru rwanzuye ko nta bugure bwabayeho, ko icyari kigamijwe ari inguzanyo y'amafaranga yunguka (*banque Lambert*), ariko kubera ko bibujijwe bandika amasezerano agaragaza ibintu uko bitari, rutegeka Uwitonze Innocent gusubiza abo baburana icyangombwa cy'inzu, Ntaganzwa Faustin nawe akamwishyura umwenda amurimo ungana na 16.000.000 Frw.

[2] Urwo rubanza rumaze gucibwa, Umuhesha w'inkiko w'umwuga Munyantore Bonaventure yatangiye imihango yo kurangiza urubanza ku gahato kugira ngo Uwitonze Innocent yishyurwe amafaranga yatsindiye, yandikira Perezida w'Urukiko rw'Ibanze rwa Kacyiru amusaba gushyiraho impuguke yakwifashishwa mu kugena agaciro k'umutungo utimukanwa wa Ntaganzwa Faustin na Kabahire Louise uri mu kibanza cyavuzwe haruguru mu rwego rwo kurangiza urubanza RCA 0175/15/HC/KIG.

[3] Ku wa 01/04/2016, Perezida w'Urukiko rw'Ibanze rwa Kacyiru yategetse ko inzu ya Ntaganzwa Faustin na Kabahire Louise ikorerwa igenagaciro na Ir Sebakwiye Théophile. Uyu yakoze ibyo yasabwe maze muri raporo ye yo ku wa 08/04/2016, agaragaza ko inzu n'ikibanza yubatsemo bifite agaciro ka 13.033.020 Frw.

[4] Tariki ya 19/04/2016, Perezida w'Urukiko rw'Ibanze rwa Kacyiru yemeje ko uwo mutungo uzatezwa cyamunara ku wa 26/05/2016 saa ine z'amanywa, anategeka uko cyamunara izatangazwa n'aho amatangazo ya cyamunara azamanikwa.

[5] Ku itariki ya 04/08/2016, Umuhesha w'inkiko Munyantore Bonaventure yakoze inyandikomvugo ya cyamunara igaragaza ko cyamunara yabaye uwo munsu kandi ko inzu yegukanywe na Uwitonze Innocent (ari nawe wari uberewemo umwenda waburanyweho mu rubanza rwarangizwaga) kuko ariwe watanze igiciro cya 16.500.000 Frw kiri hejuru mu bapiganwa umunani bari bayitabiriye, ndetse ku wa 04/01/2017 inzu iva mu maboko ya Ntaganzwa Faustin, ihabwa Uwitonze Innocent.

[6] Ku wa 13/06/2017, Ntaganzwa Faustin yatanze ikirego mu Rukiko rw'Ibanze rwa Kacyiru asaba ko cyamunara iteshwa agaciro kubera ko yakozwe mu buryo bunyuranyije n'amategeko. Mu kirego cye yavugaga ko:

Umuhesha w'Inkiko Munyantore Bonaventure na Uwitonze Innocent bumvikanye n'impuguke Sebakwiye Théophile, inzu bayitesha agaciro, ntibanamumenyesha iryo genagaciro ryatesheje inzu ye agaciro;

Icyemezo gishyiraho impuguke, Munyantore Bonaventure yakibonye ku wa 12/04/2016 kandi

bigaragara ko *expertise* yakozwe ku wa 08/04/2016, hakibazwa ukuntu yaba yarakozwe mbere y'uko icyemezo cy'Urukiko kiboneka;

Umuhesha w'inkiko ntabwo yubahirije amategeko agenga imihango yose ya cyamunara kuko amatangazo amenyesha ko hari cyamunara ku itariki ya 04/08/2016 atamanitswe ahategetswe hose;

Hari abantu baje muri cyamunara ibanziriza iya 04/08/2019, Munyantore Bonaventure yanga kubandika, ahubwo yandika aba *commissionaires* bazanywe na Uwitonze Innocent, ari nabo yandukuye mu nyandikomvugo ya cyamunara yo ku wa 04/08/2019;

Amafaranga yavuye muri cyamunara ntabwo yashyizwe kuri konti y'Urukiko.

[7] Ku wa 09/02/2018, Urukiko rw'Ibanze rwa Kacyiru rwaciye urubanza RC 00411/2017/TB/KCY, rwemeza ko ikirego cya Ntaganzwa Faustin nta shingiro gifite kuko cyamunara yakurikije amategeko hakurikijwe ibimenyetso rwahawe.

[8] Mu gufata icyo cyemezo, Urukiko rwavuze ko umuhanga wakoze igenagaciro yashyizweho n'Urukiko ku buryo Ntaganzwa Faustin adashobora kuvuga ko atarimenyeshejwe cyangwa ngo avuge ko ryakozwe ku buriganya bwa Munyantore Bonaventure na Uwitonze Innocent kuko ntaho bahuriye naryo, cyane cyane ko n'amafaranga yatanzwe muri cyamunara yarenze avugwa muri iryo genagaciro.

[9] Urukiko rwavuze kandi ko ibivugwa na Ntaganzwa Faustin ko raporo y'impuguke yabonetse mbere y'icyemezo

kimushyiraho atari ukuri kuko yashyizweho ku wa 01/04/2016, hanyuma raporo ye isohoka ku wa 08/04/2016.

[10] Ku birebana n'itangazo rya cyamunara, rwavuze ko bigaragara muri dosiye ko yamanitswe ahategetswe hose, naho ku birebana n'uko amafaranga yaguze inzu atanyuze kuri konti y'Urukiko, rwavuze ko nubwo biteganywa n'itegeko, bitari ngombwa kuko uwagombaga kuyishyurwa ari nawe watsindiye inzu yagombaga kuvamo ubwishyu.

[11] Ntaganzwa Faustin yajuriye mu Rukiko Rwisumbuye rwa Gasabo avuga ko Urukiko rw'Ibanze rwa Kacyiru rwirengagije ko inzu ye yapfobejwe agaciro, ndetse ko amatangazo ya cyamunara atamanitswe ahari hategetswe hose.

[12] Ku wa 17/10/2018, Urukiko Rwisumbuye rwa Gasabo, rwaciye urubanza RCA 00052/18/TGI/GSBO, rwemeza ko ubujurire bwa Ntaganzwa Faustin nta shingiro bufite kuko urukiko rubanza rwagaragaje ko cyamunara yakurikije amategeko hakurikijwe ibimenyetso rwahawe, Ntaganzwa Faustin akaba nta gishya yazanye mu bujurire kivuguruza ibyo rwashingiyeho, rumutegeka kwishyura Uwitonze Innocent na Munyantore Bonaventure 1.000.000 Frw y'igihembo cya Avoka.

[13] Nyuma y'uko urwo rubanza ruciwe, Ntaganzwa Faustin yandikiye Perezida w'Urukiko Rukuru asaba ko rwasubirwamo ku mpamvu z'akarengane, nawe amaze gusuzuma ubusabe bwe yandikira Perezida w'Urukiko rw'Ikirenga avuga ko rushobora kuba rwarabayemo akarengane, ko byasuzumwa hakemezwa niba rwasubirishwamo ku mpamvu z'akarengane.

[14] Mu cyemezo cye 0102/CJ/2019 cyo ku wa 09/05/2019, Perezida w'Urukiko rw'Ikirenga yemeje ko urubanza RCA

00052/18/TGI/GSBO rwandikwa mu bitabo kugirango ruzongere kuburanishwa.

[15] Urubanza rwaburanishijwe mu ruhame ku wa 04/02/2020, Ntaganzwa Faustin ahagarariwe na Me Nzeyimana Lusinga Innocent, Munyantore Bonaventure na Uwitonze Innocent bahagarariwe na Me Twizeyimana Innocent.

[16] Me Nzeyimana Lusinga Innocent uhagarariye Ntaganzwa Faustin yaburanye avuga ko Urukiko Rwisumbuye rwa Gasabo rwirengagije ko cyamunara yakozwe mu buryo bunyuranyije n'amategeko, haba ku bijyanye n'agaciro kahawe inzu ye, haba ku bijyanye n'imenyekanisha rya cyamunara, haba ku bijyanye n'uburyo umutungo weguriwe Uwitonze Innocent atawuguze, naho Me Twizeyimana Innocent uhagarariye abaregwa avuga ko ntacyo urwo rukiko rwirengagije.

[17] Ibibazo byasuzumwe muri uru rubanza ni ibyo kumenya niba mu rubanza RCA 00052/18/TGI/GSBO, Urukiko Rwisumbuye rwarirengagije ko agaciro k'inzu ya Ntaganzwa Faustin kagenwe mu buryo bunyuranyije n'amategeko; ko cyamunara itamenyekanishijwe nk'uko byari byategetswe; ko Uwitonze Innocent yeguriwe inzu ya Ntaganzwa Faustin mu buryo bunyuranyije n'amategeko.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. Kumenya niba agaciro k'inzu ya Ntaganzwa Faustin karagenwe mu buryo bunyuranyije n'amategeko

[18] Me Nzeyimana Lusinga Innocent uhagarariye Ntaganzwa Faustin avuga ko Urukiko Rwisumbuye rwa Gasabo rutasuzumye agaciro nyakuri k'umutungo wagurishijwe kuko mu rubanza RCA 0175/15/HC/KIG rwarangizwaga hemejwe ko umutungo ufite agaciro kangana na 51.720.900 Frw, ariko mu kururangiza Umuhesha w'inkiko Munyantore Bonaventure afatanyije na Uwitonze Innocent n'umugenagaciro Ir Sebakwiye Théophile bakora uburiganya, bapfobya agaciro k'inzu ye, bayiha agaciro ka 13.033.020 Frw, n'iyo raporo y'igenagaciro ntibayimushyikiriza kugira ngo agire icyo ayivugaho, abe yanakoresha indi iyivuguruza mbere y'uko inzu igurishwa muri cyamunara.

[19] Avuga kandi ko mbere yo gushyiraho umugenagaciro, bagombaga kubanza kureba niba hari uwo bahuriraho bombi aho kugira ngo Uwitonze Innocent baburana washakaga gutwara inzu ye ariwe umutanga wenyine, ari nabyo byatumye apfobya agaciro k'inzu ye, nyuma bagahimba amayeri bavuga ko yaguzwe 16.500.000 Frw kugira ngo bihurirane n'umwenda wa 16.000.000 Frw yari amubereyemo, hiyongereyeho igihembo cy'umuhesha w'inkiko Munyantore Bonaventure kingana na 500.000 Frw.

[20] Me Twizeyimana Innocent uhagarariye Munyantore Bonaventure na Uwitonze Innocent avuga ko ibyo Ntaganzwa Faustin avuga ko umutungo we wateshejwe agaciro n'abo ahagarariye bafatanyije na Ir Sebakwiye Théophile bishyiriyeho

ubwabo nta kuri kurimo kuko ataribo bashyizeho impuguke yagennye agaciro k'inzu, ahubwo ari Perezida w'Urukiko rw'Ibanze rwa Kacyiru wamushyizeho.

[21] Avuga kandi ko ibyo Ntaganzwa Faustin avuga ko atigeze yerekwa igenagaciro ryakozwe na Ir Sebakwiye Théophile nta gaciro byahabwa kuko nta kimenyetso na kimwe yatanze kigaragaza ko atayibonye cyangwa se ko yayisabye ntayihabwe, cyane ko cyamunara zose zagiye zisubikwa ahari kugeza ku ya nyuma, ku buryo iyo haba hari ikinyuranyije n'amategeko yari guhita akivuga cyamunara ntibe.

[22] Avuga nanone ko igenagaciro rya 51.720.900 Frw Ntaganzwa Faustin avuga ko ryirengagijwe ari ryo yakoresheje mu rubanza RCA 0175/15/HC/KIG agamije gutesha agaciro amasezerano y'ubugure yari yaragiranye na Uwitonze Innocent, ko ataryitwaza kuko ritigeze risabwa n'Urukiko.

[23] Avuga kandi ko nawe ubwe ako gaciro azi ko kadahuje n'ukuri kuko nyuma y'amasezerano y'ubugure bw'inzu yari yarakoranye na Uwitonze Innocent, kuitariki ya 05/10/2013, yayigurishije uwitwa Kamana Kanani ku mafaranga 10.000.000 nk'uko bigaragazwa n'amasezerano bashyize muri dosiye.

UKO URUKIKO RUBIBONA

[24] Ingingo ya 263 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, mu gika cyayo cya gatatu igira iti : mbere yo guteza cyamunara umutungo wimukanwa cyangwa utimukanwa ufite agaciro kari

hejuru ya miliyoni eshatu (3.000.000) z'amafaranga y'u Rwanda, umuhesha w'inkiko agomba kwiambaza impuguke mu igenagaciro ry'umutungo. Amafaranga y'igihembo cy'impuguke yemezwa na Perezida w'urukiko watanze icyemezo cya cyamunara kandi akurwa mu mafaranga ya cyamunara.

[25] Ingingo ya 54 y'amabwiriza N° 002/2015 yo ku wa 18/05/2015 ya Perezida w'Urukiko rw'Ikirenga agenga imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi nayo igira iti "haseguriwe ibiteganywa mu ngingo ya 263 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, umuhesha w'inkiko ushaka guteza cyamunara abanza gushyikiriza Perezida w'Urukiko rw'Ibanze rw'aho umutungo utezwa cyamunara uri inyandiko isaba kugena impuguke n'igihembo cyayo. Perezida agomba kuba yasubije mu gihe kitarenze iminsi icumi y'akazi. Icyemezo cya Perezida ni icyemezo cy'ubuyobozi, gishobora guhindurwa igihe cyose hagaragajwe mu nyandiko ko habaye kwibeshya mu kugitanga

[26] Urukiko rurasanga ibiteganywa mu itegeko n'amabwiriza bimaze kuvugwa byarubahirijwe kuko icyemezo cya Perezida w'Urukiko rw'Ibanze rwa Kacyiru cyo ku wa 01/04/2016 kigaragaza ko ariwe washyizeho Ir SebakwiyeThéophile nk'impuguke yo kugena agaciro k'umutungo utimukanwa wa Ntaganzwa Faustin na Kabahire Louise nyuma yo kubona ibaruwa y'Umuhesha w'inkiko Munyantore Bonaventure amusaba kugena impuguke yakwifashishwa mu kugena agaciro k'uwo mutungo mu rwego rwo kurangiza urubanza RCA 0175/15/HC/KIG, bityo rero ibyo uburanira Ntaganzwa Faustin avuga ko ari Uwitonze Innocent watanze umugenagaciro Ir

Sebakwiye Théophile, bikaba bitafatwaho ukuri kuko nta kibigaragaza, n'ibyo avuga ko umucamanza yagombaga gushyiraho umugenagaciro wumvikanyweho n'impande zombi bikaba nta shingiro bifite kuko ntaho itegeko cyangwa amabwiriza byagenderwagaho icyo gihe byabiteganyaga.

[27] Ku bijyanye n'ibyo uburanira Ntaganzwa Faustin avuga ko Munyantore Bonaventure na Uwitonze Innocent bafatanyije na Ir Sebakwiye Théophile bakoze uburiganya kuko inzu yari ifite agaciro ka 51.720.900 Frw kemejwe mu rubanza RCA 0175/15/HC/KIG rwarangizwaga yahawe agaciro ka 13.033.020 Frw, Urukiko rurasanga nabyo bitafatwaho ukuri kuko ukunyuranya kw'abahanga ku gaciro k'umutungo ubwabyo atari ikimenyetso cy'uburiganya, akaba nta kindi kimenyetso atanga gishyigikira imvugo ye ko habaye uburiganya mu kugena agaciro k'umutungo we.

[28] Hashingiwe ku bisobanuro byatanzwe, Urukiko rurasanga agaciro k'inzu ya Ntaganzwa Faustin karagenwe mu buryo bukurikije amategeko.

B. Kumenya niba cyamunara itaramenyekanishijwe mu buryo bukurikije amategeko

[29] Me Nzeyimana Lusina Innocent uhagarariye Ntaganzwa Faustin avuga ko itangazo rya cyamunara ritigeze rimanikwa ahategetswe hose mu rwego rw'ubucuruzi kumenyekanisha cyamunara, ibi bikaba binyuranyije n'ibyateganywaga n'ingingo ya 295 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbenezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu.

[30] Avuga ko ibimenyetso atanga by'uko itangazo rya cyamunara ritamanitswe ahategetswe hose ari inyandiko zanditswe n'inzego zitandukanye z'aho itangazo ryagombaga kumanikwa zigaragaza ko ritamanitswe ku biro byazo, na kopi y'ikaye y'Urukiko Rwisumbuye rwa Gasabo yandikwamo inyandiko zizanywe n'abagana urwo rukiko igaragaza ko kuva tariki ya 20/07/2016 kugeza ku wa 04/08/2016 nta tangazo rya cyamunara Munyantore Bonaventure yigeze aza kumanika kuri urwo rukiko kuko iyo ayizana iba yaranditswe muri iyo kaye nk'uko andi matangazo ya cyamunara yanditswemo.

[31] Me Twizeyimana Innocent uhagarariye Munyantore Bonaventure na Uwitonze Innocent avuga ko ibyategetswe byose kubirebana n'itangazo rya cyamunara byakozwe, bituma n'abantu bitabira za cyamunara nk'uko zagiye zikurikirana kugeza ku nshuro ya kane ubwo cyamunara yakorwaga bwa nyuma, kandi ko byasuzumwe mu rubanza rusabirwa gusubirishwamo, Urukiko Rwisumbuye rwa Gasabo rusanga ibyo Ntaganzwa Faustin avuga nta shingiro bifite.

[32] Avuga kandi ko inyandiko zatanzweho ibimenyetso na Ntaganzwa Faustin, zanditswe n'abayobozi b'inzego zitandukanye zitashingirwaho hemezwa ko itangazo rya cyamunara ritamanitswe ku biro by'izo nzego kuko zitigeze zihabwa kopi yaryo mbere y'uko rimanikwa, cyane ko atariko itegeko ryabiteganyaga icyo gihe.

UKO URUKIKO RUBIBONA

[33] Cyamunara ni igurisha rikorewe mu ruhame hagamijwe kwegurira umutungo ugurishwa utanze amafaranga menshi kurusha abandi. Birumvikana ko ikigamijwe kitagerwaho mu

gihe hatabaye kumenyekanisha cyamunara ku buryo amakuru arebana nayo agera ku bantu benshi bashoboka, ari nayo mpamvu, ku birebana na cyamunara itegegetswe n'Urukiko kugirango hishyurwe uberewemo umwenda yatsindiye mu rubanza rwabaye itegeko, Umushingamategeko yashyizeho uburyo cyamunara imenyekanishwa.

[34] Ingingo ya 295 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'ibanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, mu gika cyayo cya gatatu igira iti : 'bisabwe n'uwafatiriye, kandi amaze kugenzura ko imihango yose y'ifatira yubahirijwe, Perezida w'Urukiko rw'Ibanze rw'aho icyamunara izabera, cyangwa Perezida w'Urukiko rw'Ubucuruzi mu gihe harangizwa urubanza rwaciwe n'inkiko z'ubucuruzi, akena itariki n'aho ibintu bigomba kugurishirizwa, ahantu n'uburyo amatangazo y'iyi cyamunara agomba kumanikwa. icyemezo cya Perezida w'Urukiko kigomba na none gutangazwa, nibura mu minsi cumi n'itanu (15) mbere y'uko icyamunara ikorwa, mu kinyamakuru kimwe cya Leta, byaba ngombwa kikanatangazwa no mu kindi kinyamakuru cyigenga gisomwa na benshi cyagenwe na Perezida w'Urukiko cyangwa se bigatangazwa no kuri radiyo, televiziyo cyangwa irindi koranabuhanga. Perezida w'Urukiko rw'Ibanze cyangwa Perezida w'Urukiko rw'Ubucuruzi ashobora no gushyiraho ubundi buryo bwatuma cyamunara irushaho kwamamazwa.

[35] Ku birebana na cyamunara igibwaho impaka muri uru rubanza, Perezida w'Urukiko rw'Ibanze rwa Kacyiru, ashingiye ku bubasha ahabwa n'ingingo ya 295 y'itegeko ryavuzwe, yategetse ko inzu ya Ntaganzwa Faustin na Kabahire Louise izatezwa cyamunara ku wa 26/05/2016 saa ine z'anywa, ko

mu rwego rwo kuyimenyekanisha izatangazwa inshuro imwe kuri Radio Rwanda n'inshuro imwe mu Mvaho, nibura iminsi 15 mbere y'uko ikorwa kandi ko itangazo ryayo rizamanikwa mu gihe cy'iminsi 15 mbere y'uko ikorwa aha hakurikira:

Ku biro by'uturere tugize Umujyi wa Kigali;

Ku biro by'inkiko zisumbuye ziri mu Mujyi wa Kigali;

Ku biro by'inkiko z'ibanze ziri mu Karere ka Gasabo;

Ku biro by'Akagali ka Nyamugali no ku biro by'Umurenge wa Gatsata.

[36] Ku bijyanye n'aho itangazo rya cyamunara ryagombaga kumanikwa, Urukiko rurasanga mu rubanza RCA 00052/18/TGI/GSBO Urukiko Rwisumbuye rwa Gasabo rwaremeje ko ryamanitswe ahategetswe hose ntacyo rushingiyeho kuko mu cyemezo cyarwo ruvuga gusa ko Urukiko rw'Ibanze rwa Kacyiru rwerekanye ko ryamanitswe, ariko wareba urubanza rwaciwe n'urwo rukiko ugasanga narwo rubyemeza gutyo ntacyo rushingiyeho, ibi ubwabyo bikaba binyuranye n'amategeko kuko umucamanza ategetswe gusobanura amategeko n'ibimenyetso ashingiraho icyemezo cye nk'uko biteganywa mu ngingo ya 147, agace ka kabiri y'Itegeko n° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu.

[37] Ku birebana n'ibimenyetso byatanzwe na Ntaganzwa Faustin, bigizwe n'inyandiko zikurikira:

1° Ibaruwa yo ku wa 06/05/2018 y'Umunyamabanga Nshingwabikorwa w'Akagali ka Nyamugali agaragaza ko

nta tangazo rya cyamunara ryigeze rimanikwa ku nyubako y'ibiro by'ako kagali;

2° Ibaruwa yo ku wa 07/05/2018 y'Umunyamabanga Nshingwabikorwa w'Umurenge wa Gatsata nawe agaragaza ko nta tangazo rya cyamunara ryigeze rimanikwa ku nyubako y'ibiro bw'uwo murenge;

3° Ibaruwa yo ku wa 15/05/2018 y'Umunyamabanga Nshingwabikorwa w'Akarere ka Nyarugenge agaragaza ko igihe cyose nta cyemezo cy'iyakira uwamanitse itangazo agaragaza, riba ritagejewe ahagenewe kumanikwa amatangazo ku biro by'ako Karere;

4° Ibaruwa yo ku wa 07/06/2018 y'Umunyamabanga Nshingwabikorwa w'Akarere ka Kicukiro nawe agaragaza ko igihe cyose nta cyemezo cy'iyakira uwamanitse itangazo agaragaza, riba ritagejewe ahagenewe kumanikwa amatangazo ku biro by'ako karere;

5° Ibaruwa yo ku wa 31/05/2018 ya Perezida w'Urukiko Rwisumbuye rwa Gasabo agaragaza ko icyemezo cy'iyakirwa ry'itangazo rya cyamunara cyabazwa uwarizanye kuko gishyirwa kuri kopi uwazanye itangazo asubirana;

6° Ibaruwa yo ku wa 03/05/2018 ya Visi-Perezida w'Urukiko Rwisumbuye rwa Nyarugenge agaragaza ko uvuga ko itangazo ya cyamunara ryakiriwe agomba kugaragaza ko Urukiko rwaryakiriye mbere y'uko rimanikwa.

7° Ibaruwa yo ku wa 08/05/2018 ya Perezida w'Urukiko rw'Ibanze rwa Kacyiru agaragaza ko amakuru y'uko

itangazo rya cyamunara ryaba ryaramanistwe kuri urwo rukiko yabazwa uvuga ko yarimanitse;

8° Ikaye y'Urukiko Rwisumbuye rwa Gasabo yandikwamo inyandiko zakiriwe muri urwo rukiko, igaragaza ko mu nyandiko rwashyikirijwe guhera ku wa 20/07 kugeza ku wa 04/08/2016, nta na hamwe hagaragaramo itangazo ryaba ryarazanywe na Munyantore Bonaventure, nyamara igaragaramo amatangazo ya cyamunara yazanywe n'abandi bahesha b'inkiko.

Urukiko rurasanga izo nyandiko n'iyo kaye y'urukiko bigaragaza ko uvuga ko yamanitse itangazo yagombye kubitangira ibimenyetso, kuba rero abaregwa, usibye kuvuga ko ryamanitswe, badashobora kugaragaza ibimenyetso basabwa, bikaba byumvikanisha ko ritamanitswe ahategetswe hose nk'uko Ntaganzwa Faustin abivuga, cyane ko Munyantore Bonaventure, nk'Umuhesha w'inkiko w'umwuga, uri mu rwego rw'abakora imirimo y'inyungu rusange z'Igihugu, mu cyiciro cy'abunganira Ubutabera nk'uko bivugwa mu ngingo ya 60 y'Itegeko N° 12/2013 ryo ku wa 22/03/2013 rigenga umurimo w'Abahesha b'Inkiko, kandi ufite inshingano zo gukorana imirimo ye ubwitonzi, ubuhanga n'ubushishozi nk'uko bivugwa mu ngingo ya 69 y'iryo tegeko, atari ayobewe ko ari inshingano ze kugaragaza, igihe bibaye ngombwa, ibimenyetso by'uko yubahirije ibyategetswe n'Urukiko.

[38] Hashingiwe ku bimaze gusobanurwa, Urukiko rurasanga imenyekanisha rya cyamunara ritarubahirije ibiteganywa mu ngingo ya 295, igika cya gatatu y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

C. Kumenya niba Uwitonze Innocent yaregukanye inzu ya Ntaganzwa Faustin mu buryo bunyuranyije n'amategeko

[39] Me Nzeyimana Lusinga Innocent uhagarariye Ntaganzwa Faustin avuga ko Munyantore Bonaventure yafashe inzu ye ayiha Uwitonze Innocent atayiguze muri cyamunara kuko nta kigaragaza aho yishyuye ikiguzi cy'inzu, ibyo bikaba binyuranyije n'ibiteganywa n'ingingo ya 306 igika cya 2, 307 na 315 z'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbenezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi kuko uwitwa ko yaguze yananiwe kugaragariza Urukiko *bordereau* yishyuriyeho kuri konti y'Urukiko.

[40] Avuga kandi ko ikindi kigaragaza ko Uwitonze Innocent yegukanye inzu mu buryo bunyuranyije n'amategeko, ari uko amazina y'abavugwa ko bitabiriye cyamunara yo ku wa 04/08/2016 ari ay'aba *commissionnaires* Uwitonze Innocent yashakishije, akaba ari amazina amenyerewe kwifashishwa muri za cyamunara kugirango bagaragaze ko yitabiriwe.

[41] Akomeza avuga ko ikindi nanone kigaragaza ko cyamunara yabayemo uburiganya, ari inyandikomvugo ya cyamunara yakozwe na Munyantore Bonaventure ku wa 06/07/2016 avuga ko uwitwa Musoni Jean Bosco yegukanye inzu kuko yatanze 16.500.000 Frw, ngo ariko akazishyura ku wa 07/07/2016, 8h00, uwo munsu, mu ma saa 16h00 agakora indi nyandiko ivuga ko cyamunara isubitswe, ibi bikaba binyuranye n'ibivugwa mu ngingo ya 301 igika cya 3 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbenezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

[42] Me Twizeyimana Innocent uhagarariye Munyantore Bonaventure na Uwitonze Innocent avuga ko ibivugwa na Ntaganzwa Faustin nta shingiro byahabwa kuko Uwitonze Innocent nawe yari yemerewe gupiganwa muri cyamunara nk'abandi, kuko ingingo ya 315 y'itegeko ryavuzwe ibimwemerera, nawe akaba yari kuri lisiti y'abapiganwa, ndetse akaba ari nawe utanga amafaranga menshi kurusha abandi bari bitabiriye iyo cyamunara.

UKO URUKIKO RUBIBONA

[43] Ku birebana n'uko cyamunara yo ku wa 04/08/2016 yaba yaritabiriwe na ba commissionnaires Uwitonze Innocent yashakishije, bamenyerewe kwifashishwa muri za cyamunara kugira ngo bigaragaze ko yitabiriwe, Urukiko rurasanga usibye kubivuga uburanira Ntaganzwa Faustin atagaragaza ibimenyetso ashingiraho abivuga, rukaba rero ntaho rwahera rwemeza ko ibyo avuga ari ukuri.

[44] Ku bijyanye n'uko inzu ya Ntaganzwa Faustin yabanje kwegurirwa uwitwa Musoni Jean Bosco muri cyamunara yabaye ku wa 06/07/2016 kuko ariwe wari watanze amafaranga menshi kurusha abandi, ariko uwo muni Umuhesha w'inkiko Munyantore Bonaventure agakora indi nyandiko mvugo ya cyamunara ivuga ko isubitswe ku itariki ya 04/08/2016 bitewe n'uko uwari wegukanye inzu yamumenyesheje ko atakiyiguze kuko aho yari yizeye amafaranga bitashobotse, Urukiko rurasanga ubwabyo bitagaragaza ko cyamunara yabayemo uburiganya kuko ingingo ya 312 y'itegeko N° 21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, ari nayo Munyantore Bonaventure yashingiyeho asubika cyamunara nk'uko bigaragara mu nyandiko mvugo yayo, iteganya ko "iyo uwaguze muri

cyamunara atishyuye uko yabyemeye, icyo yari yaguze cyongera gutezwa cyamunara“, yamuhaga uburenganzira bwo gusubika cyamunara igihe uwaguze atishyuye nk'uko yabyiyemeje.

[45] Ku birebana n'uburyo bwo kwishyura umutungo wagurishijwe muri cyamunara, Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsiryakurikizwaga igihe cyamunara yakorwaga riteganya, mu ngingo yaryo ya 306, igika cya kabiri ko “uwaguze muri cyamunara (...) yishyura mu gihe kitarenze umunsi umwe (1) w'akazi ukurikira cyamunara amafaranga ya cyamunara kuri konti y'Urukiko Rwisumbuye rwo mu ifasi iyo cyamunara yabereyemo; rigateganya nanone mu ngingo yaryo ya 307 ko “uberewemo umwenda yishyurwa n'umucungamari w'Urukiko Rwisumbuye rwakiriye amafaranga ya cyamunara amaze kuvanamo amagarama y'urubanza, amafaranga asigaye agashyikirizwa nyir'ibintu byatejwe cyamunara mu gihe nta bandi bagomba kwishyurwa nyuma y'iminsi cumi n'itanu (15); naho mu ngingo ya 315 rigateganya ko “nta na rimwe, uwasabye ko bafatira ibintu by'undi ashobora kubitwara atabiguzwe muri cyamunara nk'abandi“.

[46] Urukiko rurasanga izi ngingo z'amategeko zumvikanisha ko uwaguze umutungo muri cyamunara awegukana ari uko awishyuye mu gihe no mu buryo bitegetswe, uberewemo umwenda nawe akishyurwa mu gihe no mu buryo bitegetswe.

[47] Urukiko rurasanga rero kuba uwaguze umutungo muri cyamunara ari nawe uberewemo umwenda bitamuhesha uburenganzira bwo kutishyura umutungo watejwe cyamunara yitwaje umwenda aberewemo kuko iyo yitabiriye cyamunara igurishwamo umutungo w'umubereyemo umwenda afatwa

nk'abandi baguzi bose, ibi bikaba byumvikana kuko ari bumwe mu buryo bwo kwirinda ko umutungo w'umuntu ugurishwa ku giciro kidafite aho gihuriye n'agaciro kawo nyakuri.

[48] Hashingiwe ku bimaze kuvugwa, Urukiko rurasanga Uwitonze Innocent yaregukanye inzu ya Ntaganzwa Faustin mu buryo bunyuranyije n'amategeko nk'uko uyu abivuga kuko yayegukanye nta bwishyu atanze yitwaje umwenda aberewemo.

[49] Mu gusoza, Urukiko rurasanga cyamunara yabaye ku wa 04/08/2016 igomba guseswa nk'uko Ntaganzwa Faustin abisaba kuko yakozwe mu buryo bunyuranyije n'amategeko, haba ku birebana n'imenyekanisha rya cyamunara, haba no ku birebana n'ubwishyu bw'inzu yatejwe cyamunara.

D. Ku birebana n'indishyi zisabwa muri uru rubanza

[50] Ntaganzwa Faustin avuga ko asaba 3.000.000 Frw y'indishyi z'akabaro zo kumushora mu manza, 1.500.000 Frw y'igihembo cya Avoka na 100.000 Frw y'ikurikiranarubanza, yose agatangwa n'abaregwa bombi, Munyantore Bonaventure na Uwitonze Innocent.

[51] Uwitonze Innocent avuga ko indishyi zisabwa na Ntaganzwa nta shingiro zifite kuko ariwe wakuruye izi manza zose, aho gushyira mu bikorwa ibyo yatsindiwe mu rukiko.

[52] Avuga kandi ko Ntaganzwa Faustin yamushoye mu manza nyinshi, kugeza ubu akaba amaze kumurega mu manza zirenga esheshatu (6) kandi agatsindwa, ariko ntanyurwe agakomeza kumukurura mu manza, ku buryo bimaze kumutwara amafaranga menshi cyane yishyura abamuburanira muri izo manza zose, akaba asaba ko yamusubiza ayo mafaranga yose

yatakaje angana na 6.000.000 Frw akubiyemo 4. 000.000 Frw mu nkiko zabanjehiyongereyeho 1.000.000 Frw kuri uru rwego na 1.000.000 Frw y'ikurikiranarubanza.

[53] Munyantore Bonaventure ntacyo yavuze ku ndishyi zasabwe na Ntaganzwa Faustin, ahubwo nawe arasaba ko yamuha 500.000 Frw y'indishyi z'akababaro, 1.500.000 Frw y'igihembo cya Avoka na 500.000 Frw y'ikurikiranarubanza.

UKO URUKIKO RUBIBONA

[54] Urukiko rurasanga indishyi Munyantore Bonaventure na Uwitonze Innocent basaba batazigenywa kuko ntacyo batsindiye mu rubanza.

[55] Urukiko rurasanga indishyi z'akababaro Ntaganzwa Faustin asaba yazihabwa kubera ko yavukijwe umutungo we mu buryo bunyuranyije n'amategeko, ariko akagenerwa 1.000.000 Frw kubera ko ayo asaba ari menshi, kandi adasobanura uko azibara.

[56] Urukiko rurasanga kandi akwiye guhabwa amafaranga y'igihembo cya Avoka n'ay'ikurikiranarubanza, akanagenerwa 500.000 Frw y'igihembo cya Avoka agenwe mu bushishozi bw'urukiko kuko 1.500.000 Frw asaba atayatangira ibisobanuro, akagenerwa na 100.000 Frw y'ikurikiranarubanza kuko ari mu rugero.

[57] Urukiko rurasanga Munyantore Bonaventure na Uwitonze Innocent bagomba gufatanya kwishyura amafaranga yategetswe kuko bombi bagize uruhare mu igurishwa ry'inzu ya

Ntaganzwa Faustin muri cyamunara yakozwe mu buryo bunyuranyije n'amategeko.

III. ICYEMEZO CY'URUKIKO:

[58] Rwemeje ko ikirego cya Ntaganzwa Faustin cyo gusubirishamo ku mpamvu z'akarengane urubanza RCA 00052/18/TGI/GSBO rwaciwe n' Urukiko Rwisumbuye rwa Gasabo ku wa 17/10/2018 gifite ishingiro;

[59] Rwemeje ko imikirize y'urwo rubanza ihindutse kuri byose, cyamunara y'umutungo utimukanwa wa Ntaganzwa Faustin yabaye ku wa 04/08/2016 ikaba iteshejwe agaciro;

[60] Rutegetse Munyantore Bonaventure na Uwitonze Innocent guha Ntaganzwa Faustin 1.600.000 Frw akubiyemo 1.000.000 Frw y'indishyi z'akababaro, 100.000 Frw y'ikurikiranarubanza na 500.000 Frw y'igihembo cya Avoka.

URUBANZA RW'UBUCURUZI

RWANDA TEA TRADING LTD v GT BANK LTD

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA
00037/2018/CA- RCOMAA 00023/2018/SC (Karimunda, P.J.,
Ngagi na Mukanyundo, J.) 22 Gashyantare 2019]

Amategeko agenga amasezerano – Impamvu itunguranye (force majeure) – Impamvu ntarengwa itunguranye (force majeure) igomba kuba ari impamvu koko ntarengwa kandi akaba nta wayihagarika (irresistible), idaturutse ku ruhande ruri mu masezerano (extérieure) kandi ikaba ari impamvu itunguranye (imprévisible).

Incamake y'ikibazo: Rwanda Tea Trading Ltd yagiranye amasezerano y'inguzanyo na GT Bank Ltd y'amafaranga angana na miliyoni magana atatu na mirongo itanu (350.000.000 Frw) yagombaga kwishyurwa mu gihe cy'amezi atandatu, Rwanda Tea Trading Ltd yakoranye amasezerano y'ubwishingire magirirane (acte de caution solidaire) na Karyabwite Claver, Mukandori Eugénie, Karyabwite Désiré, Karyabwite Eric na Karyabwite Jean Claude.

Rwanda Tea Trading Ltd ntiyubahirije amasezerano, maze igirana na GT Bank Ltd andi masezerano yo kuvugurura umwenda (réaménagement du crédit), bumvikana ko Rwanda Tea Trading Ltd ihawe undi mwenda ungana na 415.445.080Frw wagombaga kwishyurwa hamwe n'inyungu zawo mu cyiciro kimwe (paiement unique).

Aya masezerano nayo ntiyubahirije, bituma GT Bank Ltd irega Rwanda Tea Trading Ltd n'abishingizi bayo mu Rukiko rw'Ubucuruzi rwa Nyarugenge, isaba ko bayishyura umwenda n'inyungu zawo inasaba n'indishyi zitandukanye.

Urukiko rw'Ubucuruzi rwa Nyarugenge rwemeza ko ikirego cyatanzwe na GT Bank Ltd gifite ishingiro, rutegeka Rwanda Tea Trading Ltd n'abishingizi bayo kuyishyura umwenda remezo n'inyungu zawo.

Ababuranyi bose bajuririye uru rubanza mu Rukiko Rukuru rw'Ubucuruzi, GT Bank Ltd ivuga ko itishimiye umwenda Urukiko rwemeje ko yishyurwa, naho Rwanda Tea Trading Ltd n'abishingizi bayo bavuga ko atari bo batubahirije amasezerano, ko ahubwo ari GT Bank Ltd yayatesheje agaciro igihe cyo kwishyura kitaragera. Urukiko Rukuru rw'Ubucuruzi rwasanze ubujurire bwa Rwanda Tea Trading Ltd n'abishingizi bayo nta shingiro bufite, naho ubwa GT Bank Ltd bukaba bufite ishingiro kuri bimwe.

Rwanda Tea Trading Ltd ntiyishimiye imikirize y'urubanza, ijuririra mu Rukiko rw'Ikirenga, nyuma y'ishyirwaho ry'Urukiko rw'Ubujurire, ubujurire bwayo bwoherezwa muri urwo Rukiko. Mu Rukiko rw'Ubujurire isobanura ko Urukiko Rukuru rw'Ubucuruzi rwemeje ko yo n'abishingizi bayo batubahirije amasezerano, nyamara yarerekanye ko nyuma y'aho Leta y'u Rwanda ihagarikiye umushinga w'uruganda rw'icyayi rwa Gatara Tea Factory, banki yahise iyandikira iyisaba guhita yishyura kandi itariki yumvikanyweho itaragera, kuko hari hasigaye amezi atandatu (6).

GT Bank Ltd yiregura ivuga ko nta kosa Urukiko Rukuru rw'Ubucuruzi rwakoze mu kwemeza ko uwajuriye atubahirije amasezerano y'inguzanyo kuko nawe atabasha kugaragaza ko

yishyuye umwenda yari yahawe, bityo ko isanga nta mpamvu yari gutuma agumana uyu mwenda kandi icyo yawukoreshaga kitakiriho.

Rwanda Tea Trading Ltd ivuga ko kuba umushinga warahagaze bidaturutse ku makosa yayo bikwiye gufatwa nk'impamvu itunguranye yatumye amasezerano atubahirizwa kuko hatari harigeze hateganywa uko byagenda umushinga uramutse uhagaritswe. Ikomeza ivuga ko nyuma y'uko umushinga uhagaritswe, ibintu byari gusubira uko byari biri mbere, GT Bank Ltd igasubizwa amafaranga yatanze agaragara mu masezerano y'inyongera ariko nti hagire inyungu n'indishyi byishyurwa.

GT Bank Ltd ivuga ko ibyo uwajuriye avuga y'uko nta nyungu ikwiye gusabwa nta shingiro byahabwa, kuko icyatumye itanga amafaranga yayo ari uko yari itegereje inyungu, ko kuba Leta y'u Rwanda yarahagaritse iyubakwa ry'uruganda, bitabuza Banki kubona inyungu z'umwenda yatanze.

GT Bank Ltd isaba ko uwajuriye n'abishingizi be bahatirwa kwishyura umwenda usigaye. Ivuga ko Urukiko Rukuru rw'Ubucuruzi rwabariye inyungu kuri 17.5 % nyamara rwaragombaga kongeraho 2% nk'uko amasezerano abiteganyaga.

Uwajuriye avuga ko 594.052.834 Frw yamaze kwishyurwa kandi ko banki yabonye amafaranga menshi, inyungu zikaba zabarwa kugeza ku wa 22/04/2016, kuko aribwo umushinga wo kubaka uruganda wahagaze.

Incamake y'icyemezo: 1. Kuba uwahawe inguzanyo atarashoboye gushyira mu bikorwa inshingano ze zo kwishyura inguzanyo yahawe kugeza aho igihe cyari giteganyijwe mu masezerano kigeze ndetse kikanarenga aba ariwe wishe amasezerano. Bityo uwahawe umwenda ategetswe kwishyura

umwenda remezo, inyungu zawo ndetse n'ibihano by'ubukererwe mu gihe atubahirije igihe cyo kwishyura cyumvikanywe mu masezerano.

2. Impamvu ntarengwa itunguranye (force majeure) igomba kuba ari impamvu koko ntarengwa kandi akaba nta wayihagarika (irresistible), idaturutse ku ruhande ruri mu masezerano (extérieure) kandi ikaba ari impamvu itunguranye (imprévisible). Bityo, icyo umuntu yashoboraga kwirinda, ntiyacyitwaza nk'impamvu ntarengwa, ahubwo aba agomba kugikora n'ubwo byaba bimuhenze.

**Ubujurire nta shingiro bufite;
Ubujurire bwuririye ku bundi bufite ishingiro;
Amagarama y'urubanza ahwanyane n'ibyarukozwemo.**

Amategeko yashingiweho:

Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, ingingo ya 80 n'ya 60.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ku wa 25/09/2013, Rwanda Tea Trading Ltd yagiranye amasezerano y'inguzanyo na GT Bank Ltd, muri ayo masezerano GT Bank Ltd ikaba yarahaye Rwanda Tea Trading Ltd inguzanyo y'amafaranga angana na miliyoni magana atatu na mirongo itanu (350.000.000 Frw) yagombaga kwishyurwa mu gihe cy'amezi

atandatu. Kuri uwo munsu kandi, GT Bank Ltd yagiranye amasezerano y'ubwishingire magirirane (acte de caution solidaire) na Karyabwite Claver, Mukandori Eugénie, Karyabwite Désiré, Karyabwite Eric na Karyabwite Jean Claude, ko bishingiye Rwanda Tea Trading Ltd ku mwenda yahawe na GT Bank Ltd.

[2] Rwanda Tea Trading Ltd ntiyubahirije amasezerano, maze nyuma y'ibiganiro, ku wa 16/10/2014, igirana na GT Bank Ltd andi masezerano yo kuvugurura umwenda (réaménagement du crédit), bumvikana ko Rwanda Tea Trading Ltd ihawe umwenda ungana na 415.445.080Frw wagombaga kwishyurwa hamwe n'inyungu zawo mu cyiciro kimwe (paiement unique) bitarenze tariki ya 30/10/2016¹.

[3] Aya masezerano nayo Rwanda Tea Trading Ltd ntiyubahirije, bituma GT Bank Ltd iyirega mu Rukiko rw'Ubucuruza rwa Nyarugenge hamwe n'abishingizi bayo, isaba ko bayishyura umwenda n'inyungu zawo bingana na 623.353.711Frw wabazwe by'agateganyo kugeza ku wa 11/01/2017, isaba kandi indishyi zitandukanye ndetse n'uko urubanza rurarangizwa by'agateganyo ku mwenda abaregwa biyemerera.

[4] Ku wa 19/05/2017, Urukiko rw'Ubucuruza rwa Nyarugenge rwaciye urubanza RCOM 00093/2017/TC/NYGE rwemeza ko ikirego cyatanzwe na GT Bank Ltd gifite ishingiro, rutegeka Rwanda Tea Trading Ltd n'abishingizi bayo kuyishyura 594.052.834Frw y'umwenda remezo n'inyungu zawo,

¹ GT BANK Ltd ariko ivuga ko habayeho kwibeshya, uwo mwenda mushya ukaba wari 431.102.236 Frw ari nayo yashyizwe kuri konti ya RWANDA TEA TRADING Ltd ku wa 30/10/2015, aho kuba 415.445.080 Frw.

500.000Frw y'ikurikiranarubanza n'igihembo cya Avoka, na 50.000 Frw, GT Bank Ltd yatanzeho ingwate y'amagarama irega, kandi urubanza rukarangizwa by'agateganyo ku mwenda n'inyungu abaregwa biyemerera.

[5] Ababuranyi bose bajuririyeye uru rubanza mu Rukiko Rukuru rw'Ubucuruzi, GT Bank Ltd ivuga ko itishimiye umwenda Urukiko rwemeje ko yishyurwa, kandi ko umwenda remezo n'inyungu zawo bigeze kuri 769.564.268Frw, aba ari yo isaba kwishyurwa, naho Rwanda TT Ltd n'abishingizi bayo bavuga ko atari bo batubahirije amasezerano, ko ahubwo ari GT Bank Ltd yayatesheje agaciro igihe cyo kwishyura kitaragera, bavuga ko batemera irangizarubanza ry'agateganyo ryategetswe n'Urukiko rubanza.

[6] Ku wa 05/01/2018, Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza RCOMA 00393/2017/CHC/HCC-RCOMA 00395/2017/CHC/HCC rwemeza ko ubujurire bwa Rwanda Tea Trading Ltd n'abishingizi bayo nta shingiro bufite, naho ubwa GT Bank Ltd bukaba bufite ishingiro kuri bimwe, ko umwenda remezo GT Bank Ltd igomba kwishyurwa hamwe n'inyungu zawo bingana na 657,430,909 Frw. Urukiko kandi rwemeje ko irangizarubanza ry'agateganyo ryemejwe ku rwego rwa mbere ku mwenda ungana na 594.052.834Frw rigumyeho, rutegeka Rwanda Tea Trading Ltd Ltd n'abishingizi bayo guha GT Bank Ltd 500.000 Frw y'igihembo cya Avoka mu bujurire, yiyongera kuri 500.000 Frw yari yagenewe ku rwego rwa mbere.

[7] Rwanda Tea Trading Ltd ntiyishimiye imikirize y'urubanza, ijuririra mu Rukiko rw'Ikirenga, nyuma y'ishyirwaho ry'Urukiko rw'Ubujurire, ubujurire bwayo bwoherezwa muri urwo Rukiko hashingiwe ku ngingo ya 105

y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko².

[8] Urubanza rwaburanishijwe mu ruhame ku wa 17/01/2019, Rwanda Tea Trading Ltd iburanirwa na Me Nkongoli Laurent na Me Rwagatare Janvier, naho GT Bank Ltd iburanirwa na Me Bimenyimana Eric.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. UBUJURIRE BWA RWANDA TEA TRADING Ltd

1. Kumenya niba Rwanda Tea Trading Ltd yarubahirije amasezerano y'inguzanyo

[9] Rwanda Tea Trading Ltd ivuga ko, Urukiko Rukuru rw'Ubucuruzi rwemeje ko yo n'abishingizi bayo batubahirije amasezerano, nyamara yarerekanye ko nyuma y'aho Leta y'u Rwanda ihagarikiye umushinga w'uruganda rw'icyayi rwa Gatare Tea Factory, ku wa 22/04/2016, GT Bank Ltd yahise iyandikira iyisaba guhita yishyura kandi itariki yumvikanyweho itaragera, kuko hari hasigaye amezi atandatu (6). Ikomeza ivuga ko itananiwe kwishyura, ko ahubwo GT Bank Ltd ariyo yatesheje agaciro amasezerano, kuko icyo amasezerano y'inguzanyo yari

2 "Guhera igihe iri tegeko ritangiriye gukurikizwa, uretse imanza zatangiye kuburanishwa, imanza zose zitakiri mu bubasha bw'Urukiko zaregewe, zohererezwa Urukiko rubifitiye ububasha hakurikijwe ibiteganywa n'iri tegeko".

ashingiyeho cyari kivuyeho ubwo umushinga wo kubaka uruganda rw'icyayi rwa Gatare Tea Factory wari umaze guhagarikwa, ibintu bikaba byaragombaga gusubira uko byari bimeze mbere.

[10] GT Bank Ltd ivuga ko nta kosa Urukiko Rukuru rw'Ubucuruzi rwakoze mu kwemeza ko RTT Ltd itubahirije amasezerano y'inguzanyo kuko nayo itagaragaza ko yishyuye umwenda yari yahawe. Isanga nta mpamvu yari gutuma Rwanda Tea Trading Ltd igumana uyu mwenda, nyamara icyo yawukoreshaga kitakiriho ; ikaba isanga iyo yo n'abishingizi bayo baza kwishyurira umwenda ku gihe, byari kubafasha kugabanya inyungu ntizikomeze kwiyongera. Ikomeza ivuga ko n'ubwo umwenda wari kwishyurirwa rimwe ku wa 30/10/2016, ikigaragara ari uko na nyuma y'aho, Rwanda Tea Trading Ltd itishyuye umwenda ku itariki yari yumvikanyweho mu masezerano, bituma GT Bank Ltd iyandikira iyisaba kwishyura 594.052.834 Frw, ariko ntibahita bayishyura, ahubwo mu iburanisha mu Rukiko rwabanje bavuga ko ari wo bemera bituma Urukiko rutegeka irangizarubanza ry'agateganyo.

UKO URUKIKO RUBIBONA

[11] Ingingo ya 80, igika cya kabiri, y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano iteganya ko: “Iyo igihe cyo gukora ibisabwa mu masezerano kigeze, kutabikora bifatwa nko kwica amasezerano”.

[12] Inyandiko ziri muri dosiye zigaragaza ko ku wa 25/09/2013, GT Bank Ltd yakoranye amasezerano y'inguzanyo na Rwanda Tea Trading Ltd yanganaga na 350.000.000 Frw, iyo nguzanyo ikaba yaragombaga kwishyurwa mu gihe cy'amezi

atandatu (6). Ayo masezerano yaje kuvugururwa ku wa 16/10/2014, impande zombi zumvikana ko umwenda Rwanda Tea Trading Ltd ibereyemo GT Bank Ltd ungana na 415.445.080 Frw³, wagombaga kwishyurirwa rimwe bitarenze ku wa 30/10/2016. Mbere y'uko iyo tariki igera, GT Bank Ltd imaze kumenya ko umushinga Rwanda Tea Trading Ltd yari yarasabiye inguzanyo wahagaze, yahise isaba Rwanda Tea Trading Ltd kuyishyura umwenda yafashe bitabaye ngombwa ko itegereza iriya tariki. Rwanda Tea Trading Ltd ntabwo yashoboye kwishyura umwenda, bituma ku wa 06/11/2016, nyuma yo gutanga integuza, GT Bank Ltd itanga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge, urwo Rukiko rutegeka Rwanda Tea Trading Ltd n'abishingizi bayo kuyishyura 594.052.834 Frw y'umwenda n'inyungu zawo. Iki cyemezo kijurirwa mu Rukiko Rukuru rw'Ubucuruzi narwo rwemeza ko Rwanda Tea Trading Ltd itubahirije amasezerano, ko umwenda GT Bank Ltd igomba kwishyurwa n'inyungu zawo bingana na 657.430.909 Frw.

[13] Dosiye igaragaza ko mu masezerano yo ku wa 16/10/2014, avugurura ayo ku wa 25/09/2013, Rwanda Tea Trading Ltd yiyemereye ko izishyura mu ngunga imwe umwenda remezo wa 415.445.080 Frw n'inyungu zawo zibariye kuri 17.95% ku wa 30/10/2016.

[14] Kuri iki kibazo, Urukiko rurasanga uruhande rwari rusigaje gusohoza amasezerano ari Rwanda Tea Trading Ltd, inshingano yayo y'ibanze ikaba yari ukwishyura umwenda nk'uko bigaragara mu masezerano yo ku wa 16/10/2014 yibukijwe haruguru. Kuba rero itariki yumvikanyweho yarageze

3 GT BANK Ltd ivuga ko muri ayo masezerano habayeho kwibeshya ko ahubwo umwenda ungana na 431.102.236 Frw aho kuba 415.445.080 Frw.

Rwanda Tea Trading Ltd itarishyura umwenda yari ifitiye GT Bank Ltd, bivuze ko Rwanda Tea Trading Ltd ari rwo ruhande rutubahirije inshingano zarwo nk'uko ziteganywa mu masezerano.

[15] Urukiko rurasanga imvugo y'uburanira Rwanda Tea Trading Ltd, ko GT Bank Ltd ari yo itarubahirije amasezerano kuko yayisabye kwishyura igihe bumvikanye kitaragera nta shingiro yahabwa, kuko nk'uko Urukiko Rukuru rw'Ubucuruzi rwabibonye, kuba GT Bank Ltd ikimara kumenya ko umushinga yatangiye inguzanyo utagikomeje kuko wahagaritswe na Leta y'u Rwanda, igahita isaba gusubizwa amafaranga yayo, nta kosa yakoze, kuko kuyasubiza byari ku nyungu z'impande zombi, cyane cyane ko nk'uko byagaragajwe, byageze no ku itariki iteganyijwe mu masezerano Rwanda Tea Trading Ltd itarishyura, bituma nyuma y'aho GT Bank Ltd iregera Urukiko rw'Ubucuruzi rwa Nyarugenge, kuko yari imaze kubona ko integuza yatanze zabaye impfabusa.

[16] Urukiko rero rushingiye ku biteganywa n'ingingo ya 80, igika cya kabiri, y'Itegeko N°45/2011 ryo ku wa 25/11/2011 yavuzwe haruguru, rurasanga kuba Rwanda Tea Trading Ltd itarashoboye gushyira mu bikorwa inshingano zayo zo kwishyura inguzanyo yahawe na GT Bank Ltd kugeza aho igihe cyari giteganyijwe mu masezerano kigeze ndetse kikanarenga, ariyo yishe masezerano, akaba ntaho Urukiko Rukuru rw'Ubucuruzi rwari guhera rwemeza ko RTT Ltd itishe amasezerano, ndetse akaba ari nako n'uru Rukiko rubibona.

2. Kumenya niba kuba Leta y'u Rwanda yarahagaritse umushinga wo kubaka uruganda rwa Gatare Tea Factory byafatwa nk'impamvu itunguranye yatumye amasezerano atubahirizwa ku buryo nta nyungu zari zikwiye kubarwa

[17] Rwanda Tea Trading Ltd ivuga ko kuba umushinga warahagaze bidaturutse ku makosa yayo bikwiye gufatwa nk'impamvu itunguranye yatumye amasezerano atubahirizwa nk'uko biteganywa mu ngingo ya 92 y'Itegeko rigenga amasezerano⁴ kuko hatari harigeze hateganywa uko byagenda umushinga uramutse uhagaritswe. Ikomeza ivuga ko nyuma y'uko umushinga uhagaritswe, ibintu byari gusubira uko byari biri mbere, GT Bank Ltd igasubizwa amafaranga yatanze agaragara mu masezerano y'inyongera yo ku wa 15/10/2014, ariko ntihasigire inyungu n'indishyi byishyurwa nk'uko bivugwa mu ngingo ya 91, igika cya mbere, y'Itegeko ryerekeye amasezerano⁵.

[18] GT Bank Ltd ivuga ko ibyo Rwanda Tea Trading Ltd ivuga y'uko nta nyungu GT Bank Ltd ikwiye gusaba nta shingiro byahabwa, kuko icyatumye itanga amafaranga yayo ari uko yari itegereje inyungu, ko kuba Leta y'u Rwanda (MINECOFIN) yarahagaritse iyubakwa ry'uruganda, bitabuza Banki kubona

4 Iyo ngingo igira iti: "Iyo uruhande rumwe rudashobora gukora ibisabwa mu masezerano ku mpamvu zitaruturutseho kubera ko habuze ikintu amasezerano yari ashingiyeho cyangwa indi mpamvu ntarengwa itunguranye, inshingano y'urwo ruhande yo gukora ibisabwa ivaho, keretse iyo uko ibintu bimeze bibigaragaza ukundi".

5 Inshingano zo kuriha indishyi z'akababaro zishingiye ku guhakana inshingano zivaho iyo bigaragara ko uruhande rwarenganye na rwo rutari gukora igisabwa.

inyungu z'umwenda yatanze, ahubwo ko ibyo Rwanda Tea Trading Ltd yaba yaratakaje yazabisaba MINECOFIN.

UKO URUKIKO RUBIBONA

[19] Ingingo ya 64 y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano iteganya ko : “Amasezerano akozwe mu buryo bukurikije amategeko aba itegeko ku bayagiranye”. Naho ingingo ya 92 y'iri Tegeko iteganya ko : “ Iyo uruhande rumwe rudashobora gukora ibisabwa mu masezerano ku mpamvu zitaruturutseho kubera ko habuze ikintu amasezerano yari ashingiyeho cyangwa indi mpamvu ntarengwa itunguranye, inshingano y'urwo ruhande yo gukora ibisabwa ivaho, keretse iyo uko ibintubimeze bibigaragaza ukundi ” .

[20] Dosiye igaragaza ko mu masezerano Rwanda Tea Trading Ltd yakoranye na GT bank Ltd ku wa 16/10/2014, mu ngingo bise “ Les intérêts débiteurs”, impande zombi zemeranyije ko inyungu zibarwa kuri 17.95% ku mwaka, ko ariko icyo gipimo gishobora guhinduka (kigabanuka cyangwa cyiyongera) bitewe n'ihindagurika ry'ibiciro ku isoko.

[21] Urukiko rurasanga kuba Urukiko Rukuru rwaremeje ko inyungu zikomeza kubarwa, ariko rugakosora uburyo izo nyungu zabazwe nta kosa rwakozwe, kuko rwasanze ko, mu gihe bigaragaye ko GT Bank Ltd atari rwo ruhande rwishe amasezerano, ahubwo ari Rwanda Tea Trading Ltd n'abishingizi bayo batubahirije ibiteganyijwe mu masezerano, nta mpamvu rutari kubara inyungu.

[22] Urukiko rurasanga nanone ingingo ya 92 y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, Rwanda Tea Trading Ltd ishingiraho ivuga ko Urukiko Rukuru rw'Ubucuruzi rutari kubara inyungu itakurikizwa muri uru rubanza, kuko usibye ko kuyikoresha ku ruhande rwa Rwanda Tea Trading Ltd kandi byemejwe ko ari yo itarujuje ibisabwa mu masezerano, ikaba itasaba ko yasonerwa kwishyura inyungu, kuko isesengura ry'iyi ngingo ryumvikanisha ibitandukanye n'imyumvire y'ababuranira Rwanda Tea Trading Ltd nk'uko biza gusobanurwa mu bika bikurikira.

[23] Urukiko rurasanga icyo amasezerano ya Rwanda Tea Trading Ltd na GT Bank Ltd yari ashingiyeho (objet) ari amafaranga y'inguzanyo Banki yahaye Rwanda Tea Trading Ltd, aho kuba kubaka uruganda rw'icyayi, kandi n'iyi biza kuba ari ko bimeze, Urukiko rurasanga nta mpamvu ntarengwa itunguranye (force majeure) yaba yarabujije Rwanda Tea Trading Ltd gukomeza kurwubuka, kuko iyo mpamvu igomba kuba yujuje ibi bikurikira⁶: kuba ari impamvu koko ntarengwa kandi akaba nta wayihagarika (irresistible), ikaba idaturutse ku ruhande ruri mu masezerano (extérieure) kandi ikaba ari impamvu itunguranye (imprévisible).

[24] Rurasanga rero kuba MINECOFIN yarahagaritse isoko ryo kubaka uruganda kubera ko itishimiye uburyo ryakorwaga, bidahura n'ibiteganywa n'ingingo ya 92 y'Itegeko ryibukijwe haruguru ngo ibe yakwitwaza amakosa yayo yo kudakora isoko neza, ngo iyuririreho ivuga ko icyemezo cyafashwe na MINECOFIN ari impamvu ntarengwa itunguranye. Ibi bishimangirwa kandi n'inyandiko z'abahanga mu mategeko, aho

6 . Ph. MALAURIE, L. AYNES, Ph. STOFFEL-MUNCK, *Droit des obligations*, 7e édition, Paris, LGDJ, 2015, pp. 515-516.

bavuga ko icyo umuntu yashoboraga kwirinda, atacyitwaza nk'impamvu ntarengwa, ko ahubwo aba agomba kugikora n'ubwo byaba bimuhenze; bakanavuga ko nta mpamvu ntarengwa itunguranye ibaho ku bijyanye n'inshingano yo kwishyura amafaranga, kuko ufite iyo nshingano ashobora kuyishyura akoresheje umutungo we, kandi ko igihombo kitarengera ufiteinshingano⁷.

[25] Ku byerekeranye n'ibyo ababuranira Rwanda Tea Trading Ltd bavuga ko GT Bank Ltd itubahirije ibiteganywa n'ingingo ya 70 y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano⁸, kuko iyo ijya kuba ikunda ukuri kandi ifite ubushake bwo kwirinda kurenganya umukiliya wayo, kuko mu gihe yari imaze kumenya ko isoko Rwanda Tea Trading Ltd yafatiye inguzanyo rivuyeho itari kujya mu byo kubara inyungu, ahubwo yari kwakira ubwishyu bw'umwenda fatizo gusa, Urukiko rurasanga nabyo bitahabwa ishingiro, kuko GT Bank Ltd, imaze kubona ko isoko rihagaze, yasabye Rwanda Tea Trading Ltd, kuyisubiza amafaranga yayo, ibonye Rwanda Tea Trading Ltd idahise iyasubiza, itegereza itariki yari iteganyijwe mu masezerano, iyo tariki igeze itarishyurwa yohereza inyandiko z'integuza, nabwo Rwanda Tea Trading Ltd ntiyishyura, bituma ibona kugana inkiko. Urukiko rurasanga rero nta mikorere irimo uburiganya cyangwa amananiza yaba yaranze GT Bank Ltd, bityo akaba nta mpamvu itari gukomeza kubara inyungu nk'uko

⁷ (... , il n'existe pas de force majeure à l'égard des obligations de somme d'argent car le débiteur peut fournir une somme d'argent en prélevant sur ses biens, et l'insolabilité n'est pas libératoire, (Ph. MALAURIE, L. AYNES, Ph. STOFFEL-MUNCK, Droit des obligations, 7ème édition, Paris, L.G.D.J., 2015, p. 515.

⁸ Buri ruhande rufite inshingano yo kurangiza amasezerano nta buriganya kandi rukarangwa n'imikorere myiza yemerwa ku bagiranye amasezerano.

zari ziteganyijwe mu masezerano, cyane cyane ko itanarebwagwa n'amasezerano yari hagati ya Rwanda Tea Trading Ltd na MINECOFIN, akaba nta n'uruhare yagize mw'ihagarikwa ry'uwo mushinga, wenda nko kuba yarimanye amafaranga nta mpamvu bigatuma Rwanda Tea Trading Ltd idashobora kubahiriza inshingano zayo mu masezerano yakoranye na Leta y'u Rwanda (MINECOFIN).

B. UBURIRIRE BWURIRIYE KU BUNDI BWATANZWE NA GT BANK LTD

1. Kumenya niba Rwanda Tea Trading Ltd n'abishingizi bayo bahatirwa kwishyura umwenda usigaye n'ingano yawo

[26] GT Bank Ltd isaba ko Rwanda Tea Trading Ltd n'abishingizi bayo bahatirwa kwishyura umwenda usigaye ungana 255.279.610 Frw wabazwe kugeza ku wa 17/01/2019 kuko amafaranga yemera angana na 594.052.834 Frw yo yamaze kuyishyura. Ivuga ko Urukiko Rukuru rw'Ubucuruzi rwabariye inyungu kuri 17.5 % nyamara rwaragombaga kongeraho 2%nk'uko amasezerano abiteganyaga.

[27] Kuri ubu bujirire bwa GT Bank Ltd, Rwanda Tea Trading Ltd ivuga ko 594.052.834 Frw yamaze kwishyurwa nk'uko biri mu irangizwa ry'urubanza ry'agateganyo, bakumva banki yarabonye amafaranga menshi, inyungu zikaba zabarwa kugeza ku wa 22/04/2016, kuko aribwo umushinga wo kubaka uruganda wahagaze.

UKO URUKIKO RUBIBONA

[28] Ku byerekeranye n'ibyo uburanira GT Bank Ltd avuga ko Urukiko Rukuru rw'Ubucuruzi rwabaze inyungu kuri 17.5% ariko ntirwongeraho 2% nk'uko amasezerano abiteganyaga, Urukiko rurasanga koko ingingo ya 3 y'amasezerano yo ku wa 16/10/2014, iteganyaga ko hejuru y'inyungu zavuzwe haruguru (17.95%) hiyongeraho 2% akurwa ku mafaranga yose arenze urugero rw'umwenda watanzwe. Urukiko rurasanga nanone mu gika cya 16 cy'urubanza rwajuririwe, Urukiko koko ntacyo rwavuze kuri 2% yavuzwe mu masezerano.

[29] Ku byerekeranye n'ingano y'umwenda Rwanda Tea Trading Ltd igomba kwishyura GT Bank Ltd, Urukiko rurasanga impande zombi zemeranya ko GT Bank Ltd yamaze kwishyurwa 594.052.834Frw nk'uko byagaragajwe haruguru, ariko nk'uko GT Bank Ltd yabigaragaje mu iburanisha ryo ku wa 17/01/2019, Rwanda Tea Trading Ltd igomba kwishyura 255.279.610Frw akubiyemo umwenda remezo wari usigaye, inyungu zawo n'ibihano by'ubukererwe kuko itigeze iyavuguruzwa, ahubwo yatsimbaraye ku mvugo y'uko nta nyungu zikwiye kubarwa kubera ko habaye impamvu ntarengwa itunguranye, no kuba ngo yarishyuye amafaranga menshi, ibyo Urukiko rukaba rutabishingiraho gutyo gusa kuko Rwanda Tea Trading Ltd itatanze ibimenyetso bivuguruzwa ingano y'umwenda n'inyungu zawo⁹.

9 Ingingo ya 12 y'Itegeko N°22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganyaga ko: "Uvuga ko atagitegetswe gukora icyo yategekwe gukora cyagaragarijwe ibimenyetso agomba kugaragaza impamvuzakimukuyeho. Iyo abiburiye ibimenyetso, uwo baburana aramutsinda".

C. Kumenya ishingiro ry'indishyi zisabwa

[30] GT Bank Ltd isaba Urukiko gutegeka Rwanda Tea Trading Ltd kuyishyura miliyoni imwe (1.000.000 Frw) y'igihembo cya Avoka kuri uru rwego kubera gukomeza kuyishora mu manza nta mpamvu.

Me Rwagatare Janvier, uburanira Rwanda Tea Trading Ltd, avuga ko Urukiko rwazasuma ishingiro ry'izo ndishyi GT Bank Ltd isaba.

UKO URUKIKO RUBIBONA

[31] Urukiko rurasanga GT Bank Ltd yarashatse umunyamategeko uyiburanira kuri uru rwego, bikaba byumvikana ko yamuhaye ikiguzi kugira ngo ayikorere uyu murimo,

[32] Urukiko rurasanga ariko 1.000.000 Frw Banki isaba, itayatangira ibimenyetso, bityo ikaba ikwiye guhabwa 700.000 Frw y'igihembo cya Avoka, agenwe mu bushishozi bwarwo.

III. ICYEMEZO CY'URUKIKO

[33] Rwemeje ko ubujurire bwa Rwanda Tea Trading Ltd nta shingiro bufite;

[34] Rwemeje ko ubujurire bwuririye ku bundi bwa GT Bank Ltd bufite ishingiro;

[35] Rwemeje ko urubanza RCOMA 00393/2017/CHC/HCC-RCOMA00395/2017/CHC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 05/01/2018 rwajuririwe ruhindutse ku byerekeranye n'ingano y'inguzanyo n'inyungu zayo Rwanda tea Trading Ltd igomba kwishyura GT Bank Ltd ;

[36] Rutegetse Rwanda Tea Trading Ltd kwishyura GT Bank Ltd amafaranga asigaye ku nguzanyo yayihaye hamwe n'inyungu zayo angana na 255.279.610 Frw;

[37] Rutegetse Rwanda Tea Trading Ltd guha GT Bank Ltd, 700.000 Frw y'igihembo cya Avoka kuri uru rwego;

[38] Rwemeje ko amagarama yatanzwe ahwanye n'imirimo yakozwe.

**RWANDA LAW
REPORTS**

ENGLISH VERSION

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PREFACE

Dear Readers,

We are pleased to present to you the Law Reports Volume 4 [2021]. As usual, we select cases that solve some of the legal issues you encounter, either in your career or in your daily life.

This volume contains six (6) cases, which includes; two (2) petitions seeking to declare the law unconstitutional, one (1) civil case, one (1) commercial case and two (2) procedural cases.

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

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

SCOPE OF THE REPORTS

These reports cover cases decided by the Supreme Court and the Court of Appeal.

CITATION

The Reports in this volume are cited as:
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SPECIAL CLAIMS

**PETITIONS SEEKING TO
DECLARE A LAW
UNCONSTITUTIONAL**

Re ASIIMWE

[Rwanda SUPREME COURT – RS/INCONST/SPEC
00004/2020/SC (Ntezilyayo, P.J., Cyanzayire, Nyirinkwaya,
Hitiyaremye and Rukundakuvuga, J.) March 26, 2021]

Constitution – Jurisdiction of courts – Appeal – Second appeal – Due process of law – The inalienable right of appeal consists of the first appeal which may however have some limitations for legitimate reasons - The right to appeal may be limited on the second appeal but for legitimate reasons.

Constitution – Jurisdiction of courts – Unconstitutionality – Second appeal in criminal cases – Due process of law – The fact that the party pleading not guilty may be allowed a second appeal depending on the sentence imposed while the accused who pleaded guilty is barred from lodging a second appeal, amounts to unequal treatment of accused persons, which is inconsistent with the principle of equality before the law.

Facts: Asiimwe initiated a petition to request the Supreme Court to declare paragraph 2 of article 52 and paragraph 3 of article 46 of the Law n°30/2018 of 02/06/2018 determining the jurisdictions of courts inconsistent with article 29 of the Constitution of the Republic of Rwanda. He elucidates that the foregoing articles violate the due process of law provided under the Constitution on ground that in examining the second appeal, the Court limits itself to determine only whether the appellant lost the case for same reasons before both previous courts and/or whether he/she admitted charges brought against him/her.

The State Attorney contends by submitting that the foregoing articles are in no way inconsistent with article 29 of the Constitution given that there are other remedies provided under the law to which a litigant can resort in the event she/he deems to have experienced injustice.

The court admitted and accorded the petition a docket number and on the hearing date, it was examined whether the inadmissibility of a second appeal on ground that the appellant lost the case for same reasons in both previous Courts, violates the right to due process of law and whether such inadmissibility with respect to those who pleaded guilty, violates the principle of equality before the law provided under article 15 of the Constitution, and thus inconsistent with due process of law provided under article 29 of the Constitution.

Regarding Article 52, paragraph 3 of the aforementioned Law n° 30/2018 providing for the inadmissibility of the second appeal on ground that the appellant lost the case on same reasons in previous courts, the petitioner alleges that this provision creates a situation where, in the event the convict by the lower Courts resorts to the Court of Appeal for rectification of all irregularities by such courts, it declares itself incompetent on ground that he/she lost the case on same reasons, and refrains from hearing the merit of the case, which would have allowed to determine whether there has been violation of the law or disregard of evidence, and it contradicts the purpose of appeal remedy and thus, the appellant is deprived of the right to due process of law.

She additionally submits that had the law provided that the Court of Appeal does not admit the second appeal in case the appellant lost the case in previous courts for same reasons after prior examination whether there has been no violation of the law and blatant disregard of adduced evidence, the right of the litigant

would have been respected. She rests her case by submitting that the existence of the cases review due to injustice is a clear proof that the inferior courts to the High Court and Court of Appeal may err in the course adjudication. Accordingly, as long as paragraph 3 of article 52 of the aforementioned Law n° 30/2018 is applied in the same manner the Court of Appeal applies it, the litigant deprived of the right to be heard in merit while feeling aggrieved at first and second instances, would consider such a practice as condoning injustice and corruption.

The State attorney submits that the Rwandan law uphold the principle of one appeal but with exception to some cases that can be appealed at the first and the second level after examining whether the two previous courts came to the same conclusion based on similar reasons seeing that courts are expected to dispense fair justice.

She further states that concerning the ground relating to due process of law, the legislator accorded equal rights to parties where on one hand the right to appeal for the loser and on the other the right to justice for the winner, which is consistent with the provisions of article 15 of the Constitution providing that all persons are equal before the law and entitled to equal protection of the law. She concludes by submitting that paragraph 2 of article 46 and paragraph 3 of article 52 of the Law n° 30/2018 mentioned above are not inconsistent with article 29 of the Constitution.

He submits that regarding the inadmissibility of the second appeal with respect to cases wherein litigants admitted charges brought against them, the petitioner submits that the provisions of paragraph 2 of article 46 and paragraph 3 of article 52 of the Law n° 30/2018 mentioned above bars the appellant who pleaded guilty before previous courts whereas the appeal of the party who

pleaded innocent is admitted based only on the fact that he/she was sentenced to a penalty of fifteen (15) years of imprisonment, he/she accordingly finds this article inconsistent with the principle of equality before the law provided under article 15 of the Constitution. He elucidates that regarding criminal cases, it should be clear that what must be considered, is that even if the accused admitted charges before lower courts, this act should not deprive him/her of the right to lodge an appeal to the Court of Appeal as long as he deems the sentence pronounced against him unfair.

He concludes by submitting that the existence of extraordinary remedies including case review due to injustice does not solve the problem because in the event the losing party exercises such remedy, he/she seizes the same court that rejected his/her appeal, which does not guarantee him/her fair trial.

The State Attorney states that paragraph 3 of article 52 and paragraph 2 of article 46 of the Law n° 30/2018 determining jurisdiction of courts are not inconsistent with article 29 of the Constitution since even though the second appeal is not admitted on ground that the appellant pleaded guilty before previous courts, the Law provides for another remedy in case he faces injustice.

Held: 1. For the purpose of dispensation of fair justice, the legislator provided that for the second appeal to be admitted, the appellant should not have lost the case for same reasons, and this does not deprive him/her of the right to due process of law, given that the right to first appeal, which is an inalienable right, is granted to him/her, even though some limitations may be set for legitimate reasons.

2. The inadmissibility of the appeal on ground that the appellant lost the case for same reasons does not imply the occurrence of injustice since the legislator determined the remedy of case review due to injustice, therefore paragraph 2 of article 46 and paragraph 3 of article 52 of the Law n° 30/2018 of 02/06/2018 determining jurisdiction of courts are not inconsistent with article 29 of the Constitution. Nonetheless, the formulation of article 52 of the said law would be rectified whereby paragraph 3 should be dissociated from subparagraphs of paragraph 2 of the same article, with the exception of subparagraphs 8 and 9. In addition, paragraph 2 of article 46 should be linked to subparagraph 6 of paragraph 1 of the same article.

3. The fact that the party pleading not guilty may be allowed a second appeal depending on the sentence imposed while the accused who pleaded guilty is barred from lodging a second appeal despite that he/she facilitated the administration of justice, amounts to unequal treatment of accused persons, which is inconsistent with the principle of equality before the law provided under article 15 of the Constitution. Consequently, the parts of the text of paragraph 3 of article 52 and of paragraph 2 of article 46 of the Law no 30/2018 of 02/06/2018 determining jurisdiction of courts with respect to inadmissibility of the second appeal on ground that the appellant admitted charges brought against him/her, are inconsistent with articles 15 and 29 of the Constitution of the Republic of Rwanda.

**The petition to repeal articles that are inconsistent with the
Constitution has merit in part;
Paragraph 2 of Article 46 and Paragraph 3 of Article 52 of
Law n°30 / 2018 of 02/06/2018 determining the
jurisdiction of Courts on matters relating to**

**inadmissibility of second appeal “for parties having
admitted charges brought against them” are
inconsistent with Article 15 of the Constitution of the
Republic of Rwanda.**

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003, revised in 2015, articles 15 and 29;

International Covenant on Civil and Political Rights, article 14, paragraphs 1 and 5;

Law n°30/2018 determining the jurisdictions of courts, article 46, paragraph 2 and article 52, paragraph 3.

Cases referred to:

RS/INCONST/SPEC 00003/2019/SC, Kabasinga Florida rendered by the Supreme Court on 4/12/2019,

RS/REV/INJUST/CIV 0023/16/CS, Rutabayiro n’abandi v Mukakabano rendered by the Supreme Court on 27/09/2019

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Kotak Mahindra Bank Pvt. Limited Vs Ambuj A. Kasliwal & Ors, Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 538 of 2021

Judgment

I. BACKGROUND OF THE CASE

[1] Asiimwe Frank petitioned the Supreme Court praying it to declare paragraph 3 of Article 52, and paragraph 2 of Article 46 of Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts inconsistent with Article 29 of the Constitution of the Republic of Rwanda. His petition was given the docket N° RS/INCONST/SPEC 00004/2020/SC.

[2] He argues that the fact that, in examining the admissibility of the second appeal, the Court considers only that the fact that a party lost his/her case in the two previous courts for the same reasons without examining the merit of reasons are legally valid, and this violates the right to fair justice. He also points out that the fact that a party who pleaded guilty in the previous courts does not have the right to a second appeal also violates the right to fair

justice, whereby he explains that pleading guilty is different from acquiescing in the decision of the Court.

[3] The State Attorney states that Article 52, paragraph 3 and Article 46, paragraph 2 of Law n°30/2018 of 02/06/2018 determining the jurisdiction of the courts are not in contradiction with Article 29 of the Constitution of the Republic of Rwanda reading that: "*Everyone has the right to due process of law*", because, the law provides for other remedies that a party can exercise when he/she feels he/she aggrieved.

[4] The hearing was scheduled on 11/01/2021, but was not held on this date and postponed to 04/03/2021. On this day, it was held in public whereby, all parties appeared, Asiimwe Frank being assisted by Counsel Rwigema Vincent, Counsel Kabasinga Florida, Counsel Gakunzi Musore Valéry and Counsel Munyentwali Charles, while the Government of Rwanda was represented by Counsel Gahongayire Myriam.

[5] Based on the submissions of the petitioner and his legal counsel, the Court finds that the legal issues to be analyzed are as follows:

Whether the inadmissibility of the second appeal due to the fact that the appellant lost his/her case in the previous courts for the same reasons violates the right to due process of law provided under article 29 of the Constitution ;

Whether the inadmissibility of the second appeal for cases in which the parties have admitted the charges brought against them violates the principle of equality before the law provided under article 15 of the Constitution, as well

as the right to due process of law provided under article 29 of the Constitution.

II. LEGAL ISSUES AND THEIR ANALYSIS

- **A. Whether the inadmissibility of the second appeal due to the fact that the appellant lost his/her case in the previous courts for the same reasons violates the right to due process of law provided under article 29 of the Constitution**

[6] In the submissions and pleadings that Asiimwe Frank and his counsels presented to the Court they argue that Article 52, paragraph 3 of the Law n° 30/2018 creates a situation where, in the event the convict by the lower Courts resorts to the Court of Appeal for rectification of all irregularities by such courts, it declares itself incompetent on ground that he/she lost the case on same reasons, and refrains from hearing the merit of the case, which would have allowed to determine whether there has been violation of the law or disregard of evidence, and it contradicts the purpose of appeal remedy provided under Articles 150 and 157 of Law n°. 22/2018 of 29/04/2018 relating to Civil, Commercial, Social and Administrative Procedure.

[7] They support this argument by stating that the inadmissibility of the appeal on ground that a party lost the case on same grounds, deprives the appellant of the right to due process of law. They explain the principle of due process of law in two ways by referring to the judgment n° RS/INCONST/SPEC00003/2019/SC rendered by the Supreme Court whereby the procedural due process of law, meaning a set

of rights to be respected in the course of trial; and substantive due process of law. This situation prohibits the adoption of irrational laws and other measures that infringe upon the rights of the people.

[8] To explain the principle of the right to fair justice, they referred to the case of *East African Law Society vs. Attorney General of the Republic of Burundi & The Secretary General of the East African Community*,¹ and argued that the Court relied on the fact that the plaintiff was deprived of his right to due process of law, which is therefore contrary to the principle of the rule of law provided for in Articles 6 (d) and 7 (2) of the Treaty Establishing the East African Community.

[9] They also claim that such right is reiterated by Article 14 of the International Covenant on Civil and Political Rights, which provides for the principle of fair trial. They motivate that the provisions of Article 46, paragraph 2 and Article 52, paragraph 3 of the aforementioned Law n° 30/2018 violate this principle, as they establish barriers for a party who was aggrieved by two courts from lodging an appeal to another court for redress.

[10] They also motivate that the same reasons should not be confused with certain appropriate, well-founded and lawful grounds, which cannot be proved unless the Court examines the merits of the case, especially that in the lower courts the party is often not assisted, and it is clear that at the level of the Court of Appeal, he/she would have the opportunity to produce additional evidence. They argue that had the law provided that the Court of Appeal should reject the second appeal by the appellant who lost the case in the previous courts for same reasons after examining

¹ EACJ, Reference No. 1 of 2014, delivered on 15 May 2015.

whether there has not been violation of law or disregard of evidence, the right of a party to due process of law would have been respected.

[11] They point out that as long as the Court of Appeal rejected the appeal on ground that the appellant lost the case for the same reasons, even if he/she were to apply for review of the case due to injustice before the Court of Appeal or the Supreme Court for judgments rendered by the High Court, he/she would not be successful because such courts, in examining whether there has been injustice, take into account only the judgment rendered at last instance by analyzing whether the previous courts based on the same reasons to reach the final decision as decided in the case RS/INJUST/RP 00002/2019/SC between the Prosecution and Habimana Innocent.

[12] To conclude on this ground, they argue that the fact that there are judgments subject to review due injustice implies that the lower courts to the High Court and Court of Appeal can err in adjudication. They explain that as long as this article 52, paragraph 3 of Law n° 30/2018 mentioned above continues to be applied in the same manner as the Court of Appeal does, the party deprived of his/her rights to be heard in merit of the case while being aware of his/her injustice at first and second instances, he/she would consider such resort as condoning injustice and corruption in the judicial system.

[13] Counsel Gahongayire Myriam, the State Attorney, specifies that the law in force in Rwanda recognizes the principle of a basic appeal, but the law provides for exceptions for some cases susceptible to second level of appeal (articles 46 and 52 of the Law n° 30/2018 of 02/06/2018 determining the jurisdiction of courts) after determination whether the two previous courts

reached the same decision based on the same reasons, especially that courts are expected to dispense fair justice.

[14] She also indicated that Article 55 of the aforementioned Law n° 30/2018 provides the causes for lodging the appeal for review against a final judgment tainted with injustice, that the aggrieved party who is bared by Articles 46 and 52, can resort to this remedy. She added that, although it was found that among all judgments subjected to application for review, only 3% of them were vitiated by injustice. Accordingly, this article was laid down with the purpose to assist the citizen and protecting him from possible deprivation of his/her rights.

[15] She further states that concerning the ground relating to due process of law, the legislator accorded equal rights to parties where on one hand the right to appeal for the loser and on the other the right to justice for the winner, which is consistent with the provisions of article 15 of the Constitution providing that all persons are equal before the law and entitled to equal protection of the law. She concludes by submitting that paragraph 2 of article 46 and paragraph 3 of article 52 of the Law n° 30/2018 mentioned above are not inconsistent with article 29 of the Constitution.

DETERMINATION OF THE COURT

[16] Before examining whether paragraph 2 of Article 46 and paragraph 3 of Article 52 of the aforementioned Law n° 30/2018 are contrary to Article 29 of the Constitution, the court finds it necessary to explain for the onset the principle of the right to due process of law and the right to appeal.

[17] Article 29 of the Constitution provides that “Everyone has the right to due process of law”. This article lays down some of the components of the due process of law. In judgment n° RS/INCONST/SPEC 00003/2019/SC², the Supreme Court gave two explanations of the due process of law, as mentioned in paragraph 7 of the instant judgment.

[18] The Court notes that article 14, paragraphs 1 and 5, of the International Covenant on Civil and Political Rights provides for the right to a trial by a competent court and the right to appeal as part of the right to a due process of law. Legal scholars specify that the due process of law is a right to a remedy available to each party to the case who is not satisfied with the decision of the court. He/she also has the right to have the court's decision reviewed, annulled or reversed by a higher court, in accordance with the law.³

[19] Another legal scholar, Vilard BYTYQI, explains that the notion of appeal refers to the right of the accused and the prosecutor (the prosecuting authority) to have the chance to appeal the judgement of the court of first instance, under the pretense of any eventual error undertaken by this level of trial.

² RS/INCONST/SPEC 00003/2019/SC about KABASINGA Florida rendered by the Supreme Court on 4/12/2019, page 4 and 5.

³ Serge Guinchard, *Droit processual: Droit commun et droit compare du procès equitable*, 4ème Ed. Dalloz 2007, Page 420, Le droit d'accès à un tribunal est l'une des deux expressions du droit à un recours. Le droit au recours est le droit de toute personne de pouvoir contester une mesure prise à son encontre, devant une instance investie d'un pouvoir de réformation de cette mesure et/ou de réparation de ses conséquences dommageables.

The right to submit the appeal guarantees the procedural parties that the principal of two instances will be respected.⁴

[20] In addition, article 14, paragraph 5, of the International Covenant on Civil and Political Rights provides that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law, that is, the manner in which the review by a higher tribunal is to be carried out, and the determination of the tribunal entrusted with the task of carrying out the review in accordance with the Covenant. Article 14(5) does not require member states to establish more than one appellate body. However, if domestic law provides for other instances of appeal, the sentenced person must be able to make effective use of all of them.⁵

4 The Right to Appeal as a Fundamental Right under International Acts and Jurisprudence, with Special Emphasis on Criminal Procedure. Acta Universitatis Danubius. Juridica, Vol 13, No 1 (2017), <http://journals.univ-danubius.ro/index.php/juridica/article/view/3868/4027>

- The notion of appeal refers to the right of the accused and the prosecutor (the prosecuting authority) to have the chance to appeal the judgement of the court of first instance, under the pretense of any eventual error undertaken by this level of trial. Therefore, the appeal plays the role of the instrument that fixes the eventual errors, which could have been done by the court of first instance. The right to submit the appeal guarantees the procedural parties that the principal of two instances will be respected.

⁵ Le paragraphe 5 de l'article 14 dispose que toute personne déclarée coupable d'une infraction a le droit de faire examiner par une juridiction supérieure la déclaration de culpabilité et la condamnation conformément à la loi, c'est à dire les modalités selon lesquelles le réexamen par une juridiction supérieure doit être effectué, ainsi que la détermination de la juridiction chargée de procéder au réexamen conformément au Pacte. Le Paragraphe 5 de l'article 14 n'exige pas aux Etats parties qu'ils mettent en place plusieurs instances

[21] Legal scholars such as Nuala Mole and Catharina Harby argue that the right to appeal to a court or to be heard by a judge is not definitive. They pointed out that the European Union Court in *Golder v. United Kingdom* case, explains that the usual method applied, which is considered as a legitimate reduction of this right is to the effect that a given form of appeal is only allowed after examining the ground of its admissibility in accordance with in the laws established by the States.⁶

[22] The same Court further upheld that such right can be limited in accordance with article 6 of the European Convention on Human Rights on the following two conditions:

- a. Pursue a legitimate purpose ;

d'appel. Toutefois si le droit interne prévoit d'autres instances d'appel, le condamné doit pouvoir utiliser effectivement chacune d'entre elles. (Nations Unies, Pacte international relatif aux droits civils et politiques, Remarques générales No. 32, 23 aout 2007, <http://hrlibrary.umn.edu/gencomm/french/f-gencom32.pdf>)

⁶Nuala Mole et Catharina Harby, *Le droit à un procès équitable*, Un guide sur la mise en oeuvre de l'article 6 de la Convention européenne des Droits de l'Homme, Conseil de l'Europe 2007, p. 43. Toutefois, le droit d'accès à un tribunal n'est pas absolu. La Cour a ajouté dans l'arrêt *Golder c. Royaume-Uni* que ce droit appelle, de par sa nature même, une réglementation émanant de l'Etat (qui peut varier dans le temps et dans l'espace en fonction des besoins et des ressources de la collectivité et des particuliers), laquelle ne doit en aucun cas porter atteinte à la substance dudit droit ni se heurter à d'autres droits consacrés par la Convention.

Les juges de Strasbourg ont en outre précisé dans leur jurisprudence qu'une limitation du droit d'accès ne serait compatible avec l'article 6 qu'à la double condition de :

- a. poursuivre un but légitime ;
- b. présenter un rapport raisonnable de proportionnalité entre les moyens employés et le but visé.

- b. a reasonable relationship of proportionality between the means employed and the end sought.⁷

[23] Other legal scholars added that the right to a first-level appeal is treated as a fundamental right, the law established by the states determines how it is exercised. The second appeal and other appeal remedies provided under national law are exercised in accordance with the needs of the community, and the legislator may also determine the requirements for the admissibility of the appeal.⁸

[24] The provision of the requirements for the admissibility of the appeal is also evident in the judgment of the Supreme Court of India between Kotak A. Mahindra Bank Pvt. Limited and Ambuj A. Kasliwal & Ors⁹, where the Court held that it is trite law that in the event where the right of appeal is provided under the law, and while granting such right, the legislature may lay down the conditions for the exercise of such right thereof, and such exercise must be done without obstructing the rights of the beneficiary.

⁷ Ibidem.

⁸ Tarun Jain, Limitations on Second Appeal: The Law Revisited, 18 November 2010, <http://legalperspectives.blogspot.com/2010/11/limitations-on-second-appeal-law.html> ; Sabodt Asthana, Second Appeal under Civil Procedure Code: Nature, Scope, Forum and Procedure, 4 January 2020, <https://blog.iplleaders.in/second-appeal/>

⁹ Kotak Mahindra Bank Pvt. Limited Vs Ambuj A. Kasliwal & Ors, Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 538 of 2021, <https://indiankanoon.org/doc/56200562/> : “It is well settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory.”

[25] The Court notes that the Rwandan Legislator, as it is in other countries, provided for the possibility for a party to the case to appeal to a higher court than the trial court, in articles 46 and 52 of the aforementioned law n° 30/2018, he/she has also provided for the modalities of lodging a second appeal. He/she has provided in paragraph 2 of Article 46, and paragraph 3 of Article 52 of the aforementioned law, that the second appeal is not admissible for a losing party for the same reasons.

[26] For a fair administration of justice, it is in the finding of the Court that the fact that the legislator provided that in order for the second appeal to be admissible, the appellant must not have lost for the same reasons, does not deprive him/her of the right to the due process of law since he/she is guaranteed the possibility of appealing for the first instance, and this is an inalienable right that he/she cannot be deprived of, although there may be certain limitations for legitimate reasons.

[27] With regard to the issue of whether there is no other remedy for the party to obtain justice in case he/she lost the case for the same reasons and both courts prejudiced him/her, the Court notes that the fact that the Court of Appeal rejects his appeal does not prevent him/her from applying for a review of the judgment against him/her on grounds of injustice, provided that he/she does not exceed a period of thirty days effective from the date he/she was notified of the decision of the Court of Appeal in accordance with the legal position set by such Court in various cases.¹⁰

¹⁰ Example of Case No. RS/REV/INJUST/CIV 0023/16/CS, rendered on 27/09/2019, paragraph 28.

[28] Based on motivations provided, the Court finds that paragraph 2 of Article 46, and paragraph 3 of Article 52, of Law n° 30/2018 of 02/06/2018 determining the jurisdiction of courts are not contrary to Article 29 of the Constitution.

[29] Nonetheless, the Court notes the formulation of article 52 of the said law would be rectified whereby paragraph 3 should be dissociated from subparagraphs of paragraph 2 of the same article, with the exception of subparagraphs 8 and 9. In addition, paragraph 2 of article 46 should be linked to subparagraph 6 of paragraph 1 of the same article. Indeed, the judge should not ignore the defects referred to in subparagraphs 2 to 7 of article 52, and subparagraphs 1 to 5 of article 46, even if the party has lost in both courts for the same reasons.

B. Whether the inadmissibility of the second appeal for cases in which the parties have admitted the charges against them violates the principle of equality before the law provided under article 15 of the Constitution, thus violating the right to due process of law provided under article 29 of the Constitution

[30] As for criminal cases, Asiimwe Frank and his counsels argue that the right to appeal for a convicted person is reiterated by article 14 of the International Covenant on Civil and Political Rights ratified by Rwanda. They motivate that normally pleading guilty is beneficial to the defendant in different ways, such as minimizing impact of an offence on the victim, reducing the time and money spent on investigative activities and prosecution, especially for the offender, resulting in a reduction of the sentence in his/her favor as decided by the Supreme Court in judgment RPAA 0014/10 / CS rendered on October 25, 2013,

involving the Public Prosecutor's Office vs. Dusabeyezu Damascene.

[31] They further argue that regarding criminal cases, it should be clear that what must be considered, is that even if the accused admitted charges before lower courts, this act should not deprive him/her of the right to lodge an appeal to the Court of Appeal as long as he/she deems the sentence pronounced against him/her unfair. Nevertheless, the provisions of paragraph 2 of Article 46 and paragraph 3 of Article 52 of the aforementioned Law n°30 / 2018 prevent the appellant who pleaded guilty before previous courts whereas the appeal of the party who pleaded innocent is admitted based only on the fact that he/she was sentenced to a penalty of fifteen (15) years of imprisonment, he/she accordingly finds this article inconsistent with the principle of equality before the law provided under article 15 of the Constitution

[32] They go on to explain that law scholars stress that the primary purpose of appeals in criminal cases is to secure justice. Evidently, any obstacle that deprives the aggrieved party of the right to appeal is contrary to the principles of administration of justice.

[33] They refer to judgments rendered by the Court of Appeal in which it dismissed the appeal on ground the appellant pleaded guilty at all previous instances. They inter alia include case n° RPAA 00147/2018/CA, the Prosecution v. Munyurangabo Jean Paul who pleaded guilty to defilement at all instances and the Court sentenced him to life imprisonment. He appealed to the High Court which decided that his appeal was without merit. He appealed to the Court of Appeal, which ruled that the appeal was not within its jurisdiction on ground that he had lost the case at two previous instances for the same reasons. They also cite the

authority n°. RPAA 00166/2018/CA against Habimana Cedrick, authority n°. RPAA 00168/2018/CA against Bizumuremyi Thadée, authority n°. RPAA 00069/2018/CA against Ngezahoguhora Olivier and authority n°. RPAA 00167/2018/CA the Public Prosecutor's Office against Museruka Fabrice.

[34] They motivate that Article 107, paragraph 1 of Law n° 027/2019 on Criminal Procedure states that the burden of proof of an offence lies with the prosecution and the civil party. They point out that relying solely on the defendant's admission of charges for the Court to declare his/her appeal inadmissible violates the principle of not self-incrimination.

[35] They conclude by submitting that the existence of extraordinary remedies including case review due to injustice does not solve the problem because in the event the losing party exercises such remedy, he/she seizes the same court that rejected his/her appeal, which does not guarantee him/her fair trial. They also point out that the purpose of the legislator in enacting paragraph 3 of Article 52, and paragraph 2 of 46, of Law n° 30/2018 was to determine jurisdiction on the basis of the value of the subject matter or the sentence imposed, and such should be maintained.

[36] State Attorney Gahongayire Myriam argues that Article 52, paragraph 3 and Article 46, paragraph 2 of Law n°. 30/2018 determining the jurisdiction of the courts are not contrary to the provisions of Article 29 of the Constitution, because although the second appeal is not admissible on ground the appellant pleaded guilty in the previous courts, the law nevertheless provides for other avenues of redress if he/she considers him/herself wronged.

DETERMINATION OF THE COURT

[37] Article 52, paragraph 3 of the aforementioned law provides that "*the appeal at second instance cannot be admissible for cases in which parties have admitted charges brought against them [...]*", the same is true for paragraph 2 of article 46, of the aforementioned law concerning the admissibility of the appeal at the level of the High Court.

[38] With regard to the right of appeal in criminal matters, the Court considers that, as stated above, the inalienable right of appeal consists of the first level of appeal, although it may also be subject to limitations for a legitimate purpose. This right may be limited for the second level of appeal, but for a legitimate purpose and in a reasonable relationship of proportionality between the means employed and the aim pursued, as decided by the judges of the Court of Justice of the European Union.¹¹

[39] It is in the finding of the Court that in criminal matters, Article 52, paragraph 2, subparagraph 9 of the aforementioned Law n°30 / 2018 allows the person sentenced by the High Court or the High Military Court to at least 15 years of imprisonment to appeal to the Court of Appeal.

[40] The Court notes, however, that paragraph 3 of Article 52 of the aforementioned Law n°30/2018¹² provides that the second level of appeal by parties who pleaded guilty is inadmissible, which means that persons convicted of the same offense and sentence have the right to appeal to the Court of Appeal, such a

¹¹ Cfr paragraph 21 and 22 of the present case

¹² This also concerns paragraph 2 of article 46 of the aforementioned Law about the second appeal in the High Court.

person who has pleaded not guilty has the right to appeal based only on the sentence imposed on him or her, for such a person who has pleaded guilty, the appeal is inadmissible even though he or she has facilitated the court in the administration of justice. This amounts to inequality of the parties and their unequal protection, which is contrary to the principle of equality before the law provided under Article 15 of the Constitution.

[41] Based on the foregoing, the Court finds that paragraph 3 of article 52 and part of paragraph 2 of article 46 of Law n°30 / 2018 determining the jurisdiction of courts regarding the inadmissibility of the second level of appeal on ground that the appellant has admitted the charges against him/her are contrary to article 15 of the Constitution of the Republic of Rwanda and thus contrary to article 29 of the Constitution.

III. DECISION OF THE COURT

[42] Holds that the petition initiated by Asiimwe Frank is partially founded;

[43] Holds that part of paragraph 2 of Article 46 and part of paragraph 3 of Article 52 of Law n°30/2018 of 02/06/2018 determining the jurisdiction of the courts regarding the admissibility of the appeal in second instance for "*a party who has lost his/her case in both courts for the same reasons*", are not contrary to Article 29 of the Constitution of the Republic of Rwanda; the Court recommends, however, that article 52 of this Law be reformulated so that the provisions of paragraph 3 apply only to subparagraphs 8 and 9 of paragraph 2, and that paragraph 2 of article 46 applies only to subparagraph 6 of paragraph 1 of this article;

[44] Holds that part of paragraph 2 of Article 46 and part of paragraph 3 of Article of Law n°30/2018 of 02/06/2018 determining the competence of the courts regarding the admissibility of the appeal to the second degree for "*the appeal at second instance cannot be admissible for cases in which parties have admitted charges brought against them*" are contrary to the provisions of Article 15 of the Constitution of the Republic of Rwanda, and thus devoid of effect in accordance with the provisions of Article 3 of the Constitution;

[45] Orders that this judgment be published in the Official Gazette of the Republic of Rwanda.

Re KABASINGA ET AL

[Rwanda SUPREME COURT – RS/INCONST/SPEC
00005/2020/CS - RS/INCONST/SPEC 00006/2020/CS –
(Mukamulisa, P.J., Cyanzayire, Hitiyaremye, Muhumuza and
Rukundakuvuga, J.) February 12, 2021]

Constitution – Criminal law – The criminal law must be clear, plain and unambiguous – It is not the duty of the judge to determine punishable acts, rather it is the duty of the legislator – The law must be written in such a way that everyone can know the limits of what is allowed and prohibited as well the consequences of penalties in order to refrain for committing a crime (predictability) – The punishable act and related penalty are determined by the Law.

Constitution – Fair trial – Mandatory sentencing – The ineffectiveness of the appeal remedy available for the convict in order to benefit the penalty reduction on ground of mitigating circumstances, undermines the principle of fair trial and of independence of the judge to determine an appropriate penalty.

Constitution – Freedom and independence of the judge – Life imprisonment – In exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority – The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the circumstances surrounding the commission of the offence and substantial mitigating circumstances that would have reduced his sentence in case there are any.

Constitution – Due process of law – Limits to freedom of expression – Although a career judge may adjudicate the case disregarding the public opinions, the parties and the public may think that he/she was influenced by those premature publications and comments, which would discredit that decision whereas it is the principle that justice must not only be done, it must manifestly and undoubtedly be seen to be done.

Facts: Kabasinga and Niyomugabo, each petitioned the Supreme Court stating that some articles of Law n° 68/2018 of 08/30/2018 determining offences and penalties in general are contrary to the Constitution of the Republic of Rwanda of 2003 revised in 2015. Their petitions were joined as they manifest common issues.

The petitioners argue that article 92 and paragraph 3 of article 133 of the Law determining offences and penalties in general which they both raised in their petitions, which forbids the judge from reducing the penalty on ground of mitigating circumstances, violate the principle of the right to due process of law and the principle of independence of the judge provided under articles 29 and 151 of the Constitution respectively.

Kabasinga also states that the aforementioned paragraph 4 of article 84 of the Law n° 68/2018 of 08/30/2018, does not indicate the circumstances in which the judge may or may not exempt the penalty to the accomplice when it implicates the offender's spouse or relative up to the fourth (4th) degree, which violates the principle of the right to due process of law. She also stated that the provisions of the Article 271 of Law n° 68/2018 of 08/30/2018 stipulating that any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence, violates also the principle of right to due process of law.

Another article that she identified as contrary to the Constitution is the article 256 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general of which she states to be infringing the freedom of expression. Therefore, it is contrary to article 38 of the Constitution.

Concerning the fact that paragraph 4 of article 84 of the above-stated Law n° 68/2018 of 30/08/2018 does not specify when a judge may or may not exempt a penalty to the accomplice who is the offender's spouse or relative up to the fourth (4th) degree, is inconsistent with the right to due process of law referred to in article 29 of the Constitution. Kabasinga stated that the Legislator did not specify whether these persons would be punished as accomplices or not, this is due to the fact that it provides that the judge may not punish them, implying that he/she may also punish them, and it is not in his/her discretion to determine it.

In addition, the way this article was drafted contradicts the principle that criminal laws must be clear, plain and unambiguous. In case such provisions are confusing, the persons concerned do not know whether they should not aid or abet their spouses or relative up to the fourth (4th) degree. She concluded that it is contrary to article 2, subparagraph one of the aforementioned law, as it offer the judge the room to make a decision that may be arbitrary or in favor of the defendant due to the nature of the Law. For these reasons, she requested the Court to repeal this article or order its amendment by drafting it clearly.

The Government of Rwanda states that article 2, paragraph one, subparagraph 5 of the Law determining offences and penalties in general defines an accomplice as a person having aided the offender in the means of preparing the offence before its commission. This means that the offender 'spouse, who becomes his /her accomplice, as well as relatives up to the fourth (4th)

degree, may be punished under article 84 of the aforementioned law. The legislator indicated that the court could exempt accomplices from penalties on basis of circumstances surrounding the commission of the offence. The discretion to determine whether they would be exempted or punished is left to the judge, which is not contrary to Article 29, subparagraph 4 of the Constitution.

Regarding whether the prohibition of penalty reduction based on mitigating circumstances, as provided for under article 92 and paragraph 3 of article 133 of Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, is contrary to articles 29 and 151 of the Constitution, Kabasinga explained that these provisions prevent an offender from enjoying due process of law as he/she may not benefit from penalty reduction even if there are mitigating circumstances. It even deprives him/her of the right to appeal against the sentence when convicted. Therefore, it infringes the defendant's right to due process of law. She went on stating that in those articles the judge's power is limited to determining whether the defendant is convicted because the sentence is provided for by law, which is contrary to article 49 of the Law determining offences and penalties in general that provides the factors taken into account by a judge in determining a penalty. Moreover, it undermines the judge's right to be objective during penalty determination. It also undermines his/her independence for fair trial as it prevents him/her from comparing what would lead him/her to impose less or more serious penalty. Therefore, due to the above grounds, she requests the Supreme Court to declare that both articles are unconstitutional, and order their repeal.

Niyomugabo also states that article 133, paragraph 3 of the aforementioned law provides for mandatory sentencing for the

convict of defilement committed against a child under fourteen years of age, regardless of mitigating circumstances, and this deprives the accused the right to due process of law as it bars the judge to exercise his/her independence of reducing the penalty, which is contrary to the principle that all persons are equal before the law and they are entitled to equal treatment. Therefore, he requested the Court to repeal it.

The Government of Rwanda finds that there is no need to submit on it since the Supreme Court has already set its position in the petition RS/INCONST/SPEC 00003/2019/SC and has given its advisory opinion on other similar issues not included in the petition.

In addition, it was examined whether the provisions of article 271 of Law n° 68/2018 of 30/08/2018 determining offences and penalties in general are contrary to Article 29 of the Constitution. Kabasinga explained that this article includes three acts and each of them constitutes a distinct offense, namely counterfeiting, use and circulation of negotiable instruments. The formulation of the text of this article is likely to prevent the use of negotiable instruments as well as their circulation in Rwanda. It is necessary to make a distinction between the person who circulates them illegally and the one who does so on behalf of his/her company. Among constitutive elements of this offence, the intentional element is lacking.

The Government of Rwanda explained that the text of article 271 is not ambiguous because the counterfeit of negotiable instruments, their use and circulation in any form constitute an offence. This means that the use of negotiable instruments is regulated by law and it is the non-compliance that constitutes the offence provided for under this article. Maintaining that this provision is contrary to Article 29 of the Constitution is not true,

because the elements of an offence namely *mens rea*, *actus reus* and its being punishable by law, must be met in order for a person to be considered as an offender.

Regarding the issue whether article 256 of Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 38 of the Constitution, Kabasinga stated that the constitutive elements of the offence referred to in this Article consists of publication of opinions with intention to mislead a judge or witnesses; but it does not specify the medium of their publication. It is not clear whether they must be published in the course of trial as the judge does not rely his or her ruling on public, individual or press opinions, rather, he/she relies on elements of evidence and other documents in case file. This means that the judge may not be misled by publications in any form made outside court hearing.

She further states that this article prevents everyone from any declaration or comment on an incident that occurred while pending trial, so that it would not be deemed that he/she intended to mislead the judge while the latter should avoid being misled or relying upon statements from elsewhere other than from the hearing or case file. This Article infringes the media because many criminal acts or offences under prosecution are often covered by the media. This Article would also prevent officials and security agencies from holding media programs to acts likely to be prosecuted in courts, and could even prevent activist groups from publishing and expressing their views for fear of being regard as misleading the judge or witnesses.

The Government of Rwanda avers that Article 256 is not a matter of concern, since an individual who makes a statement about a pending case is not regarded as trying to mislead, unless it is established through prosecution. Consequently, it is not contrary

to Article 38 of the Constitution as it does not mention journalists, who normally express their views on pending cases without facing prosecution for trying to mislead a witness or a judge since it not their intent.

Held: 1. The criminal law must be clear, plain, unambiguous and must be written in such a way that everyone can know the limits of what is allowed and prohibited as well the consequences of penalties in order to refrain for committing a crime (predictability), therefore, paragraph 4 of article 84 of Law n° 68/2018 of 30/08/2018 determining offences and penalties in general infringes the principle that offenses and penalties should be determined by law, and thus, it violates the principle of the right to a fair trial provided for under article 29, subparagraph 4 of the Constitution.

2. The ineffectiveness of the appeal remedy available for the convict in order to benefit the penalty reduction on ground of mitigating circumstances, undermines the principle of fair trial and of independence of the judge to determine an appropriate penalty because in criminal matters the judge is obliged to consider the circumstances surrounding the commission of the offence, the prior record of the offender, on the affected family and on the victim. Therefore, article 133 of the above mentioned law is inconsistent with article 151(5) of the Constitution.

3. The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the circumstances surrounding the commission of the offence and substantial mitigating circumstances that would have reduced his sentence in case there are any.

4. Although *a* career judge may adjudicate the case disregarding the public opinions, the parties and the public may think that he/she was influenced by those premature publications and comments, which would discredit that decision whereas it is the principle that justice must not only be done, it must manifestly and undoubtedly be seen to be done.

Paragraph 4 of the article 84 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general is inconsistent with article 29, paragraph 4 of the Constitution and has no effect based on the provisions of the article 3 of the Constitution.

The part of the text of article 92 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general reading that: “that cannot be mitigated by any circumstances”, is contrary to articles 29 and 151 of the Constitution, and has no effect.

Paragraph 3 of article 133 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general with regard to the part of the text reading that “if child defilement is committed on a child under fourteen years, the penalty is life imprisonment that cannot be mitigated by any circumstances”, is contrary to articles 29 and 151 of the Constitution, and has no effect.

Article 257 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with the Constitution;

Article 256 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with the Constitution.

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 Revised in 2015, in Articles 3, 29, 38 and 151.

Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code in its Articles 257, 326, 477 and 478

Decree-law n° 21/77 of 18 August 1977 Instituting the Penal Code.

Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, in Articles 2, 3, 49, 84, 92, 133, 256 and 271.

Law n° 48/2017 of 23/09/2017 governing the National Bank of Rwanda, Article 48.

Law n° 15/2004 of 12/6/2004 relating to Evidence and its Production, Article 62.

Law n° 09/2004 of 29/04/2004 relating to the Code of Ethics for the Judiciary, Articles 4 and 5.

Article 7 of the African Charter on Human and Peoples' Rights of 27/06/1981 as ratified by Law n°10/1983 of 01/07/1983 and published in the Official Gazette of the Republic of Rwanda of 01/07/1983.

Articles 10, 15 and 19 of the International Covenant on Civil and Political Rights as ratified by Decree-Law n° 8/75 of 12/02/1975, published in the Official Gazette of the Republic of Rwanda of 1975;

Article 11 of the Universal Declaration of Human Rights as ratified by Rwanda on 18/09/1962.

Cases referred to:

Re Kabasinga, RS/INCONST/SPEC 00003/2019/SC tried by the Supreme Court on 04/12/2019.

R. v. Beauregard, tried by the Supreme Court of Canada.

Cullen v. Toibin tried by the Supreme Court of Ireland.

- Kelly v O'Neill⁴¹ tried by the Supreme Court of Ireland.
- DPP v Independent Newspapers (Irl) Ltd, 42 tried by the Supreme Court of Ireland.
- Attorney-General for England and Wales v Times Newspapers Ltd tried by Supreme Court of England.
- Worm v. Austria, 29 August 1997, Application 22714/93, 25 EHRR 454, par.50.
- The Sunday Times v. United Kingdom, 26 April 1979, Series A No. 30, 14 EHRR 229, par. 63.
- Dagenais v. Canadian Broadcasting Corp., N° 23403, 1994: January 24, 1994, December 8, p.5.
- Bridges v. California, 314 US 252 (1941); Pennekamp v. Florida, 328 US 331 (1946); Craig v. Harney 331 US 367 (1946); Wood v. Georgia 370 US 375 (1962).
- South Africa Supreme Court of Appeal: The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others (425/2017) [2017] ZASCA 97 (21 June 2017), at para.37.
- South Africa Supreme Court of Appeal: Midi Television v Director of Public Prosecutions (Western Cape) 2007 (3) SA 318 (SCA) at para 19.
- Nebraska Press Association v. Hugh Stuart: (1976) 427 US 539.
- Reliance Petrochemicals v. Proprietor of Indian Express⁵⁶ tried by Supreme Court of India.
- John D. Pennekamp v. State of Florida⁵⁷ tried by Supreme Court of United States of America.

Notes of legal scholars referred to:

- Santerre Christine, Étude franco-canadienne du principe légaliste : le processus qualitatif et interprétatif du texte pénal. In: Revue internationale de droit comparé. Vol. 68 N°4, 2016, p.4.

- Canadian Fondation for Children, Youth and the Law c. Canada (Procureur Général), [2004] 1 S.C.R. 76, 2004 SCC 4, Note 14, Par. 16.
- R. c. Nova Scotia Pharmaceutical Society, 9 Juillet 1992, n° 22473, p.3-4.
- Déc. n° 96-377 DC du 16 juillet 1996, cons. No 3 et s., citée par Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), Cahiers du Conseil Constitutionnel N° 26 (Dossier la Constitution et le droit Pénal) - Aout 2009, p. 12.
- See *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No .458/1991, para. 9.7.
- SIRACUSA Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).
- Background Paper on Freedom of Expression and Contempt of Court for the Internationnal Seminar Promoting Freedom of Expression with three specialized international mandates, op. cit., p. 3.
- Cited by Law Commission of India, 20 Report on trial by media, Free speech and Fair trial under Criminal procedure code 1973, August 2006, p. 12 & 13.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Kabasinga Florida petitioned the Supreme Court to declare that:

- a. Paragraph 4 of Article 84, Article 92, paragraph 3 of Article 133 and the Article 271 of Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general are contrary to the Article 29 of the Constitution;
- b. Article 92 and paragraph 3 of Article 133 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general are contrary to the Article 151 of the Constitution;
- c. Article 256 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general are contrary to the Article 38 of the Constitution;

Her petition was given the docket number RS/INCONST/SPEC 00006/2020/SC.

[2] Niyomugabo Ntakirutimana also petitioned the Supreme Court to declare that paragraph 3 of Article 133 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general is contrary to Articles 29 and 151 of the Constitution. His petition was given the docket number RS/INCONST/SPEC 00006/2020/SC.

[3] Both petitions were joined because of connexity and given the docket number RS/INCONST/SPEC 00005/2020/SC - RS/INCONST/SPEC 00006/2020/SC. The hearing was scheduled on 12/01/2021.

[4] On the foregoing date, a public hearing was held whereby Kabasinga Florida appeared and assisted by Counsel Mugabonabandi Jean Maurice, Niyomugabo Ntakirutimana represented by Counsel Kayirangwa Marie Grâce and Counsel

Gabiro David. The Government of Rwanda was represented by Counsel Cyubahiro Fiat together with Counsel Batsinda Aline.

[5] Issues raised by petitioners may be classified into two main categories:

- a. The articles challenged by the petitioners that they violate the right to due process of law and the independence of the judge to impose the penalty provided under Articles 9 and 151 of the Constitution respectively;
- b. The article challenged by one petitioner contending that it violates the principle of freedom of press and expression provided for by Article 38 of the Constitution.

[6] The first category consists of the following articles:

- a. Paragraph 4 of Article 84 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general of which Kabasinga Florida stated to be contrary to Article 29 of the¹ Constitution. Such article relates to the penalty imposed to an accomplice who is the offender’s spouse or relative up to fourth (4th) degree.
- b. Article 92 and Article 133, paragraph 3 of the aforementioned Law n° 68/2018 of 08/30/2018 of which the petitioners claim to be contrary to Article 29 of the

¹ “Everyone has the right to due process of law, which includes the right: 1°
; 4° not to be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute an offence under national or international law at the time it was committed. Offences and their penalties are determined by law;
 5°

Constitution with respect to deprivation of the right to penalty reduction for any person who commits one of the offenses provided for under these articles, despite mitigating circumstances. They also stated that these Articles are contrary to Article 151² of the Constitution with respect to the independence of the judge to determine the penalty.

Both Florida and Niyomugabo Ntakirutimana have the petition relating to paragraph 3 of Article 133 in common.

- c. Regarding Article 271, Kabasinga Florida stated that it is contrary to Article 29 of the Constitution because it does not indicate the elements constituting the offense of counterfeit, use or circulation of negotiable instruments.

[7] The second category includes the Article 256 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general, which punishes any person who declares his/her opinions with intention to mislead a decision of a judge or witness. Kabasinga Florida stated that this Article is contrary to Article 38 of the Constitution on freedom of press, of expression and of access to information.

[8] The foregoing issues have been examined in this case, according to the respective categories.

²The judicial system is governed by the following principles: in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority

II. ANALYSIS OF LEGAL ISSUES

- **A. The articles impugned by the petitioners on ground of violating the principle of the right to due process of law and the independence of the judge to determine a penalty**

A.1. Determination of whether the fact that the paragraph 4 of Article 84 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general, does not indicate the circumstances in which the judge may or may not punish the accomplice who is the offender's spouse or relative up to the fourth (4th) degree, infringes the right to due process of law provided for under Article 29 of the Constitution

a. Kabasinga Florida's arguments

[9] Kabasinga Florida and her Counsel state that the paragraph 4 of Article 84³ is contrary to the subparagraph 4 of

³ The Article 84 of the Law no 68/2018 OF 08/30/2018 determining offenses and penalties in general stipulates that: The co-offender incurs the same penalties as the offender.

The accomplice does not incur the same penalties as the offender except where:

the law provides otherwise;

2 ° the judge, in his/her discretion, finds that the accomplice's responsibility in the commission of the offence is the same as or greater than that of the principal offender.

The accomplice may be prosecuted even if the criminal action cannot be instituted against the offender due to reasons particularly specific to the offender such as death, insanity or his/her being unidentified.

Article 29 of the Constitution, providing that the offences and their penalties are determined by law. This is based on the following reasons:

- a. This paragraph 4 does not indicate when the offender's spouse, who is an accomplice, as well as a relative up to the fourth (4th) degree are punished. The legislator has not indicated whether these people will be punished as accomplices or not. This is because he/she indicated that the judge may exempt them from penalties, which means he/she may also punish them.
- b. This option of punishing them or not is the cause issue because it is contrary to the guiding principles of criminal cases to determine a punishable act by the law. This is likely to affect the administration of justice because paragraph 4 of Article 84 does not indicate in which circumstances the judge must punish or not the persons referred to in this paragraph, as it is not in his/her competence to determine it.
- c. The text of this article contradicts the principle that criminal laws must be clear, plain and unambiguous. While they are

However, when a person referred to in items 5 d), 5 e) and 5 f) of Article 2 of this Law is the offender's spouse or relative up to the fourth (4th) degree, the court may exempt him/her from the penalties prescribed for the accomplice.

confusing or ambiguous, they prevent people from accessing due process of law as stated by the Article 84 above, the people involved do not know whether they should avoid being accomplice of their spouses or relatives up to the fourth (4th) degree while they do not know if they can be exempted from penalties or not.

- d. The formulation of the text of Article 84, paragraph 4 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general is also contrary to the paragraph one of Article 2 of this Law⁴ because it gives latitude of appreciation to the judge, whose decision may be unjust or in favor of the offender.

[10] Kabasinga Florida and her counsel further pray the Court to repeal this Article for being contrary to the Constitution; and if necessary, the Court may order its amendment to make it clear.

b. Opinions of State attorneys

[11] The State attorneys state that the statement by petitioner lacks merits for the following reasons:

- a. The Article 2, paragraph one, subparagraph 5° of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general describes an⁵ accomplice. In view of

⁴ offence: an act or omission that breaches public order and which is punishable by law;

⁵Accomplice: a person having aided the offender in the means of preparing the offence through any of the following acts;

this article, a person is considered as an accomplice when there exists an offender and an act punishable by the law. Whoever having aided the offender in the means of preparing the offence is an accomplice.

b. According to this definition, the offender's spouse as well as relatives up to the fourth (4th) degree who becomes his /her accomplice, may be punished as provided for under the Article 84 of the above law. The legislator indicated that the court could exempt accomplices from penalties depending on the circumstances surrounding the commission of the offence. The discretion to determine whether they will be exempted or punished is left to the judge, and this is not contrary to Article 29, subparagraph 4 of the Constitution.

a person who, by means of remuneration, promise, threat, abuse of authority or power has caused an offence or given instructions for the commission thereof;

a person who knowingly aids or abets the offender in the means of preparing, facilitating or committing the offence or incites the offender;

a person who causes another to commit an offence by uttering speeches, inciting cries or threats in a place where more than two (2) persons gather, or by means of writings, books or other printed texts that are purchased or distributed free of charge or displayed in public places, posters or notices visible to the public;

a person who harbours an offender or a co-offender or an accomplice to make it impossible to find or arrest him/her, helps him/her hide or escape or provides him/her with a hiding place or facilitates him/her to conceal objects used or intended for use in the commission of an offence;

a person, who knowingly, conceals an object or other equipment used or intended for use in the commission of an offence;

a person who steals, conceals or deliberately destroys in any way objects that may be used in offence investigation, discovery of evidence or punishment of offenders;

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[12] The Article 84 of the aforementioned Law n° 68/2018 of 08/30/2018 provides for the punishment modality of the accomplice; it provides the exception in the event of the offender's spouse or relative up to the fourth (4th) degree. The paragraph states that: However, when a person referred to in items 5 d), 5 e) and 5 f) of Article 2 of this Law is the offender's spouse or relative up to the fourth (4th) degree, the court may exempt him/her from the penalties prescribed for the accomplice.

[13] Persons referred to in items 5 d), 5 e) and 5 f) of Article 2 of this Law are the following:

d. A person who harbours an offender or a co-offender or an accomplice to make it impossible to find or arrest him/her, helps him/her hide or escape or provides him/her with a hiding place or facilitates him/her to conceal objects used or intended for use in the commission of an offence;

e. A person, who knowingly, conceals an object or other equipment used or intended for use in the commission of an offence;

f. A person who steals, conceals or deliberately destroys in any way objects that may be used in offence investigation, discovery of evidence or punishment of offenders;

[14] The provisions of paragraph 4 of the Article 84 implies that a person who commits one of the acts referred to in points 5 d), 5 e) and 5 f) of aforementioned Article 2 is the offender's spouse or relative up to the fourth (4th) degree may be punished

or exempted from the penalties. Kabasinga Florida's petition to the Court is that the legislator has not clearly enlightened the judge about under what circumstances he/she must or must not punish the accomplice provided for under paragraph 4 of Article 84. She indicates that it infringes the principle that criminal law provisions must be clear, plain and unambiguous. It is likely to violate the right to due process of law provided for under Article 29 of the Constitution, especially in paragraph 4.

[15] For addressing this petition initiated to the Court by Kabasinga Florida, it is necessary to examine whether the provisions of paragraph 4 of Article 84 mentioned above are not clear in such a way that they infringe the right to due process of law provided for under paragraph 4 of the Article 29 of the Constitution.

[16] The statement “the court may exempt him/her from the penalties” prescribed for the accomplice, used in paragraph 4 of Article 84, are interpreted as granting the judge the competence to punish and exempt them from penalties. However, the article does not indicate under which circumstances such power should be exercised. This situation can lead to different penalties for two offenders of the same offences before two different judges, whereby one may be punished while the other may not because the judge has the discretion to determine his/her *standard of appreciation* whether the act constituting the offence is punishable or exemptible from penalty. Is this amounting to the contravention of the principle according to which no punishment without law provided for under paragraph 4 of the Article 29 of the Constitution?

[17] The first paragraph of Article 3 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general reads

that no one can be held guilty of an offence because of any act or omission, which did not constitute an offence under national or international law at the time when it was committed. The provisions of this paragraph are in accordance with the general principle of law which provides that there must be no crime or punishment except in accordance with fixed, predetermined law (*Nullum crimen, nulla poena, sine lege = principe de la légalité des infractions et des peines*). This principle is found in various international conventions, especially those ratified by Rwanda.

[18] Article 11(2) of the Universal Declaration of Human Rights, ratified by Rwanda on 09/18/1962 is similar to Article 3 of Law n° 68/2018 of 08/30/2018 mentioned in previous paragraph⁶. It is also similar to Article 15(1) of the International Covenant on Civil and Political Rights ratified by Rwanda under Law n° 8/75 of February 6, 1975 and published in the Official Gazette of the Republic in the same year⁷, as well as Article 7(2) of the⁸ (*African Charter on Human and Peoples' Rights*) ratified by Rwanda under Law n° 10/1983 of 01/07/1983 and published in the Official Gazette of the Republic on 01/07/1983.

[19] The principle provided for under Article 3 of Law n° 68/2018 of 30/08/2018, as well as in the aforementioned international conventions, is similar to that provided for under paragraph 4 of Article 29 of the Constitution; and constitutes one of the elements of the right to due process of law. This principle,

⁶No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

⁷No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.....

⁸No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed.

which prohibits the conviction of any person for acts that are not provided for as offenses under the law, has been clarified by Legal scholars and various courts.

[20] Legal scholar Bertrand de Lamy explains that the principle that offenses and penalties should be determined by law rests on two particularly solid foundations: the law is the only one that has the legitimacy to establish the right to punish, and to avoid arbitrariness and to guarantee equality in the face of repression by warning everyone of the limits of what is permitted and prohibited (*Le principe légaliste, ainsi affirmé, repose sur deux fondements particulièrement solides: l'un, politique, tenant à la souveraineté de la loi, expression de la volonté générale, et qui, seule, a la légitimité permettant d'asseoir le droit de punir; l'autre, plus philosophique, fait de la légalité criminelle le moyen d'assurer la mise en œuvre du libre arbitre, d'éviter l'arbitraire et de garantir l'égalité devant la répression en avertissant chacun des frontières du permis et de l'interdit*)⁹.

[21] Legal scholar Christine Santerre explains that, the principle of legality of offenses and penalties requires the law to determine offense and its all elements, which means an act constituting an offence and related penalty. (*Ce principe de la légalité des délits et des peines suborne l'existence d'une infraction à un texte de loi, lequel doit prévoir l'ensemble des composantes de celle-ci, c'est-à-dire la conduite prohibée et la*

⁹ Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), *Dérives et évolution du principe de la légalité en droit pénal français : contribution à l'étude des sources du droit pénal français* par Diffusion numérique: 4 mars 2010, n°2 (<https://id.erudit.org/iderudit/039334ar>)

peine)¹⁰. She also explains the said principle lies on two foundations: the first aims to provide citizens with a reasonable warning about prohibited acts and of the penal consequences in the event of non-compliance with the law. The second is to limit the discretionary power of law enforcement officials and to prevent vague texts from leaving the courts with wide room of interpretation. (*Deux fondements de ce principe : le premier vise à formuler au citoyen un avertissement raisonnable afin qu'il soit avisé des conduites proscrites et des conséquences pénales en cas du non-respect de la loi. La clarté et la précision du texte de loi exigées par le principe légaliste assurent ainsi au justiciable une juste connaissance des interdits pénaux. Le second fondement vise à limiter le pouvoir discrétionnaire des personnes chargées de l'application de la loi. Il s'agit d'éviter que des textes flous laissent aux tribunaux un vaste pouvoir d'interprétation*)¹¹.

[22] In the same context, the Supreme Court of Canada has ruled that an unclear provision of Law prevents the citizen from realizing that he/she is venturing into an area where he/she may be subject to criminal sanctions. Moreover, it prevents law enforcement officials and judges from determining whether an offence has been committed. It also raises concerns that law enforcement officials shall have unlimited power (*Une règle de droit imprécise empêche le citoyen de se rendre compte qu'il s'aventure sur un terrain où il s'expose à des sanctions pénales. De même, elle complique la tâche des responsables de son application et des juges lorsqu'ils sont appelés à déterminer si un crime a été commis. Elle suscite également la crainte que les*

¹⁰ Santerre Christine, Étude franco-canadienne du principe légaliste: le processus qualitatif et interprétatif du texte pénal. In: Revue internationale de droit comparé. Vol. 68 N°4, 2016, p.4.

¹¹ Ibid., p.6-7.

*responsables de son application disposent d'un pouvoir discrétionnaire trop grand)*¹².

[23] The Court also clarified that the fact that the criminal laws must be clear is based on the principle that the public must know in advance what is prohibited, and that the discretionary power of law enforcement officials has its limits. The law is determined to be unconstitutional if it is not clear enough that no one can understand what it means based on the principles of legal interpretation. (*La théorie de l'imprécision repose sur la primauté du droit, en particulier sur les principes voulant que les citoyens soient raisonnablement prévenus et que le pouvoir discrétionnaire en matière d'application de la loi soit limité. L'avertissement raisonnable aux citoyens comporte un aspect formel - la connaissance même du texte – et un aspect de fond - la conscience qu'une certaine conduite est assujettie à des restrictions légales. ... La théorie de l'imprécision peut donc se résumer par la proposition suivante: une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire, c'est-à-dire pour trancher quant à sa signification à la suite d'une analyse raisonnée appliquant des critères juridiques)*¹³.

[24] The Constitutional Court of France has also ruled that the legislator must explain the offences in a clear and plain manner, so that no unfounded decisions are made (*.... qu'il en résulte la*

¹² Canadian Fondation for Children, Youth and the Law c. Canada (Procureur Général), [2004] 1 S.C.R. 76, 2004 SCC 4, Note 14, Par. 16.

¹³ R. c. Nova Scotia Pharmaceutical Society, 9 Juillet 1992, no 22473, p.3-4.

nécessité pour le législateur de définir les infractions en termes suffisamment clairs et précis pour exclure l'arbitraire)¹⁴.

[25] It also explained that the legislator should draft the law in such a way as to enable the judge, to whom the principle of legality imposes a strict interpretation of the criminal law, to give a ruling free from any criticism of being arbitrary. (*Le législateur doit rédiger la loi « dans des conditions qui permettent au juge, auquel le principe de légalité impose d'interpréter strictement la loi pénale, de se prononcer sans que son appréciation puisse encourir la critique d'arbitraire*)¹⁵.

[26] According to the explanations provided by the Legal scholars and decisions of the various courts on the principle of legality of offenses and penalties, provided under Article 29, paragraph 4 of the Constitution, the following main concepts are highlighted:

- a. Offences and their penalties are determined by law;
- b. It is not the responsibility of the judge to determine the punishable acts, but it is the responsibility of the legislator;
- c. The criminal law must be drafted in a clear and unambiguous manner to avoid blatantly baseless decisions, and to avoid arbitrariness;

¹⁴ Cons. const., 20 janv. 1981, n° 80-127 DC. Lire en ligne: (<https://www.doctrine.fr/d/CONSTIT/1981/CONSTEXT000017665953>).

¹⁵ Déc. n° 96-377 DC du 16 juillet 1996, cons. N° 3 et s., citée par Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), Cahiers du Conseil Constitutionnel N° 26 (Dossier la Constitution et le droit Pénal)- Aout 2009, p. 12.

d. The law must be drafted in such a way to warn everyone of what is permitted and prohibited as well as the penalties in the event he/she commits a prohibited act for predictability.

[27] After a comparative analysis of the foregoing explanations and the provisions of paragraph 4 of Article 84 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general, the Court notes that:

a. This article provides that the judge may decide to exempt the accomplice who is the offender's spouse or relative up to the fourth (4th) degree without specifying their punishable actions that may lead to their punishment and actions that may lead to their exemption from penalty.

b. The fact that the law does not determine punishable acts, gives the judge the latitude to determine the reasons to punish or exempt any person whereas it is not in his/her responsibilities but of the legislator.

c. This situation can also lead different judges to impose different penalty to offenders of the same offense because the law did not explicitly and unambiguously explain the person who will be punished or exempted from penalty.

d. the persons referred to in paragraph 4 of Article 84 cannot know in advance the prohibited act as provided under the law because it is left in the discretion of the judge.

[28] In view of the foregoing elucidations, the Court notes that paragraph 4 of the Article 84 of Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general is contrary to the principle of legality of offences and their penalties. Therefore, it

infringes the principle of right to due process of law provided for under paragraph 4 of Article 29 of the Constitution. The Court finds this paragraph without effects according to the provisions of Article 3 of the Constitution.

[29] Considering the background of this Article, it is obvious that the Decree-Law n° 21/77 of August 18, 1977 Instituting the Penal Code that was amended by the Organic Law n° 01/2012/OL of 05/02/2012 instituting the Penal Code, Article 257 provided that whoever will have knowingly concealed a person whom he/she knew to have committed a felony or a misdemeanor or whom he/she knew is wanted by prosecution or who will have obstructed his/her arrest or search or will have helped him/her to hide or flee, shall be punished as an accomplice to the offense being prosecuted. This Article also provided that the spouse, relatives or in-laws of the offender, up to the fourth (4th) degree, are exempt from these provisions. This Article was later modified by the Organic Law n° 01/2012/OL of 02/05/2012 instituting the Penal Code, in its Article 478. This Article read that: In the cases provided under Article 477¹⁶ of this Organic Law, the Court may discharge from punishment a spouse, parents or relatives of the offender up to the fourth degree of relationship.

¹⁶ Any person, other than the offender or accomplice who:

1° knowingly conceals objects or tools that are used or intended to be used to commit a felony or a misdemeanor related to public security, or objects, materials or documents obtained through such felony or misdemeanor;

2° destroys, withdraws, conceals or knowingly alters any documents used in the investigation of a felony or a misdemeanor, proof gathering or punishing those who commit offences against public security; shall be liable to the penalty applicable to the offence of concealment provided under Article 326 of this Organic Law.

[30] In the course of the amendment of of 2018 of the Penal Code, this Article has not changed much. According to the copy, in the possession of the Court, of the Broadcast Program by the staff member of the Rwandan Law Reform Commission on the draft law of 2018 determining offenses and penalties in general amending Organic Law n° 01/2012/OL of 02/05/2012 Instituting the Penal Code, it was explained that the new element in this draft law was that the offender's spouse is not always exempted from penalty if he/she has been an accomplice of his/her spouse. This document says that he/she is only exempted from penalty when the offender did not reveal it to him/her (perhaps he/she meant "he/she hid it from him/her"), he/she concealed stolen goods or destroyed the necessary evidence to serve in the prosecution of an offence committed by his/her spouse. In other instances, (a person who, by means of remuneration, has caused an offence, provides equipment intended for use in the commission of an offence, incites the commission of offence, causes another to commit an offence by uttering speeches), the offender's spouse who is an accomplice is not exempted. The acts described by this document subjected to exemption are also found in paragraphs 5 d), 5 e) and 5 f) referred to in paragraph 2 of this Case, Article 2 of the Law n° 68/2018 of 30/08/2018 stated above; but the provisions of that Article in the amended law remained unchanged. The content of this document is also similar to the

provisions of the penal codes of different countries such as Vanuatu¹⁷, State of Nevada¹⁸, Cameroon among others¹⁹.

The Court notes that, if the content of this document corroborate the provisions of paragraph 4 of the Article 84, it should have been clearly drafted.

¹⁷ Art.34. Accessory after the fact:

(1) An accessory after the fact shall mean a person who, knowing or having reasonable cause to suspect that another person has committed a criminal offence, shelters such person or his accomplice from arrest or investigation, or has possession of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence or used for the purpose of committing the offence.

(2) Subsection (1) shall have no application to any ascendant, descendant, sibling or the spouse of the person sheltered.

(3) An accessory after the fact shall be punished as a principal offender.

¹⁸ NRS 195.030 Accessories:

1. Every person who is not the spouse or domestic partner of the offender and who, after the commission of a felony, destroys or conceals, or aids in the destruction or concealment of, material evidence, or harbors or conceals such offender with intent that the offender may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony.

2. Every person who is not the spouse, domestic partner, brother or sister, parent or grandparent, child or grandchild of the offender, who, after the commission of a gross misdemeanor, harbors, conceals or aids such offender with intent that the offender may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a gross misdemeanor or is liable to arrest, is an accessory to the gross misdemeanor.....

¹⁹ SECTION 100: Accessory after the Fact:

(1) An accessory after the fact shall mean a person who after the commission of a felony or misdemeanor shelters an offender or his accessories from arrest or from Investigation, or who has custody of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence.

(2) This Section shall not apply as between husband and wife.

[31] The Court advises that paragraph 4 of Article 84 be well drafted to clearly indicate the purpose of the legislator and be aligned with the provisions of paragraph 4 of the Article 29 of the Constitution.

A.2. Whether the prohibition of penalty reduction according to mitigating circumstances as provided under Articles 92 and 133, paragraph 3 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general, is contrary to Articles 29 and 151 of the Constitution.

a. Kabasinga Florida's arguments

[32] Kabasinga Florida and her counsel state that Article 92 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general²⁰, and paragraph 3 of Article 133 of this Law²¹ are contrary to Articles 29 and 151 of the Constitution for the following reasons:

- a. These two articles are contrary to Article 29 because they violate the right to due process of law for a person convicted of the crime of genocide or defilement against a child under the age of fourteen (14) in the event that he/she cannot benefit from penalty reduction, despite the mitigating circumstances.
- b. The person convicted of an offense provided under one of these articles is deprived of the right to penalty

²⁰Any person who commits any of the acts referred to under Article 91 of this Law (definition of crime of genocide) commits an offense. Upon conviction, he/she is liable to the penalty of life imprisonment that cannot be mitigated by any circumstances.

²¹ If child defilement is committed on a child under fourteen (14) years, the penalty is life imprisonment that cannot be mitigated by any circumstances.

reduction despite mitigating circumstances, as well as the right to appeal against the decision. Accordingly, it violates the right of the defendant to due process of law which starts from the investigation until the conviction and penalty imposition.

c. The fact that a person is denied one of the aforementioned procedures, he/she is denied justice by the law that should have protected him/her. This was upheld by the Supreme Court after having considered opinions legal scholars and precedents from other jurisdictions which have ruled on the same issue by stating that: “It is the finding of the Court notes that in criminal matters, the right to due process of law begins with investigation and prosecution stages, hearing and penalty imposition for the offenses provided for under criminal laws. It means that the matters relating to the examination of mitigating circumstances and penalties for the hearing stage must also respect the principles of right to due process of law”.

d. The reading of the first paragraph, article 49 of the Law n° 68/2018 of 08/08/2018 determining the offenses and the penalties in general indicates the factors taken into account by a judge in determining the penalty²², to the extent that any contradiction with them implies contradiction with the elements of right to due process of law with respect to imposition of penalty.

²² A judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender’s prior record and personal situation and the circumstances surrounding the commission of the offence.

e. The analysis of Articles 92 and 133, reveals that the judge's power is limited to determining whether the defendant is guilty because the penalty is determined by law, which is contrary to Article 49 of the Law determining offences and penalties in general providing the factors taken into account by a judge in determining a penalty much as these offenses provided for under both articles are grave and deserve severe penalties, there are often mitigating Circumstances likely to lead to penalty reduction in favor of offender,

f. Although the country is committed to the prevention and the fight against genocide, in the event where the offence is committed either by a Rwandan or foreigner and surrenders himself/herself to justice or undertakes to facilitate investigation to identify unknown conspirators, he/she can benefit the penalty reduction for his/her contribution to justice. The genocide crime is committed in dissimulation such a way that it is difficult to find witnesses, which is easy for the judge to discover the truth.

g. Although it is obviously inexcusable for many people about the offense of defilement committed against a child under fourteen (14) years, even the judge responsible for the ruling on such cases understands their gravity. Thus, it is not appropriate to ignore that there may be circumstances surrounding the commission of the offense which may reduce its gravity such that the offender benefits penalty reduction in the court's discretion.

h. Moreover, these provisions undermine the judge's independence to be objective in imposing the penalty. They also undermine his/her independence for fair trial as

they prevent him/her from comparing what would lead him/her to impose less or more severe penalty. Giving the judge the discretion over the conviction or acquittal of the accused and at the same time preventing him/her from imposing the appropriate penalty for the acts committed amounts to depriving him/her of the independence and denying the parties of their right to due process of law.

i. The forgoing articles also impede the independence of the judge provided under Articles 4 and 5 of the Law n° 09/2004 of 04/29/2004 relating to the Code of Ethics for the Judiciary²³. This was underlined by the Supreme Court in judgement n° RS/INCONST/SPEC 00003/2019/SC, paragraph 35, stating that: “The principle of the independence of judge in the exercise of his/her functions is related to the independence of the judiciary. It's considered as the judge's freedom to hear and adjudicate according to the procedure and manner prescribed by law and do so independently without any external pressure from public institutions or from others”.

j. The independence of the judge was also explained in the judgement R. v. Beauregard, rendered by the Supreme Court of Canada as follows: « *The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider, be it Government, pressure group, individual*

²³ A judge shall be independent in the exercise of his or her judicial functions. A judge shall independently examine matters before him or her and take decisions without any external pressure. In cases before court, a judge shall guard against any attempts to influence his or her decisions other than those made through the ordinary procedure provided for by the law. A judge is bound to decide cases in accordance with the law.

or even another judge should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision”.

[33] Based on the above reasons, Kabasinga Florida requests the Supreme Court to declare Article 92 and Article 133, paragraph 3 contrary to the Constitution and order their repeal.

b. Niyomugabo Ntakirutimana's arguments

[34] Niyomugabo Ntakirutimana and his legal counsel contend that the fact that Article 133, paragraph 3 of the above law that provides for mandatory sentence for defilement committed against a child under fourteen (14) years, despite the existence of mitigating circumstances, deprives the offender of the right to due process of law provided for by Article 29 of the Constitution in connection to his case at the Court of Appeal. They allege that courts cannot reduce his/her penalty in connection to his case relating to defilement committed on a child under fourteen (14) years, because the judge is barred by paragraph 3 of Article 133.

[35] Niyomugabo Ntakirutimana and his legal counsel further state that this Article should be repealed because it does not grant to the judge the latitude to reduce the penalty and it is contrary to the principle of equality before and protection of the law. Their additional statements are similar to those reiterated by Kabasinga Florida.

c. Opinions of State attorneys

[36] The State attorneys find that there is no need for comment because the Supreme Court has set its position in the case

RS/INCONST/SPEC 00003/2019/SC paragraphs 39²⁴ and 40²⁵, and has given its advisory opinion with respect to other similar issues not included in the petition.

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[37] The Court notes that the same legal issue was examined in the judgement RS/INCONST/SPEC00003/2019/SC tried on 04/12/2019, from the petition initiated to the Court by Kabasinga Florida requesting for a declaration that paragraph 4 of the Article 133 relating to child defilement followed by cohabitation as husband and wife is contrary to articles 29 and 151 of the Constitution. The only difference is that Kabasinga Florida and Niyomugabo Ntakirutimana seized the Court against paragraph 3 of Article 133, and Article 92 with respect to Kabasinga Florida. However, both petitions are similar and consist of the fact that such provisions are contrary to the principle of the right to due process of law and the independence of judge in determining the penalty.

²⁴ Paragraph 39: “According to the explanations mentioned in the precedent paragraph, the provisions of article 133 of the Law no 68/2018 of 30/08/2018 stipulating that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances, are contrary to article 151.5 of the Constitution which provides that in exercising their judicial functions, judges are independent because they are not allowed to be motivated by mitigating circumstances in determining appropriate penalty”.

Paragraph 40: “There are other articles which determine the penalties which are not subject to reduction, but the Court has not yet given its position because they are not seized. The State may examine these articles if their rectification is necessary to be harmonized with the content of this judgement”.

[38] In regard to that case, the Court found out t the provisions of Article 133 of the Law n° 68/2018 of 30/08/2018 providing that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances to be contrary to one of the principles of the right to due process of law reading that a judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender’s prior record and personal situation and the circumstances surrounding the commission of the offence. Therefore, it declares that it is contrary to Article 29 of the Constitution.

[39] The Court also found the provisions of Article 133 of the Law n° 68/2018 of 30/08/2018 stipulating that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances, to be contrary to article 151(5) of the Constitution which provides that in exercising their judicial functions, judges are independent because they are not allowed to be motivated by mitigating circumstances in determining appropriate penalty”.

[40] The Court motivated in paragraph 40 of that case that there are other articles which determine mandatory sentences of which the Court cannot pronounce itself over them given that they have not been part of the subject matter of the case It issued an advisory opinion that the government would consider if their rectification is necessary to harmonize them with the ruling of the said judgement. The Court finds that Article 92 of Law n° 68/2018 of 30/08/2018, its text reading that: “that cannot be mitigated by any circumstances”; and paragraph 3 of Article 133providing that if defilement is committed against a child under fourteen (14) years, the penalty is life imprisonment that

cannot be mitigated by any circumstances, are part of the provisions mentioned in paragraph 40 of judgement RS/INCONST/SPEC00003/2019/SC. Accordingly, the Court finds that the parts of such provisions are also contrary to the principles of the right to due process of law and the independence of judge in determining penalty on the basis of the holdings set out in the judgement RS/INCONST/SPEC 00003/2019/SC which should not be reexamined due to their similarities. Therefore, they are contrary to Articles 29 and 151 of the Constitution.

[41] The Court recalls the advisory opinion given in the judgement RS/INCONST/SPEC00003/2019/SC delivery on 04/12/2019 according to which the government would consider other articles determining mandatory penalties over which the court did not pronounce itself because they have not been part of the subject matter of the case in order to be harmonized with the position set by that judgment.

A.3. Whether the provisions of Article 271 of Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general reading that “any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence”, are contrary to Article 29 of the Constitution

a. Kabasinga Florida's arguments

[42] Kabasinga Florida and her Counsel tabled the following arguments:

- a. Article 271²⁶ of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general includes

²⁶ “Any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than three (3) years and not more than five

three acts and each of them constitutes a distinct offense. These include the counterfeiting, use and circulation of negotiable instruments.

b. The first act of counterfeit is undisputable on ground that counterfeiting of any form of document constitutes an offence. Only the remain o acts are drafted in such a manner as to contravene the constitution given that the only use of negotiable instruments does not constitute an offence. The legislator should have therefore made distinction between users of counterfeited negotiable instruments willingly and those who use them lawfully.

c. The formulation of the text of this article seems to forbid the use of negotiable instruments as well as their circulation in Rwanda. It is necessary to make a distinction between the person who circulates them illegally and the one who do so on behalf of his/her company. In addition, among the elements constituting the offense, the intentional element is lacking (intention to harm). The different opinions of legal scholars indicate that for there to be qualified as an offense, the offender must act with intention to harm or to do the illegal acts with the aim of breaching public order with the knowledge that his/her act harms the victim, which is qualified as specific intent.

d. In accordance with the first paragraph of article 2 of the above Law n° 68/2018 of 08/30/2018, the legislator must, during the classification of the offense, indicate the act

(5) years and a fine of two (2) to ten (10) times of the value of the counterfeited amount”.

constituting the offense. This article provides that the offense is an act or omission that breaches public order;

e. Article 271 of the Law n° 68/2018 of 08/30/2018 violates Article 29 of the Constitution because the court cannot render a fair trial as long as it is not indicating how such acts constituting the offense breach public order.

[43] In respect of the foregoing reasons, Kabasinga Florida requests the Court to declare Article 271 of the Law n° 68/2018 of 08/30/2018 determining offences and penalties in general inconsistent with Article 29 of the constitution and consider its repeal from Rwanda legislation or its rectification.

b. Opinions of State attorneys

[44] The State attorneys contend that there is no drafting flaw in Article 271 of Law n° 68/2018 of 08/30/2018 for the following reasons:

a. Counterfeit, use or circulation of negotiable instruments, by any means, constitute an offence. The use of negotiable instruments is regulated by law and it is the non-compliance that constitutes the offense provided for under Article 271 of the above law. The lawful use and circulation of negotiable instruments should not be criminalized.

b. Article 48 of the Law n° 48/2017 of 23/09/2017 governing the National Bank of Rwanda, stipulates that National Bank of Rwanda participates in the issuing and distribution of Treasury securities, which is not done by a natural person. The person who allows himself to do so commits an offense against the public under Article 271

of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general.

c. The allegation that this provision is contrary to Article 29 of the Constitution is unfounded, because the elements constituting the offense, in particular the premeditation and the commission of the act, which is punishable by law, must be met in order to consider the suspect as the offender. Thus, the allegation that the offense provided for by Article 271 lacks intentional element is unfounded because the person who counterfeits, uses or circulates negotiable instruments, does it intentionally.

DETERMINATION OF THE COURT

[45] The first sentence of Article 271 of the Law n° 68/2018 of 08/30/2018 reads that: any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence.

[46] Kabasinga Florida states that the reading of this provision, suggests that the legislator did not make distinction between users of counterfeited negotiable instruments with full knowledge and those who use them in accordance with the law.

[47] This article is placed in the section one of the fourth Chapter of the Law n° 68/2018 of 08/30/2018, entitled “counterfeit and falsification of monetary symbols”. The title of the Chapter IV is “offences against public credibility” whereas the title of the Article 271 is “counterfeit, use or circulation of negotiable instruments”. The comparative analysis these titles and the text of the first sentence of the Article 271 implies that the legislator intended to criminalize the counterfeit, use or

circulation of negotiable instruments. Therefore, the legislator should not include in the punishable acts, the lawful use and circulation of negotiable instruments.

[48] The Court considered the formulation of the provisions punishing similar offense in other countries and found that there are legal instruments clearly indicating that the punishable act consists of the counterfeiting, use and circulation of negotiable instruments. These countries are Burkina Faso²⁷, Gabon²⁸, Senegal²⁹, Ivory Coast³⁰(in all these countries, there is a provision that punishes any person who counterfeits, and another distinct provision punishing the use or circulation of negotiable instruments, and the latter provision is concern in this case).

²⁷ Article 253, al 1 code pénal de 1996 :

Est puni des peines prévues aux articles 250, 251 et 252, selon les distinctions qui y sont portées, quiconque participe à l'émission, l'utilisation, l'exposition, la distribution, l'importation de signes monétaires contrefaits, falsifiés, altérés ou colorés ».

²⁸ Art. 230 code penal de 2019:

« Quiconque aura contrefait, falsifié, altéré ou détruit des billets de banque ou pièces de monnaie ayant cours légal au Gabon, ou participé à l'émission ou à l'exposition desdites pièces ou billets contrefaits, falsifiés ou altérés ou à leur introduction sur le territoire gabonais, sera puni de la réclusion criminelle à perpétuité ».

²⁹ Article 120, al. 1 code penal de 1965 :

« Quiconque aura participé à l'émission, l'utilisation, l'exposition, la distribution, l'importation ou l'exportation de signes monétaires contrefaits, falsifiés, altérés ou colorés sera puni des peines prévues aux articles ci-dessus, selon les distinctions qui y sont portées ».

³⁰ Article 293-2, al. 1 code penal de 1981 :

Est passible des peines prévues ci-dessus selon les distinctions susvisées, celui qui participe à l'émission, l'utilisation, l'exposition, la distribution, l'importation ou l'exportation des signes monétaires contrefaits, falsifiés, altérés ou colorés ».

[49] The Court notes that the issue raised by Kabasiga Florida in relation to the Article 271 of the law n° 68/2018 of 30/08/2018 determining offenses and penalties in general should not be considered in the context of unconstitutionality, on the contrary, it would be a formulation related issue which could be rectified to make it more clear. Therefore, the Court finds that this Article is not contrary to Article 29 of the Constitution. Rather, the Court recommends in the event of law revision, this provision should be articulated in a way that is clear enough for readers.

- **B. With regard to Article alleged by Kabasinga Florida to violate the freedom of press, of expression and of access to information.**

a. Whether Article 256 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general is contrary to Article 38 of the Constitution;

a. Kabasinga Florida's arguments

[50] Kabasinga Florida and her counsel state that Article 256 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general is unconstitutional for the following reasons:

a. The acts constituting an offense provided for by Article 256 consist of the publication of opinions with intention to mislead a judge or witnesses, but it does not specify the medium of their publication. It is not clear whether they must be published in the course of trial as the judge does not rely his/her ruling on public individual or press opinions, rather, he/she relies on elements of evidence and other documents in the case file. As a matter of principle, the judge cannot rule the cases on the basis of his/her personal knowledge it; be it the information he/she

learned from reading or heard from the media, which entails that he/she cannot be misled by opinions published by any means outside court hearing.

b. Article 151, 5 of the Constitution provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority, thus, even the citizen cannot exercise influence over him/her.

c. Regarding the fact that the publication of opinions may mislead the witness, it is impossible considering the definition of testimonial evidence provided for by Article 62 of the Law n° 15/2004 of 12/06/2004 relating to Evidence and its Production. This Article reads that testimonial evidence consists of statements made in court by an individual regarding what he/she personally saw or heard that is relevant to the subject matter of the trial. Thus, the legislator has no reason to fear that a person would consider and produce the statements from the public or radio broadcasts as testimonial evidence in the trial.

d. Preventing people from expressing their opinions in media or broadcasts about what happened would be violating freedom of press, of expression and of access to information provided under the Article 38 of the Constitution.

e. Article 256 of the aforementioned law prevents everyone from any declaration or comment on an incident that occurred while pending trial, so that it would not be deemed that he/she intended to mislead the judge while the latter should avoid being misled or relying upon

statements from elsewhere other than from the hearing or case file.

f. This Article impedes the media because many acts constituting an offence or prosecuted in courts are often covered by the media. The journalist who publishes an article on an issue pending trial may have limited freedom to do so as long as he/she is not in a position to determine which information is likely to mislead the judge or witness.

g. This Article would also prevent officials and security agencies from holding media programs related to acts likely to be prosecuted in courts, and could even prevent activist's groups from publishing and expressing their views for fear of being regarded as misleading the judge or witnesses.

h. The fact that a citizen may express his/her opinion on matters pending trial or the media stance thereon which ever form it may take cannot influence the judge or the witness's position; and the statements of third parties should not necessarily corroborate the court's decision or the witness statements. The petitioner gives as an example of the case that was aired in media and of which people expressed different opinions, whereby the press reported that a group of girls assault their colleague with intent to kill her and mutilate her genitals. However, nowhere in the trial was it found that this girl had undergone genital mutilation.

[51] Based on the foregoing reasons, Kabasinga Florida and her counsel note that Article 256 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general is

contrary to Article 38 of the Constitution and they request that it be repealed from Rwanda penal code.

b. Opinions of State attorneys

[52] The State attorneys state that Article 256 of the Law n° 68/2018 of 30/08/2018 is not a matter of concern, since an individual who makes a statement about a pending case is not regarded as trying to mislead, unless it is established through prosecution.

[53] They allege that there is no contradiction with Article 38 of the Constitution as it does not mention journalists, who normally express their views on pending cases without facing prosecution for trying to mislead a witness or a judge since it is not their intent. The example of the trial relating to the group of girls who assaulted their colleague for which various speculations were broadcast, shows that the aforementioned Article 256 does not contradict Article 38 of the Constitution since the false information disseminated by journalists was not considered to mislead the judge or witnesses, especially that it was not the purpose.

DETERMINATION OF THE COURT

[54] The Article 256 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general provides that Any person who declares his/her opinions with intention to mislead witnesses or a decision of a judge before the case is determined, commits an offence. Upon conviction, is liable to imprisonment for a term of one (1) year to two (2) years and a fine of one million Rwandan francs (1,000,000 Frw) to two million Rwandan francs (2,000,000 Frw).

[55] The offense provided for under this article mentioned above is one of the offenses listed in Section 5 of Chapter 3 of the Law n° 68/2018 of 08/30/2018 on obstruction to good administration of justice. Offenses relating to obstruction to good administration of justice are qualified differently depending on the country. In common law system countries³¹, there is a concept known as *contempt of court* present in Rwandan legislation even though it has a different term. It is described in three categories:

- a. Contempt's of court, including behavior that hinders the good conduct of the hearing, obstruct good administration of justice. [*contempt in the face of the court (contempt in facie curiae), which comprises conduct that deliberately disrupts or obstructs court proceedings and is prejudicial to the course of justice*]³². These can be considered as contempt of court offenses set

³¹ In common law jurisdictions, contempt of court has traditionally been classified as either in facie curiae (in front of the court) or ex facie curiae (outside the court). Examples include yelling in the court room, publishing matters which may prejudice the right to a fair trial ("trial by media"), or criticisms of courts or judges which may undermine public confidence in the judicial system ("scandalizing the court")

The common law doctrine of contempt of court does not exist in civil law jurisdictions in such a broad, encompassing sense, but there are undoubtedly functional equivalents, particularly in matters relating to freedom of expression; Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, London, United Kingdom, 29-30 November 2000, p 1-2 (<https://www.article19.org/data/files/pdfs/publications/freedom-of-expression-and-internet-regulation.pdf>).

³² Law Reform Commission of Ireland, Contempt of Court and other Offences and Torts Involving the Administration of justice, 2016, p. 11 (<https://www.lawreform.ie/news/issues-paper-on-contempt-of-court-and-other-offences-and-torts-involving-the-administration-of-justice.644.html>)

out in the Article 80 of the Law n° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure.

b. Offenses relating to scandalizing the court, making or publishing untrue allegations about a court or judge that would undermine public confidence in the judiciary³³. Such offenses are found in the Law n° 68/2018 of 08/30/2018, in subsection titled: discrediting Judiciary and committing violence against personnel in judicial organs.

c. Offenses related to obstruction to good administration of justice through sub judice contempt³⁴, publishing prejudicial material about pending court proceedings that would interfere with the administration of justice³⁵. The provision of Article 256 of the Law n° 68/2018 of 08/30/2018 is similar to what is stated in this subsection.

[56] Following these general explanations, the Court will examine whether the provision of the aforementioned Article 256 infringes the freedom of expression provided for by Article 38 of the Constitution. This Article states that: Freedom of press, of expression and of access to information are recognized and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and

³³ Law Reform Commission of Ireland, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice*, op. cit, p. 11.

³⁴ Sub judice contempt”, or contempt in connection with pending proceedings, relates to publications concerning pending proceedings that are intended to interfere with the administration of justice”; *Ibid.*, p. 11.

³⁵ *Ibid.*, p. 11.

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

[57] In this regard, on the basis of various documents, it will be examined whether the principle of freedom of expression is an *absolute* principle or whether it is a principle with limitations, what are they and are how they are defined by other courts and law scholars. Finally, it will be examined whether or not such limitations apply to the provisions of Article 256 of the Law n° 68/2018 of 08/30/2018.

[58] The principle of freedom of expression has been reiterated by various international conventions ratified and domesticated by Rwanda, especially article 19 of the International Covenant on Civil and Political Rights³⁶.

[59] According to Articles 38 of the Constitution and 19 of the International Covenant on Civil and Political Rights, the freedom of expression is not an absolute principle; it has limitations. The Article 38 of the Constitution indicates the rights that this principle must not violate and further states that the conditions

³⁶ Art. 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;For the protection of national security or of public order (ordre public), or of public health or morals.

for exercising and respecting such freedoms are determined by law. Article 19,3 of the International Covenant on Civil and Political Rights stipulates that freedom of expression entails duties and responsibilities and it may therefore be subject to certain restrictions provided by law and are necessary for the respect of the rights of others.

[60] Based on this International Convention, subjecting freedom of expression to restrictions must be provided by law for the purposes of fulfilling one of the objectives specified in Article 19 (3), and it must be necessary for the protection of such purpose (*Under the ICCPR, restrictions must meet a strict three-part test*³⁷. *First, the interference must be provided for by law. Second, the interference must pursue one of the legitimate aims listed in Article 19 (3). Third, the interference must be necessary to secure that aim*). This was also reaffirmed by the Siracusa Principles on limitations and exceptions for the provisions of the International Covenant on Civil and Political Rights, in its article 10 (*Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation..... pursues a legitimate aim, and is proportionate to that aim*)³⁸

[61] The “rights of others” referred to in Article 19(3) (a) undoubtedly includes rights linked to the administration of

³⁷ See *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, N°.458/1991, para. 9.7.

³⁸ Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, op. cit., p. 3.

justice, such as the right to a fair trial and the presumption of innocence³⁹.

[62] Matters regarding restrictions to which freedom of expression is subjected in the context of protecting rights related to the right to due process of law had been defined by the various courts as follows:

a. in the case *Cullen v. Toibin* rendered by the Supreme Court of Ireland, it has been ruled that freedom of expression under the Irish Constitution is not an absolute principle. It may not be respected in the context of protecting the right to due process of law. In addition, this ruling explains that articles published in the course of trial may compromise the right to a fair trial; and for this reason it may be necessary to limit freedom of expression in order to protect it and promote due process of law (*The right to freedom of expression is also protected by Article 40.6.1° of the Constitution of Ireland. This right is not absolute, however, and is subject to limitation. For example, the right may be restricted so as to uphold the right to a fair trial of an accused person and to protect the administration of justice. In cases where a prejudicial publication has been made, this clearly has the potential to impede an accused person's right to a fair trial. Therefore, it may be necessary to restrict the right to freedom of expression so as to protect the right to a fair trial and to maintain the administration of justice. Freedom of the press can, however, only be restricted*

³⁹ SIRACUSA Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

where this is necessary for the administration of justice)⁴⁰.

b. In the judgement of *Kelly v O’Neill*⁴¹ rendered by the Supreme Court of Ireland, the court explained that the protection of freedom of expression is not absolute and may be subject to limitations on cases related to obstruction to good administration of justice, which applies to cases of contempt. (*the court stated that the protection of freedom of expression is not absolute and may,, be subject to limitation in line with public order and the common good, which applies to cases concerning contempt*).

c. In addition, in the case *DPP v Independent Newspapers (Irl) Ltd*,⁴² tried by this Court, it was clarified that in the cases for sub judice contempt is to determine whether the material published was intended to interfere with the good administration of justice or create the perception of such interference (*the Supreme Court (Dunne J) explained that the test for sub judice contempt is whether the material published was intended to interfere with the administration of justice, or created the perception of such interference*). Further, in the case *Attorney-General for England and Wales v Times Newspapers Ltd* rendered by the Court of Appeal of England, it was clarified that judgments relating to offenses of contempt of the good administration of justice consist of the prevention of media litigation; the media should not broadcast about

⁴⁰ *Cullen v Toibín* [1984] ILRM 577 at 582, referred to in *Contempt of Court and Other Offences and Torts involving the Administration of Justice*, op. cit., p. 53.

⁴¹ [1999] IESC 81, [2000] 1 IR 354, at 374.

⁴² [2005] IEHC 353, [2006] 1 IR 366, at paragraph 34.

ongoing trials in a way that would mislead witnesses or judges (*Sub judice contempt developed as another means to protect the administration of justice, by preventing a “trial by media”. The media should not attempt to “prejudge” the issues in a certain case in a way that would influence would-be witnesses or jurors*)⁴³.

d. In the case of *Worm v. Austria*⁴⁴, the European Court of Human Rights clarified that the violation of freedom of expression was necessary in order to protect the right to due process of law and maintain public confidence in the administration of justice (*the interference with freedom of expression was “necessary in a democratic society” in order to protect the right to a fair trial and to maintain public confidence in the administration of justice.....*).

e. In the case of *Sunday Times v. United Kingdom*⁴⁵. The European Court of Human Rights had also clarified that *If the issues arising in litigation are ventilated in such a way to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts.*

f. The Court of Appeal of New Zealand, in the case of *Gisborne Herald Co. Ltd. v. Solicitor General*⁴⁶, had explained that when freedom of expression and the right

⁴³ *Attorney-General for England and Wales v Times Newspapers Ltd* [1974] AC 273 at 300; referred to in *Contempt of Court and Other Offences and Torts involving the Administration of Justice*, op. cit., p. 52.

⁴⁴ 29 August 1997, Application 22714/93, 25 EHRR 454, par.50.

⁴⁵ *The Sunday Times v. United Kingdom*, 26 April 1979, Series A No. 30, 14 EHRR 229, par. 63.

⁴⁶ [1995] 3 NZLR 563; referred to in *Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates*, o. cit., p. 10.

to a fair trial cannot be fully guaranteed, the appropriate measure to be taken is to limit freedom of the press to ensure a fair trial (*...The present rule is that, where on conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial*).

g. The Supreme Court of Canada had explained that the decision to ban the publication of an article can be taken when it is necessary in the context of preventing the blatant and substantial obstruction to good conduct of the judgement, and that this decision must prevent the more severe risk than the deleterious effects it may have on the people affected by the decision (*... A publication ban should only be ordered when:*

(a) Such ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

*(b) The salutary effects of the publication ban outweigh the deleterious effects to freedom of expression of those affected by the ban)*⁴⁷.

h. In the United States, the power to punish the interference in the good administration of justice by using dissenting opinions is rarely used. The general rule is that a publication can only be punished for contempt if there is a blatant and serious danger to the administration of

⁴⁷ Dagenais v. Canadian Broadcasting Corp., N° 23403, 1994: January 24, 1994, December 8, P.5.

justice (*the power of the courts to punish for contempt by publication is extremely limited. The general rule is that a publication cannot be punished for contempt unless there is a “clear and present danger” to the administration of justice*⁴⁸. *The test requires that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished*)⁴⁹.

Apart from the United States and Canada, there are other countries which have declared that for a prosecution for contempt of the administration of justice to occur, the content of published articles must constitute the blatant and serious obstruction of the process of the judgement. Those countries are England and Wales (*the test for sub judice contempt in section 2(2) of the Contempt of Court Act 1981 is that there is “a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced”*); New Zealand (*the test for “publication” is whether there is a “real risk” that the publication will interfere with the right to a fair trial*⁵⁰); and South Africa (*the Supreme Court of Appeal held that “a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is*

⁴⁸ *Bridges v. California*, 314 US 252 (1941); *Pennekamp v. Florida*, 328 US 331 (1946); *Craig v. Harney* 331 US 367 (1946); *Wood v. Georgia* 370 US 375 (1962).

⁴⁹ *Bridges v. California*, *Ibid.*, p. 263.

⁵⁰ New Zealand Law Commission, Issues Paper on Contempt in Modern New Zealand (IP36 2014) at paragraph 4.9 (https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZ_LC%20IP36.pdf).

*demonstrable and substantial and there is a real risk that the prejudice may occur if the publication takes place)*⁵¹.

[63] Among the provisions of the Constitution and the International Conventions as well as the positions of the jurisdictions taken especially in relation to the admissible limitations with regard to the freedom of expression, the following key conclusions are implied:

- a. Freedom of expression is not an absolute principle; it has limits;
- b. Limitations on freedom of expression must be determined by law;
- c. The restriction of freedom of expression must be necessary for the respect of the rights of others, and with a legitimate aim; Among the rights of others identified as one of the legitimate aims, includes the right to due process of law which includes the right to a fair trial;
- d. It must be necessary to achieve this goal;
- e. The limitations on freedom of expression must be necessary in order to promote public confidence for the administration of justice;
- f. Not all publications over ongoing trial are subject to prosecution. It becomes necessary to prosecute contempt of the good administration of justice in order to guarantee

⁵¹ South Africa Supreme Court of Appeal: *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97 (21 June 2017), at para.37; and South Africa Supreme Court of Appeal: *Midi Television v Director of Public Prosecutions (Western Cape)* 2007 (3) SA 318 (SCA) at para 19.

the right to a fair trial, when the publications constitute a blatant and substantial obstruction to the conduct of trial.

[64] Following the comparative analysis of the main opinions and the provisions of Article 256 of Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, in the context of determining whether or not it is affected by the restrictions on freedom of expression, the Court notes that:

- a. Article 256 of the Law n° 68/2018 of 08/30/2018 provides for restrictions on freedom of expression if these opinions intend to mislead witnesses or a decision of a judge before the case is determined.
- b. A person who publishes opinions with the intention to mislead witnesses or a decision of a judge before the case is determined, is considered to have the intention to obstruct the good administration of justice and the right to a fair trial.
- c. Obstruction of the good administration of justice and the right to a fair trial is one of the legitimate reasons that may lead to the need of limiting the freedom of expression.

Nevertheless, the court, notes that not all the opinions expressed in relation to the current trial must be prosecuted on the basis of this provision, because for this to happen, it must be indicated that the publisher had intention of misleading and that the publications manifestly and seriously undermine the smooth conduct of the trial.

[65] Regarding the statements of Kabasinga Florida that the judge rules based on the content of the file and that he/she cannot

therefore be misled as a result of publications by any means, the court will examine this question based decided cases on the same matter. Some courts have indicated that a judge cannot be misled by publications while others concluded otherwise.

[66] The judgements establishing that the judge cannot be misled by the publications include:

a. The judgement rendered by the High Court of England, *Vine Products Ltd. v. MacKenzie & Co. Ltd*⁵², it ruled that professional judges participate in sufficient training to such an extent that they cannot be misled, during deliberation, by publications relating to the trial (*It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing [a prejudging of the issues] to influence them in deciding the case*).

b. The case *Akinrinsola v. Attorney-General of Anambra State*⁵³ tried by the court of Nigeria ruled that a statement that was regarded as contempt in the smooth administration of justice in case involving non-professional judges, it would rarely be contempt in a trial by judge-alone (*a statement that was regarded as contempt in a jury trial would rarely be contempt in a trial by judge-alone*).

⁵² 1965] 3 All ER 58, referred to in Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized international mandates, op. cit., p. 11.

⁵³ (1980) 2 NCR 17, referred to in Background Paper on Freedom of Expression and Contempt of Court for the International Seminar Promoting Freedom of Expression with three specialized International Mandates p.11.

c. the case *Nebraska Press Association v. Hugh Stuart*⁵⁴, where the Supreme Court of the United States of America has ruled that the decision by the jury of the first jurisdiction of banning publication of media publications on the case pending in the courts because it is susceptible to the influence non-professionals is ill-founded (*the American Supreme Court vacated a prior-restraint order passed by the trial Judge in a multiple murder case while that case was pending, on the ground that the view of the trial Judge that Jurors are likely to be influenced by the press publications, was speculative*).

d. The case *Attorney General v. BBC*⁵⁵ rendered by the Court of Appeal in England where the judge had observed that professionally trained Judges are not easily influenced by publications (*Lord Denning in the Court of Appeal had observed that professionally trained Judges are not easily influenced by publications*).

[67] Judgments establishing that judge may be influenced by publications include:

a. The case *Reliance Petrochemicals v. Proprietor of Indian Express*⁵⁶ rendered by the Supreme Court in India and ruled that there is no distinction between the professional and a non-professional judge with regard to being misled by publications made on the pending trial (*No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may*

⁵⁴ *Nebraska Press Association v. Hugh Stuart*: (1976) 427 US 539.

⁵⁵ *Attorney General v. BBC*: 1981 A.C 303 (HL), p.312

⁵⁶ *Reliance Petrochemicals v. Proprietor of Indian Express* : 1988(4) SCC 592.

amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges).

b. Explanations of Justice Frankfurter (concurrent opinion) during the case of *John D. Pennekamp v. State of Florida*⁵⁷ tried by the Supreme Court of the United States of America:

- *The Judiciary could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court.*
- No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. *(No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational*

⁵⁷ John D. Pennekamp v. State of Florida (1946) 328 US 331.

process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. It is a condition of that function - indispensable in a free society - that in a particular controversy pending before a court and waiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence Judges and Jurors".

c. In the case of *Attorney General v. BBC: 1981 A.C 303 (HL)*⁵⁸ Aforementioned, Lord Dilhorne dissented the opinion of Lord Denning that no Judge will be influenced in his Judgment by anything said by the media, but that no one is able to entirely get rid of what he/she has seen, heard or read that are likely to influence him/her unconsciously (*It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the*

⁵⁸ *Attorney General v. BBC: 1981 A.C 303 (HL)*, p. 335

Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it).

[68] The statements of the Justice Frankfurter and Lord Dilhorne have been echoed by some law reform commissions which added that criminalization of contempt of the good administration of justice is also intended to protect the public perception in relation to impartiality for decisions made by judges:

a. The New South Wales Law Reform Commission in Australia had clarified that the judge can be subconsciously influenced – by what he/she has seen, heard or read-, and that it is essential to prevent the problem that the public would believe that the judge is biased (first, it is always possible that a Judicial officer may be subconsciously influenced; and secondly, it is just as important to protect the public perception of Judges' impartiality as to protect against risk of bias)⁵⁹.

b. The Law Reform Commission of Canada had also explained that *while Judges may generally be impervious to influence, the possibility of such influence could not be ruled out altogether, and that in the case of Judicial*

⁵⁹ The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on 'Contempt by Publication, <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Other-Publications/Discussion-Papers/DP43>, para

*officers, the sub-judice rule served an important function of protecting public perception of impartiality)*⁶⁰.

[69] The above reasons were reiterated by *The UN Special Rapporteur on Freedom of Expression and Opinion*) on the case of Ms. Bernadette and Mr. Michael McKevitt who fought for the independence of Ireland. The media reported that they are linked to the bomb explosion that killed around 29 people even before police's interrogated them. The UN Special Rapporteur had indicated that what was broadcast by the media had created a situation where no one is willing to tolerate the possibility that Bernadette and Michael McKevitt are innocent. This had led them to believe that if they are prosecuted, they have no hope of getting a fair trial. (*...In the case of Bernadette and Michael McKevitt, the media have created a situation where almost no one in Ireland is prepared to countenance the possibility that they may be innocent.....They create such certainty of their guilt in the minds of the public that, if these persons are even actually charged and tried, they have no hope of obtaining a fair trial*)⁶¹.

[70] What particularly concerns misleading witnesses was said in the case of *Attorney General v. Mirror Newspapers* (*The premature publication of evidence may have a tendency to influence the evidence of witnesses or potential witnesses*)⁶².

⁶⁰ Canadian Law Reform Commission, *Contempt of Court: Offences against Administration of Justice* {Working Paper 20, 1977, p 42-43} and Report 17 (1982) at p 30), cited by Law Commission of India, 20 Report on trial by media, free speech and fair trial under criminal procedure code 1973, August 2006, p.57 (<https://lawcommissionofindia.nic.in/reports/rep200.pdf>).

⁶¹ Cited by Law Commission of India, 20 Report on trial by media, Free speech and Fair trial under Criminal procedure code 1973, August 2006, p. 12 & 13.

⁶² *Attorney General v Mirror Newspapers Ltd* [1980] 1 NSWLR 374; Referred to in civil Trials Bench Book, Contempt

[71] In the previous judgments and documents, three main schools of thought are evident. The first school advances that the professional judge cannot be misled by the publications made outside the hearing; while the second alleges that it is possible. The third declare that even if, in general, the judge can ignore broadcasts made during deliberation, but they are likely to influence him/her unconsciously. In addition, there is the problem that people who have watched or listened to these broadcasts may suspect that they have influenced them, which can lead them to discredit any decision and thus affect the good administration of justice. This Court concurs with the third school of thought.

[72] Therefore, a career judge must adjudicate in a manner that he/she deems appropriate based on trial statements and on the content of the case file, regardless of what he/she has seen or heard. However, the judge is a human being all the same and by nature what goes into his/her intellect can influence his/her thinking unconsciously. Even though the judge can generally ignore broadcasts made during his/her deliberations, litigants and the public may suspect that he/she was influenced leading to discredit any decision to be made. And moreover, as stated by the Law Reform Commission of New South Wales (Australia)⁶³ on the basis of the principle established in the judgment *R v. Sussex Justices: Exparte McCarthy*: 1924 (1) KB 256 which is still applicable, "Justice should not only be done, it should manifestly and undoubtedly be seen to be done".

Generally(https://www.judcom.nsw.gov.au/publications/benchbks/civil/contempt_generally.html#p10-0360)

⁶³ The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on 'Contempt by Publication', p.70.

[73] It is therefore in the finding of the Court that based on the provisions of laws, international conventions ratified by Rwanda, as well as all elucidations, especially based on decided cases, the provisions of Article 256 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general are acceptable restrictions with a legitimate aim on the principle of freedom of expression and thus do not infringe this principle. Therefore, it is not contrary to Article 38 of the Constitution.

III. DECISION OF THE COURT

[74] Hereby declares with merit in part the petition initiated by Kabasinga Florida.

[75] Hereby declares with merit the petition initiated by Niyomugabo Ntakirutimana.

[76] Hereby declares paragraph 4 of the Article 84 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general contrary to Articles 29, paragraph 4 of the Constitution; and without effect based on the provisions of Article 3 of the Constitution.

[77] Hereby declares part of the text of Article 92 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general reading that: “that cannot be mitigated by any circumstances”, contrary to Articles 29 and 151 of the Constitution and without effect.

[78] Hereby declares paragraph 3 of the Article 133 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general, with regard to the part of the text reading that “if child

defilement is committed on a child under fourteen (14) years, the penalty is life imprisonment that cannot be mitigated by any circumstances”, contrary to Articles 29 and 151 of the Constitution, and without effect.

[79] Declares Article 256 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general not inconsistent with the Constitution;

[80] Declares Article 256 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general not inconsistent with the Constitution;

[81] Hereby orders the publication of this case in the Official Gazette of the Republic of Rwanda.

PROCEDURAL CASES

**CASE RELATING TO THE
PROCEDURE FOR REVIEW OF A
JUDGMENT DUE TO INJUSTICE**

NTEGEYE v ECOBANK RWANDA LTD

[Rwanda SUPREME COURT – RCOMAA 00001/2019/SC
(Ntezilyayo, P.J., Rukundakuvuga and Cyanzayire, J.) 24
January 2020]

Review of the case due to injustice – Review of the case due to injustice is a special procedure that cannot be subject to other remedies of appeal because those remedies have to first be exhausted – A decision on the case under review due to injustice is not subject to any other remedy of appeal because the cases to be eligible for review due to injustice must have exhausted those remedies.

Facts: BCDI (ECOBANK) offered a loan to Ntegeye Bernard and the latter failed to pay back in due time as agreed. For that reason, he agreed to hand over his immovable property composed of a house to BCDI, but they agreed that, in case the Bank would like to sell it, Ntegeye Bernard would have preemptive rights for a period of 10-year.

Thereafter, the house was auctioned and purchased by BNR, but the loan was not all covered. Ntegeye referred his claim against ECOBANK to the arbitration tribunal, arguing that his house was sold illegally, but the arbitration tribunal held the house was sold legally.

Ntegeye appealed before the High Court and the latter ordered the annulment of the agreement titled *acte de cession d'immeuble* concluded between BCDI and Ntegeye, and that the latter be given back his house.

BCDI appealed before the Supreme Court arguing that the appealed judgment, was not rendered in consideration of the subject matter since the Court ordered the annulment of the sale agreement, and this was not the subject matter for the appeal. The Supreme Court found his appeal with merit, and ordered Ntegeye to pay back the principal loan with its interests.

Ntegeye applied for the review of the case due to injustice, and later, the two parties to the case concluded an amicable settlement agreement. In its decision, the Supreme Court held that the application for review of the case due to injustice is not admissible because the concluded amicable settlement has the same binding force as the final judgment, therefore, the application was not admitted.

With reference to article 83 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, Ntegeye filed another claim requesting the review of that judgment, stating that the aforementioned article does not prohibit him to apply for the review of the judgment rendered in the review due to injustice, rather the present article only excludes judgments rendered by the Supreme Court and the latter found that they are vitiated by injustice, and he therefore found that his application did not violate this article since it was not admitted for examination.

Ecobank Rwanda Ltd and National Bank of Rwanda argue that article 83 Organic Law No 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court barred him from applying for the review of the judgment which was rendered during the review due to injustice because the second paragraph states that the decision taken in the review of the judgment due to injustice cannot be appealed.

The Supreme Court rendered the ruling based on article 53 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts, which stipulates that a judge who received a case vitiated by injustice may choose one among the decisions and held that it is vitiated by injustice or not, he may even not admit the application. Any decision made by the judge about this, is irrevocable. Therefore, a judgment, rendered on the case under review due to injustice cannot be subject to any procedure of appeal because it is binding.

Held: 1. A decision on the case under review due to injustice is not subject to any other remedy of appeal because the cases to be eligible for review due to injustice must have exhausted those remedies.

**The application for review of the judgment due to injustice;
is inadmissible;
Court fees cover the proceeding expenses.**

Statutes and statutory instruments referred to:

Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts, article 53

Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 83.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] In 1998, Ntegeye Bernard was offered the loan by BCDI SA (currently called Ecobank Rwanda Ltd) equivalent to 50,000,000 Frw and deducted from that amount 42,485,087 Frw to pay back the pending loan he got from BACAR SA in 1993 for building a house in the plot No 1200 Kacyiru – North. Ntegeye Bernard failed to pay back the loan offered by BCDI SA, and the loan increased to 73,839,942 Frw, and this resulted in the conclusion of an agreement of appropriating to the Bank the house located in the plot N° 1200 Kacyiru - North, a house that was then valued to 41,484,288 Frw. On that amount (value of the house), a sum of 4,122,750 Frw was added as the value of its furniture, and the total value of the house was estimated to 45,607,038 Frw, meaning that his pending debt was 28,232,904 Frw. Article 6 of the agreement they concluded stipulates that once the Bank decides to sell the house, Ntegeye Bernard will have a 10- year right of preemption. Ntegeye Bernard failed to pay back the remaining amount so that the amount of money increased. On 11/04/2003, BCDI SA auctioned the aforementioned house, and the successful purchaser was National Bank of Rwanda.

[2] Ntegeye Bernard filed an application against BCDI SA (changed to Ecobank Rwanda Ltd) before the Arbitral Tribunal with the intervention of National Bank of Rwanda, stating that his house located in the plot No 1200 Kacyiru-North was illegally auctioned, and without considering the article 6 of the agreement they had concluded. On 02/12/2005, the Arbitral Tribunal held

that BCDI SA did not violate the agreement, that the purchase by National Bank of Rwanda was valid, and ordered Ntegeye Bernard to pay 28,232,000 Frw mentioned in the agreement of 09/02/2001. With regard to the preemption right, the Tribunal motivated that the statements of Ntegeye Bernard are baseless, because he did not prove if he could purchase a house sold at 100,000,000 Frw while he failed to reimburse 28,232,000 Frw. The Tribunal found that the Bank failed to fulfill its responsibilities of informing him about the sale, and thus ordered the Bank to award him damages equivalent to 5,000,000 Frw.

[3] Ntegeye Bernard was not satisfied with that decision from the Arbitration, and appealed before The High Court of the Republic. On 31/05/2007, in the judgment, RCOMA 0020/05/HC/KIG, this Court declared that the agreement concluded between Ntegeye Bernard and BCDI SA entitled “*Acte de cession d’immeuble*” is invalidated and that Ntegeye Bernard did not owe a loan to that Bank based on the Bank statement of the account N° 110-2534703-9. The Court ordered that Ntegeye Bernard be reappropriated his house, be awarded 6,000,000 Frw as compensation for pecuniary loss and 5,000,000 for moral damages.

[4] BCDI SA and National Bank of Rwanda filed appeal against that judgment, before the Supreme Court. On 30/07/2010, in the judgment, RCOMAA 0005/07/CS, The Court found that appeal with merit, and ordered Ntegeye Bernard to pay Ecobank Rwanda Ltd (former BCDI SA) 48,102,687 Frw resulting from the loan amounting to 28,232,000 Frw and its interests. The Court motivated that:

- a. The High Court rendered the judgment, on the subject matter not filed, because it indicated that the sale

agreement between BCDI SA and National Bank of Rwanda was fraudulent, but it invalidated the agreement concluded between BCDI SA and Ntegeye Bernard which was not the subject matter of the filed claim;

b. The agreement concluded on 09/02/2001 entitled « *acte de cession d'immeuble* » fulfilled all conditions required for a valid sale agreement, therefore, the house subject to that agreement became the property of BCDI SA, meaning that the latter had right to sell it to National Bank of Rwanda;

c. With reference to the report by the Expert appointed by the Court, Ntegeye Bernard did not pay back the remaining amount of the loan he received from BCDI SA.

[5] Ntegeye Bernard applied for a review of the case due to injustice, and the Office of Ombudsman indicated that the Supreme Court did not decide on the implementation of the provision of the article 6 of the agreement entitled « *acte de session d'immeuble* », and it even did not say anything about it, while they constituted the subject matter of the claim. The file was submitted to the Supreme Court, and the claim was registered on RS/REV/INJUST/COM 0001/16/CS. In that judgment, Ecobank Rwanda Ltd raised an objection related to inadmissibility of the claim of Ntegeye Bernard, arguing that after submitting his concern to the Office the Ombudsman, they concluded an amicable settlement agreement.

[6] On 09/09/2016, the Supreme Court held that the objection raised by Ecobank Rwanda Ltd had merit, and declared the inadmissibility of the application for a review of the case due to injustice submitted by Ntegeye Bernard and ordered the latter to pay to Ecobank Rwanda Ltd and National Bank of Rwanda the

procedural and counsel fees. The Court made that decision basing on the article 591 of Book III of the Civil Code which stipulated that “Amicable settlement agreement has the same binding force between their parties as the judgment, finally decided on at the last instance. Nobody can request its invalidation on the grounds that he made a mistake related to legal provisions, or that the price was excessive”.

[7] The Supreme Court motivated that Ntegeye Bernard and Ecobank Rwanda Ltd concluded an agreement on 06/03/2014 stating that the two parties agree on the execution of the judgment, RCOMAA 0005/07/CS rendered on 30/07/2010. The article one of the aforementioned agreement stipulates that Ntegeye Bernard agrees to pay 34,000,000 Frw to Ecobank Rwanda Ltd in order to settle the disputes between them ¹, and the article 3 stipulates that both parties voluntarily agree to conclude an amicable settlement agreement being aware of its related impacts, and therefore agree on its execution and implementation with full honesty ².

[8] The Supreme Court also motivated that Ntegeye Bernard concluded an amicable settlement agreement with Ecobank Rwanda Ltd after he had submitted his application about injustice faced, because he submitted his application in 2012, and the

¹ « Monsieur Ntegeye Bernard s’engage à verser la somme de 34.000.000 Frw à Ecobank Rwanda en vue de liquider tous ses engagements qu’il a envers Ecobank Rwanda Ltd en rapport avec le jugement (RCOMAA 0005/07) ».

² “les parties s’engagent à clôturer la mise en application de l’arrêt RCOMAA 0005/07 de la Cour Suprême et à exécuter de bonne foi la transaction. Les parties s’interdisent de remettre en cause la mise en application de la transaction et de ce fait les parties rappellent connaître pleinement la portée de leur engagement volontaire auquel elles ont donné un consentement libre et éclairé ».

agreement was concluded on 06/03/2014; and in that agreement he stated that the dispute between him and the Bank is settled in all grounds of the judgment, including those he had sued for injustice. The Court indicated that, in the amicable settlement agreement with the Bank, he agreed that he did not face injustice, if it was not so, he should have mentioned the grounds on which the disputes were settled and others for which he was still in disagreement with the decision made on them.

[9] Ntegeye Bernard filed another claim requesting the review of the judgment, N° RS/REV/INJUST/COM 0001/16/CS rendered on 09/09/2016. The Court's Registry confirmed that the claim was not admitted to be registered in the Court's registers because it is against the provisions of the article 83 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court. Ntegeye Bernard lodged his appeal to the President of the Supreme Court. In his decision of 08/06/2018, the President of the Supreme Court held that the appeal of Ntegeye Bernard be registered in the Court's registers for the Bench to examine whether the judgment, rendered on the case under review due to injustice could be reviewed so that the decision made thereof could serve as jurisprudence for other courts.

[10] Ntegeye Bernard based his application for the review of the case on legal principles disregarded by the Court, and those

are : «*contra proferentem* »³, and «*Parol evidence rule* »⁴and he stated that he knew them after the case under review was pronounced. In their submissions, the defendants argued that those principles already exist in the law, and therefore it cannot be a ground for reviewing the judgment, because there is no convincing reason for failing to refer to them in his pleading for the concerned case.

[11] The defendants also stated that Ntegeye Bernard failed to respect the deadline for submitting an application, because the judgment, RS/RV/INJUST/COM 0001/16/CS was rendered on 09/09/2016, while the application for its review was submitted after one year on 09/09/2017, and the law provides that it has to be submitted not later than two months. Ntegeye Bernard stated that he knew the principle of « *contra proferentem* » on 14/08/2017 and he submitted his application on 27/09/2017 before a period of two months was expired.

[12] The case was heard in public on 06/01/2020, Ntegeye Bernard represented by Counsel Zawadi Stephen, Counsel Mubangizi Frank and Counsel Umutangana Aimée Jacqueline, whereas Ecobank Rwanda Ltd was represented by Counsel Munyaneza Remy and National Bank of Rwanda represented by Counsel Murego Jean Leonard and Counsel Byiringiro Jacques. The parties to the case started by discussing on the issue regarding

3 The principle states that, in case of confusing terms in the agreement, the consideration is made to the elements that are in the interest of a party which did not contribute to its drafting.

4 The principle states that when there is a written agreement signed by both parties concerned, it could not be changed on basis of the verbal statements contrary to its written contents.

whether the judgment, rendered on the case under review due to injustice could be reviewed, and it was decided that this issue would be firstly decided by Court. The Court informed the parties that a decision on that issue would be pronounced on 24/01/2020. In case the Court should rule that the judgment, rendered on the case under review due to injustice could be rereviewed, the following other legal issues would thereafter be analysed:

- a. Whether the deadlines for the review of the judgment, had been respected;
- b. Whether failure to respect a legal principle could be a reason to review the judgment,

[13] Basing on what have been stated in the previous paragraphs, the main issue analysed in this judgment, was to determine whether the judgment, rendered on the case under review due to injustice could be reviewed.

II. THE LEGAL ISSUE AND ITS ANALYSIS

- **Whether the judgment, rendered on the case under review due to injustice could be reviewed**

[14] The Counsel for Ntegeye Bernard argue that the article 83 of the Organic Law N° 03/2012/OL determining the organization, functioning and jurisdiction of the Supreme Court does not prohibit him to apply for the review of the judgment, RS/RV/INJUST/COM 0001/16/CS. They explain it as follows:

- a. They state that the present article excludes only cases heard by the Supreme Court and found them vitiated by injustice, because it corrects all legal errors committed and provides legal guidance, and that is why the law provides that a such decision is final and irrevocable. This does not concern the judgment, RS/RV/INJUST/COM 0001/16/CS since it has not been analysed and held that it was vitiated by injustice;
- b. They state that the application of Ntegeye Bernard is not among excluded cases aforementioned, since it has not been admitted and examined, meaning that the injustice the Office of the Ombudsman found in the judgment, RCOMAA 0005/07/CS rendered by the Supreme Court on 30/07/2010, is still existing. They add that an objection raised by Ecobank Rwanda Ltd and the injustice found by the Office of the Ombudsman should have been examined and decided on together;
- c. They also indicate that the statements of the counsel for Ecobank Rwanda Ltd and National Bank of Rwanda that the article 53 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts clarified the article 83 of the aforementioned Organic Law, are baseless, since it had been enacted after the application filing.

[15] The Counsels for Ecobank Rwanda Ltd and National Bank of Rwanda argue that the article 83 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court impeded him to file again an application against a decision on the judgment, reviewed due to injustice. They explain it as follows:

a. The second sentence of that article mentions “a decision made”, meaning that any decision that can be made on a judgment, reviewed due to injustice is final. This has been emphasized by the legislator in the article 53 in the last part of a New Law determining the jurisdiction of courts published in 2018⁵, and this law can be referred to in order to make the aforementioned article 83 clearer;

b. Another reason for the inadmissibility of the application of Ntegeye Bernard is based on the interest of justice that take account of the irrefutable truth of the court final decision. This is the reason why there exist ordinary and extraordinary appeal procedures, their modalities and time limit. Failure to respect them violates the principle that takes account of the court final decision, the winning party would have doubt about what he/she won for, or the parties would neglect by thinking that at any time and for any ground they could file again application before the courts.

c. They maintain that the way in which the counsels of Ntegeye Bernard interprets the article 83 of the Organic Law N° 03/2012/OL of 13/06/201 is wrong, because they want to dissociate what the legislator did not dissociate, and this is not accepted in the interpretation of law, it is necessary to analyse the entire article, not its part; and this should be related to the title of this article which deals with any decision made, meaning in case the injustice had been pointed out, in case the injustice had not been pointed out or in case the application is not admitted.

5 «Judgements reviewed on the grounds that they were vitiated by injustice are not subject to any appeal procedure »

[16] They add that the doubt of the President of the Supreme Court raised when he accepted the registration of the application of Ntegeye Bernard does no longer exist, because it was clarified by the article 53 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts, meaning that the Court guidance is no longer needed.

DETERMINATION OF THE COURT

[17] In the decision N° 0022/2019 of 08/06/2018 relating to the recourse of Ntegeye Bernard for the admissibility of his application for the review of the case, the President of the Supreme Court found that, for the interests of justice, the application had to be registered in the Court's registers in order to provide a legal guidance that would be used by other courts in determining whether the judgment, rendered on the case under review due to injustice can be reviewed, basing on the provisions of the article 83 of the Organic Law No 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court (that was in place when the application was filed).

[18] Pending the hearing of the judgment, the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts was published, and the provisions of the article 83 of the Organic Law No 03/2012/OL of 13/06/2012 aforementioned, were modified by the provisions of the article 53 of the Law N° 30/2018 of 02/06/2018. Even though the article 83 of the Organic Law No 03/2012/OL of 13/06/2012 has been repealed, the Court finds that it is necessary to provide a legal guidance on its provisions differently interpreted by the parties to the case, since it is still applied to the ongoing cases in the courts filed before the

publication of the Law N° 30/2018 of 02/06/2018, with reference to the provisions of the article 280 of the present Law⁶.

[19] Article 83 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court stipulated that: “When the Supreme Court finds that the decision which was made is unjust, it shall correct errors made in the judgment and provide legal guidance to correct such errors. The decision made shall not be subject to any procedure of appeal”.

[20] In interpreting this article, it is necessary to examine first what was the purpose when establishing the procedure for the review of the case due to injustice. Cases applied for the review due to injustice are already heard at the last instance⁷. The purpose of the legislator was to correct the injustice that may be committed during the case hearing, due to errors and judge’s blatant disregard for legal provisions and evidence, without any other procedure to correct it. It is an extraordinary procedure that cannot be subject to other appeal procedures, since they are already exhausted.

[21] The judge who is assigned the application for the review of the case due to injustice can make one of the following decisions:

6 “Ongoing cases in the courts before this law comes into force, are tried in accordance with this law, but without having any impact on the trial procedure followed before its publication”.

7 The article 78 of the Organic Law No 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court;

Article 53 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts.

- a. When he finds injustice, he repairs it and provides a legal guidance when necessary;
- b. When he finds that there is no injustice, he motivates it and holds that the application has no merit and sustains the judgment, rendered;
- c. He can reject an application; when he finds that the conditions for the admissibility of the application for the review of the case due to injustice are not respected; at that time, he holds that the application is rejected.

[22] The decision made by the judge among the aforementioned three decisions shall not be subject to any procedure of appeal. This is what is stipulated in the last sentence of the article 83 of the aforementioned Organic Law No 03/2012/OL of 13/06/2012 when examined together with the heading of that article. That title stipulates a “Decision taken on the application for review of a final decision”, and this does not only concern a decision for injustice, but also it concerns any decision that can be made on the application for the review of the judgment, due to injustice. If such is not the case, any judgment, that determined that it is not vitiated by injustice, or which rejected an application, can open other ordinary and extraordinary procedures of appeal, this can result in endless hearing of a case in courts, and this was not the purpose of the legislator.

[23] The Court finds that, in the first sentence of the aforementioned article 83, the legislator provided a procedure to follow in case the Supreme Court finds injustice in the judgment, in order not to only repair the injustice committed but also to provide a legal guidance that can be referred to by the courts for similar cases. This was not necessary in case the Court finds that

no injustice was committed or that the application cannot be admitted, and this is why it is not provided, because it can be considered that the judgment, subject to the application for the review is sustained.

[24] The Court observes that what should be understood is that in the article 83 of the Organic Law N° 03/2012/OL of 13/06/2012, the legislator's purpose was not to maintain endless cases in the courts, and this is why the last sentence of that article does not only concern the decision which confirmed that an injustice was committed but also it concerns the decision which held that there was no injustice as well as the decision which rejected the application. For this reason, in the article 53 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts, the legislator clarified the confusion caused by the text of the article 83 of the Organic Law N° 03/2012/OL of 13/06/2012, and the text of the last sentence of that article was put in its own special paragraph which stipulates that: "Judgments reviewed on grounds of being vitiated by injustice may not be appealable".

[25] Basing on the explanations above provided, the Court finds that the decision made on the application for the review of the judgment, due to injustice cannot be subject to review or any procedure of appeal. In this case, Ntegeye Bernard applied for the review due to injustice of the judgment, RS/RV/INJUST/COM 0001/16/CS rendered by the Supreme Court on 09/09/2016, about the application for the review of the judgment, vitiated by injustice. This means then, that the application for the review of the case due to injustice, submitted by Ntegeye Bernard cannot be admitted and examined. For that reason, the Court finds that it is no longer necessary to analyse other issues raised.

- **Whether Ecobank Rwanda Ltd and National Bank of Rwanda should be awarded the damages they claimed**

[26] The counsel for National Bank of Rwanda argue that due to the pecuniary loss that the Bank suffered from the unnecessary lawsuits Ntegeye Bernard dragged it in, they request the Court to order him to pay the Bank the damages related to being dragged in unnecessary lawsuits, the counsel and procedural fees, all amounting to two million (2,000,000Frw).

[27] The counsel for Ecobank Rwanda Ltd requested the Court to order Ntegeye Bernard to pay damages related to continuous unnecessary lawsuits dragged in equivalent to ten million (10,000,000Frw), procedural and counsel fees amounting to two million (2,000,000Frw).

[28] The counsel for Ntegeye Bernard argue that the damages related to unnecessary lawsuits requested by Ecobank Rwanda Ltd and National Bank of Rwanda are baseless, because it is the right Ntegeye Bernard is granted by the law to apply for the review of the case vitiated by injustice in order to obtain fair justice. They also state that Ecobank Rwanda Ltd should be held liable for its procedural and counsel fees, because it is the one which pushed Ntegeye Bernard in lawsuits.

DETERMINATION OF THE COURT

- **Regarding the damages for being dragged in unnecessary lawsuits**

[29] The Court finds that Ecobank Rwanda Ltd and National Bank of Rwanda should not be awarded the claimed damages for being dragged in unnecessary lawsuits, because Ntegeye Bernard filed a claim to protect his interests, and the law grants him such rights.

[30] The Court finds that Ecobank Rwanda Ltd should be awarded procedural and counsel fees since it has been deemed necessary to follow up its case against Ntegeye Bernard and pay the Counsels who represented it before the Court. The Court finds that the Bank should not be awarded 2,000,000 Frw it claimed because it cannot prove it and it is excessive, and in its discretion, the court awards 300,000Frw for procedural fee and 500,000Frw for counsel fee. This means that the total amount Ecobank Rwanda Ltd is awarded is $300,000\text{Frw} + 500,000\text{Frw} = 800,000\text{Frw}$.

[31] The Court finds that National Bank of Rwanda should not be awarded procedural and counsel fees it claimed on the grounds that the case was followed up and pleaded by its officers who are remunerated for such job and they receive related facilities from the national budget. This is similar to the decision made in the judgment, RAD 00001/2019/SC rendered by that Court on 31/05/2019 for Kabango Antoine against The Republic of Rwanda.

III. DECISION OF THE COURT

[32] Declares inadmissible the application submitted by Ntegeye Bernard because it was not lodged in accordance with the law;

[33] Held that the judgment, RS/RV/INJUST/COM 0001/16/CS rendered by the Supreme Court on 09/09/2016 is sustained;

[34] Orders Ntegeye Bernard to award Ecobank Rwanda Ltd 800,000Frw for procedural and counsel fees;

[35] Orders that the court fees paid by Ntegeye Bernard cover the proceeding expenses.

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

ACCESS BANK RWANDA LTD v RUHANDO

[Rwanda-SUPREME COURT – RCOMAA 00051/2017/SC
(Kayitesi Z, P.J., Kayitesi R and Cyanzayire, J.) 23 April 2019]

Commercial procedure – Case review– Confusion about the situation of facts – Confusion about the situation of facts is a misunderstanding of the subject of the dispute between the parties and the basis for its settlement, which misleads the judge to take a decision he should not have taken if he understood or got well the situation of facts.

Fact: On 02/05/2013 Ruhando Ndatira Ernest requested Access Bank Rwanda Ltd to transfer \$ 76,835 to the account of Aluzinc Asia Pte Ltd Company via *international transfer* on account N°503149270301 named West Atlantic Pte Ltd, through the OCBC Bank from Singapore, for the purpose of paying for iron sheets. The money was transferred to the account mentioned above, but given to West Atlantic Pte Ltd Company because it was the account holder.

Later, Ruhando raised an issue by stating that the Bank has not fulfilled its mandate because the dollars did not reach the intended recipient. He claimed that the Company he wanted to pay was Aluzinc Asia Pte Ltd, but the money was transferred to West Atlantic Pte Ltd. He also stated that he had found that the invoice issued was forged. After that, Ruhando seized Nyarugenge Commercial Court against the Bank demanding the money to be repaid to him, alleging that it had not complied with

the mandate whereas it was in its obligations. The Court ruled that the Bank should pay back the money to Ruhando.

Access Bank Rwanda Ltd has appealed to the Commercial High Court stating that the Court made confusion about the situation of facts by disregarding the evidence provided. The Court ruled that the Bank had respected the given mandate, so that it had made no mistake; and the fact that the invoice was forged, according to Ruhando Ndatira, Access Bank Rwanda Ltd was not liable. Therefore, the Court ruled that the judgement under appeal is overruled in whole; thus the Bank should not be liable.

Ruhando was not satisfied with the ruling of the case and made an appeal to the Supreme Court stating that the Court did not understand how *SWIFT* works as a standard format of money transfer through *international transfer* as it declared the nullity of the *payment order* issued without any legal basis. By making analysis of the case, the Court found that the Bank had not implemented properly the *mandate* assigned to it because it had transferred dollars to the wrong recipient. Therefore, it should be liable and pay them back plus damages arising from improper implementation of the assigned mandate.

The Bank filed an application for review of the case stating that the grave faults for confusion about the situation of facts occurred; and the existence of new evidence corroborated its application for review of Case. During the hearing, Ruhando filed an objection of inadmissibility of a claim because the Bank did not specify the reasons for case review as provided for under the Law. The Court ruled that an objection would be subjected to hearing together with the case on merits.

During the hearing, the Bank explained that it was requesting the Court to admit its application for case review stating that there

had been grave faults as the Court made confusion about the situation of facts by confusing *the mandate agreement* and international standard format for transferring money called *SWIFT*.

On the other hand, Ruhando stated that the Bank has filed an application for case review based on the repealed article and on a document called *Agreement of Participation in Automated Transfer System* as new evidence, but nevertheless they already existed during the hearing of the case at appeal level. Therefore, the application should not be admitted as this document should not be considered as ground or new evidence.

Access Bank stated that the evidence for implementing the mandate assigned was the invoice issued to Ruhando himself to mean that recipient was Aluzinc Asia Pte Ltd, but the beneficiary account was registered in the name of West Atlantic Pte Ltd Company (Account name). This is why Ruhando sustained that the money was transferred to the wrong recipient.

On the other hand, Ruhando maintained that although the Bank claimed to have relied on a payment receipt made by him, it did not prevent it from doing the wrong transfer of money, stating that the Bank had made a decision itself to change the name of recipient; he further stated that the Bank made a mistake as it would have done what it was asked for without any change.

In an incidental claim filed by Ruhando, he requested for damages to continue being calculated until the ruling of the case and on basis of the value of the dollar. Access Bank Rwanda stated that these damages may be declared unfounded; but rather, Access Bank Rwanda Ltd continued to spend money because of being dragged into unnecessary lawsuits.

Held: 1. Confusion about the situation of facts is a misunderstanding of the subject of the dispute between the parties and the basis for its settlement, this can lead the judge to take a decision he should not have taken if he understood or got well the situation of facts.

2. When person's name is different from his or her account, at the time of payment they consider the account of which the holder should be paid. But that is possible when it is a payment between banks themselves. When it is evident that the mandatary has implemented the mandate, it shall be deemed to have met his/her obligations.

The application for the case review is admitted and has merits.

The Bank should not pay dollars plus damages.

The Court fees covers the expenses of this case.

Statutes and statutory instruments referred to:

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, paragraph 6, article 186.

Law of 30/07/ 1888 relating to contracts or conventional obligations, articles 532.

No cases referred to.

Judgment

BRIEF BACKGROUND OF THE CASE

[36] The case began in Nyarugenge Commercial Court, where Ruhando Ndatira Ernest filed a claim stating that he had asked Access Bank Rwanda Ltd to transfer money, via international transfer, to Aluzinc Asia Pte Ltd Company, account n° 503-149270-301, but the money did not reach the intended recipient. In case RCOM 1218/14/TC/NYGE rendered on 13/03/2015, the Court found that Access Bank Rwanda Ltd had accepted the mandate assigned by Ruhando Ndatira Ernest, but did not implemented it. The Court ordered the Bank to return \$ 76,835 debited from Ruhando Ndatira Ernest's Account n°1002150200663201 because the money did not reach the intended recipient, to pay him procedural fees and lawyer's fees equivalent to 2,000,000 Frw and make a refund of 50,000 Frw of court fees.

[37] Access Bank Rwanda Ltd filed an appeal to Commercial High Court stating that the Court, at the first instance, made confusion about the situation of facts, disregarded the evidence provided, refused summon in the case the National Bank of Rwanda or any staff of the *SWIFT (Society for Worldwide Interbank Financial Telecommunication)* to explain how international money transfers between banks works.

[38] In the Case RCOMA 0179/15/HCC tried on 20/07/2015, the Commercial High Court found that Acces Bank Rwanda Ltd had implemented the mandate assigned by Ruhando Ndatira Ernest because \$ 76,835 had been sent to Singapore as requested by him via *SWIFT*, under the name and account number provided

by Ruhando Ndatira Ernest. For this reason, therefore, the Bank did not err and the fact that the invoice considered was a forgery, as Ruhando Ndatira Ernest admitted, Access Bank Rwanda Ltd may not be not liable for it. The Court declared that the judgment subjected to appeal is reversed in entirety ; and the Bank must not pay it back to him.

[39] Ruhando Ndatira Ernest was not satisfied with the ruling of the case and lodged an appeal to the Supreme Court stating that the Court did not understand the functioning of *SWIFT* as a standard format of *international transfer*, declared the nullity of *payment order* issued without legal basis, made a decision based on the evidence (receipt) that came up after the hearing was closed that has led to an unfair legal conclusion; the Court deprived him \$ 76,835 plus interests and granted to the Bank as advantage without any reason.

[40] In the case RCOMAA 0054/15/CS tried on 21/04/2017, the Supreme Court found that Access Bank Rwanda Ltd had not implemented the *payment order* issued by Ruhando Ndatira Ernest, by transferring \$ 76,835 to the Company called WEST ATLANTIC Pte Ltd which was not intended to be the recipient rather than ALUZINK ASIA Pte Ltd which was written on *payment order*. The Court decided that the Bank was involved in the disappearance of Ruhando Ndatira Ernest 76,835 USD. Therefore, given the Article 532 of the Civil Code Book III (CCLIII), it should be liable for such dollars and damages arising out of the improper implementation of the mandate assigned. The Court ordered Access Bank Rwanda Ltd to repay Ruhando Ndatira Ernest \$ 76,835 plus interests equivalent to 33,950,919 Frw and 2,700,000 Frw including the proceeding fees and the lawyer's fees.

[41] Access Bank Rwanda Ltd filed an application on 13/06/2017 for review of the case RCOMAA 0054/15/CS stating that there had been grave faults in confusing the situation of facts which enabled the Court to make unfair decision, though the Access Bank Rwanda Ltd had provided evidence corroborating its compliance with obligations.

[42] The case was tried in public on 06/02/2018, Ruhando Ndatira Ernest represented by Counsel Zitoni Pierre Claver and Access Bank Rwanda Ltd by Counsel Rukangira Emmanuel and Counsel Buzayire Angèle. At the beginning of the hearing, Counsel Zitoni Pierre Claver recalled his objection for inadmissibility of a claim because Access Bank Rwanda Ltd did not provide the reasons for the case review as provided under Article 186 of Law N^o 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure in force at that time.

[43] Based on the provisions of Article 78, paragraph 4 of the Law N^o 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, the Court declared that the objection would be examined at the same time with the hearing of the case on the merits, the parties were given the opportunity to defend themselves on objections and reasons for case review. The hearing was closed and the parties were informed of the pronouncement scheduled on 02/03/2018.

[44] The case was not pronounced on that day as the Court was reviewing the case files. At that time, the Court found that Counsel Rukangira Emmanuel, representing Access Bank Rwanda Ltd, wrote to the president of the bench on 12/02/2018 stating that after the hearing he received another evidence which further supports his claim called the *Agreement of Participation*

in Automated Transfer System thus requesting the hearing to be re opened.

[45] During the interlocutory judgement tried on 16/03/2018, the Court found that the document called *Agreement of Participation in Automated Transfer System* was not subjected to the hearing and the Bank sustained that it served for emphasizing its pleading ; and the Court ordered the hearing to be resumed on 08/05/2018 for the parties to defend themselves.

[46] The hearing did not take place that day because the bench was not complete, the judgement was adjourned to 26/06/2018. Given the restructuring planned in the judicial organs, the hearing was fixed in advance on 19/06/2018. On the same date, the case was heard and closed and the pronouncement set on 29/06/2018. But during the deliberations, the Court found necessary to carry out the investigation in the National Bank to understand the contents of the document called *Agreement of participation in the Automated Transfer System*, the use of the document called *Payment Order { ut6} and how SWIFT* works, and ordered that the investigation should be conducted on 11/07/2018.

[47] The case was reconvened on 27/11/2018, but was adjourned for various legal reasons. It was finally heard and closed on 02/04/2019. Ruhando Ndatira Ernest was represented by Counsel Zitoni Pierre Claver, whereas Access Bank Rwanda Ltd was represented by Counsel Rukangira Emmanuel. The pronouncement of the judgement was scheduled on 23/04/2019.

II. ANALYSIS OF THE LEGAL ISSUES

[48] The issues to be examined in this case are whether Access Bank Rwanda Ltd's application for review of the case RCOMAA 0054/15/CS tried by the Supreme Court on 21/04/2017 should be admitted, in case the Court observe that it should be admissible, it would examine whether Access Bank Rwanda Ltd has not implemented the mandate given by Ruhando Ndatira Ernest to transfer 76.835 USD, so that it should be held liable for it and refund it with damages.

- **Whether Access Bank Rwanda Ltd's application for review of the case RCOMAA 0054/15/CS should be admissible.**

[49] Counsel Rukangira Emmanuel and Counsel Buzayire Angèle representing Access Bank Rwanda Ltd stated that the reason for filing an application for review of the case is that in paragraph 34 of the judgement subjected to review, the Court confused the mandate agreement and international standard format for transferring money called SWIFT by deciding that Ruhando Ndatira Ernest was not the one who brought the invoice which served for preventing the money from reaching the recipient, but it did not indicate where the invoice came from.

[50] They explained that the Court declared that the money was sent before the invoice was issued, which is not true ; because the Bank's cheque book indicated that the payment order was signed when the invoice was already issued. This is the reason why they are asking the Court to declare that there was a grave fault in confusing the situation of the facts and declare that the application is received in accordance with the provisions of

Article 186,6° of the Law N° 21/2012 of 14/06/2012 aforementioned. They further explained that the Court confused the situation of the facts by declaring that the invoice indicating the name of West Atlantic Pte Ltd, the recipient, was issued after OP issuance by Ruhando Ndatira Ernest, however he received the invoice on 26/04/2013 and the transaction was made on 02/05/2013, which means that he already had it before. This is where there is a serious fault of confusing the situation of the facts.

[51] Counsel Rukangira Emmanuel and Counsel Buzayire Angèle also stated that the document " Agreement of Participation in Automated Transfer System "is a new evidence they have obtained explaining how money transfer between banks works, which indicates that the Court should have relied on account rather than on the account name. The fact that it has not done so corroborated their claim of confusion about situation of the facts. They concluded by stating that the document called Agreement on Participation in Automated Transfer System does not concern only the banks, according to Counsel representing Ruhando Ndatira Ernest, given that it protects customers of banks due to the fact that it contains the instructions of the National Bank, and the latter is the regulatory bank, the reason why Access Bank Rwanda Ltd claim should be admissible.

[52] Counsel Zitoni Pierre Claver, representing Ruhando Ndatira Ernest, stated that case review is only allowed if at least one of the grounds provided for in Article 186 of Law noof 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure has been indicated. He explained that Access Bank Rwanda Ltd stated that its application was based on the sixth paragraph of the article on the ground that the

Court may have confused the mandate agreement and international standard format for transferring money called SWIFT but did not indicate the confusing points, the Court disregarded the fact that the invoice which served for the money transfer was deposited to the Bank before the money was transferred, however, the invoice was brought during the hearing, it was not brought by Ruhando Ndatira Ernest because he was not aware of where it came from, as it was first produced before the Court on 29/06/2015 by Counsel Rukangira Emmanuel. He explained that Access Bank Rwanda Ltd stated that the Court confused the invoice with the payment order, while this did not happen, even if this happened, it would be considered as criticism of the ruling of the case, this is the reason why he asked the Court to declare the claim inadmissible, as there was no reason indicated by the claimant that would result in review of the case.

[53] Counsel Zitoni Pierre Claver also stated that the document entitled Agreement of Participation in Automated Transfer System included in the case file by Access Bank Rwanda Ltd existed already during the case review at the appeal level and the Access Bank Rwanda Ltd did not deny it. Therefore, the document should not be provided as a ground or as a new evidence for the case review. He stated that this document was issued by National Bank Rwanda so that there was no link with Access Bank Rwanda Ltd customers, this also indicated that Access Bank Rwanda Ltd claim should not be admissible.

[54] Counsel Zitoni Pierre Claver concluded by stating that Access Bank Rwand Ltd has filed an application for case review pursuant to the Article 186, subparagraph 6 of Law no21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure providing for “confusion about the

situation of facts” and such subparagraph was repealed by the new Law no22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, therefore, in accordance with the provisions of its Article 280 which provides that “the cases pending before courts at the time of publication of this Law are governed by provisions of this Law. However, procedural acts already conducted before its publication remain valid”, which should apply ; this also is a ground for which the claim of Access Bank Rwanda Ltd should not be admissible.

DETERMINATION OF THE COURT

[55] The Court finds that before examination of the Article relating to the admissibility of an application based on the confusion about the situation of facts as provided for in Article 186, subparagraph 6 of Law no21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, firstly, it is necessary to examine the issue raised by Ruhando Ndatira Ernest's Counsel stating that Access Bank Rwanda Ltd has filed an application for case review pursuant to that article 186, subparagraph 6, while it was repealed by the new Law no 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure in accordance with the provisions of Article 280 which stipulates that: “Cases pending before courts at the time of publication of this Law are governed by provisions of this Law. However, procedural acts already conducted before its publication remain valid”.

[56] The Court finds that the statement of Ruhando Ndatira Ernest's Counsel should be considered unfounded because he gave the wrong interpretation of Article 280 of the new Law no22/2018 of 29/04/2018 mentioned above while it should serve

for the applications filed before its publication to be admissible and examined in accordance with the existing Law when the Courts were seized, therefore this claim should be examined in accordance with Article 186, subparagraph 6 of the Law no 21/2012 of 14/06/2012 mentioned above, because the application was filed when the law was in force.

[57] With regard to the case review, the Article 186, subparagraph 6 of the Law n° 21/2012 of 14/06/2012, mentioned above, which was in force while Access Bank Rwanda Ltd filed an application and which is also the basis for application for case review, stipulates that, “for the case review if, during the hearing, there were errors committed based on confusion about the situation of facts or basing on a non existing law”.

[58] The Court finds that the confusion about the situation of facts is a misunderstanding of the subject of the dispute between the parties and the basis for its settlement, this can lead the judge to take a decision he should not have taken if he understood or got well the situation of facts.

[59] The Court finds that in paragraph 34 of case RCOMAA 0054/15/CS rendered on 21/04/2017 subjected to review, it is indicated by the Court that Ruhando Ndatira Ernest did not admit that he was the one who submitted the invoice to Access Bank Rwanda Ltd because he got information from Access Bank Rwanda Ltd that his dollars did not reach the intended recipient, the Bank also failed to prove how it received the invoice was from him; and also nothing indicated that before transferring the dollars it had already received the invoice.

[60] The Court finds that the mentioned invoice is the one indicated in the case file (Page c 29), issued by Aluzing Asia Pte

Ltd on 26.04.2013 for Rwatole Entreprises (Customer name) indicated that the Beneficiary Bank is OCBC Bank Singapore. The Name of Beneficiary Account is West Atlantic Pte Ltd and the account number is n o 503149270301. It finds that the invoice mentioned in the letter of 06/05/2013, signed by Ruhando Ndatira Ernest as President of Rwatole Entreprises, to Mr Bala explaining that there was a money transfer to West Atlantic Pte Ltd and it was a forgery (Page 28). This proves that he wrote the letter being aware of it and in good faith. Therefore, his letter have to be considered in accordance with Article 28 of Law n o 47/2017 of 23/09/2017 stipulating that : “a letter from one party to another shall be used as evidence against its author....”.

[61] The Court finds the fact that Ruhando Ndatira Ernest was aware of the invoice and had it before he issued OP on 02/05/2013, indicated that no one else had submitted it to Access Bank Rwanda Ltd, especially since it was used as an annex to the OP to explain why the money was transferred as it is usually done in this way to send money to others.

[62] The statements of Ruhando Ndatira Ernest's Counsel who maintained that the invoice was not produced at the precedent degrees, but it was produced at the appeal instance during the case subjected to review, do not constitute the ground that could exclude Access Bank Rwanda Ltd from using it at the appellate level as evidence corroborating its pleading; given that what is prohibited at the appellate level is a new argument but the new evidence is not prohibited when it may help the party to corroborate his/her element of evidence.

[63] The Court finds that the confusion about the situation of facts was based on the fact that the Court considered that when Ruhando Ndatira Ernest was preparing the OP of 76,735 USD

payment, he had not yet received the invoice mentioning West Atlantic Pte Ltd, he was not the one who had submitted it to Access Bank Rwanda Ltd ; but, through the above letter of 06/05/2013 he admitted himself that he had received the invoice.

[64] Due to the fact that the Court decision was based on the issue of such invoice by confusing when it was issued, who received it and the way it was submitted to Access Bank Rwanda Ltd as it is indicated under the paragraph 34 of case RCOMAA 0054/15/CS subjected to review, the Court finds that there was a serious fault of confusion about the situation of facts which resulted to a decision that would not be made in the absence of such confusion.

[65] Based on such explanations and Article 186, 6 as described above, the Court finds that there was a confusion about the situation of facts relating to invoice, which is one of the reasons for admissibility of Access Bank Rwanda Ltd's application for review of the case RCOMAA 0054/15/CS rendered by the Supreme Court on 21/04/2017.

[66] The Court also finds that in case the Access Bank Rwanda Ltd's application should be admissible based on ground of confusion about the situation of facts, it was not necessary to examine another reason stated by Access Bank Rwanda Ltd for review of the case RCOMAA 0054/15/CS based on new evidence; especially that in interpreting the article, it states itself that the evidence corroborates their claim concerning the confusion about the situation of facts happened, as it explains how the transfer of money between the banks work which indicates that it should be based on the account instead of the account name.

- **Whether Access Bank Rwanda Ltd has not implemented the mandate assigned by Ruhando Ndatira Ernest to transfer \$ 76,835 so that it should be held liable for it and refund it with damages**

[67] Counsel Rukangira Emmanuel and Counsel Buzayire Angel representing Access Bank Rwanda Ltd, stated that Ruhando Ndatira Ernest went to Access Bank himself to complete the transfer voucher/payment order (OP) of \$ 76,835 by handwriting. This is to say that the information written on bank slip regarding the recipient of money was from him ; even the code used to transfer also indicated that it was sent by Ruhando Ndatira Ernest, therefore, due to the fact that the money had not reached the intended recipient, there was no mistake made by Access Bank Rwanda Ltd.

[68] They explained that the invoice submitted by Ruhando Ndatira Ernest himself to Access Bank Rwanda Ltd indicated that the one who was required to pay was the company called Aluzinc Asia Pte Ltd, but its account provided by Ruhando Ndatira, also written on the Payment Order was under the West Atrantic Pte Ltd name, by the fact that the money was transferred to Aluzinc Asia Pte Ltd account opened in OCBC (OVERSEAS CHINESE BANKING CORPORATION) as requested, the Bank implemented the mandate assigned by Ruhando Ndatira Ernest.

[69] They further sustained that Ruhando Ndatira Ernest did not explain why the dollars did not reach his intended recipient because he later found that the invoice he had submitted to Access Bank Rwanda Ltd was forged; and after performing an operation of money transfer, Ruhando Ndatira Ernest wrote to Mr Bala asking him to contact the Bank (OCBC) to which the dollars

were transferred to help him suspending the transfer process, but they told him that he delayed, the transfer was performed, and Ruhando Ndatira Ernest even went himself to Singapore for a follow up of the issue.

[70] They supported that in order to help him, Access Bank Rwanda Ltd also wrote to its Correspondant Bank (CITI BANK NEW YORK) requesting it to suspend the transfer to OCBC, but it replied that it was performed, it was no longer possible ; and also it wrote to OCBC requesting it to refund the dollars because they were transferred to the wrong intended recipient, but it did not receive a reply. They maintained that Ruhando Ndatira Ernest intended to blame Access Bank Rwanda Ltd for his own mistakes because the invoice used was submitted by himself.

[71] Regarding the amount of dollars on the invoice that were different from the dollars written on the payment order, they averred that the fact that the figures were different was due to his collaboration with the recipient, this did not mean to indicate that the mandate assigned to Access Bank Rwanda Ltd was not implemented. Concerning what Access Bank Rwanda Ltd did after realizing that the recipient appearing on the payment order was different from the one appearing on the invoice, he replied that on the payment order it was written ALUZINC ASIA Pte Ltd which had submitted the invoice indicating that the account holder was West Atlantic Pte Ltd, therefore, Access Bank Rwanda Ltd considered the number of the account provided by Ruhando Ndatira Ernest on the payment order and the account number on the invoice issued by Aluzinc Asia Pte Ltd and it found them matching, and one person may have multiple accounts in the same bank but with different names.

[72] They stated that the investigation conducted by the Court into the National Bank of Rwanda was consistent with the explanations provided by Access Bank Rwanda Ltd since the beginning of the case hearing, as it was found that in the event of a contradiction between the name and the account number itself, the account is taken into account; and that when the one who requests for the transfer of the money fills the payment order and the bank performs the transfer, the rest to be done in order to get money to the intended recipient is carried out by other banks.

[73] With regard to the criticism of the representative of Ruhando Ndatira Ernest against the court's inquiry by stating that the interviewees' team had not been sworn in, their profiles were incomplete and they did not have sufficient knowledge of how SWIFT works and the National Bank of Rwanda has no link with its functioning, they maintained that there is no other source of information needed by the Court, except in the National Bank of Rwanda as it is the regulatory bank; all the criticisms appear in report.

[74] Counsel Zitoni Pierre Claver, representing Ruhando Ndatira Ernest, supported that the mistake made which had led Access Bank Rwanda Ltd to not paying the intended recipient was made by itself, because though it stated that the invoice considered for payment was submitted by Ruhando Ndatira Ernest, it was not true because he did not know where it came from since it was first presented to the Court on 29/06/2015 by Counsel Rukangira Emmanuel. He further stated that the amount of 71,241,12 USD on it was different from the one on payment order issued by Ruhando Ndatira Ernest amounting to 76,635 USD; it also indicated that account name of beneficiary was West Atlantic Pte Ltd, whereas on payment order it was indicated

that the beneficiary name was Aluzinc Asia Pte Ltd, therefore, Access Bank Rwanda Ltd was involved in the wrong transfer of the dollars, because it committed itself to change the beneficiary name contrary to one to be paid indicated by Ruhando Ndatira Ernest.

[75] Counsel Zitoni stated that the inquiry conducted by the Court at the National Bank was illegal because the respondents had not sworn in before, their identification was incomplete, and the respondents' group could not provide accurate information because they had nothing to do with how SWIFT works, rather it should conduct the investigation on the external transaction staff from the Banking Operations Department because they were the ones who could provide accurate information on the operation of SWIFT system, SWIFT is an independent money transfer system that has nothing to do with the National Bank, except being aware of its existence and it can do nothing about it.

[76] He further stated that during the investigation by the Supreme Court, the respondents' team explained that when the customer's name is different from his/her account, at the time of payment whereas the holder is supposed to be paid, they consider the account, but this happens when it is a payment between banks themselves, this is different from SWIFT's payment method, what is common is that when a bank finds a customer's name different from his/her account, the payment process is immediately suspended and it is questionable why Access Bank Rwanda Ltd chose to change the intended recipient of the dollars.

[77] Counsel Zitoni Pierre concluded by stating that Access Bank Rwanda Ltd made a mistake because it should implement its mandate as assigned; the statements of its Counsels that the invoice was the annex to the payment order is not true, because

the sender is not required to give any explanation to the bank, even on the forms there is no place to provide such information. He further explained that what emphasizes its mistake is that after the lack of dollars to be transferred, Access Bank Rwanda Ltd wrote various documents to suspend the transfer including the emails written by its employee, Aline, even the letter written by Ruhando Ndatira Ernest was for bank's requirement ; and according to the context in which things happened, both sides worked together to resolve the problem, though such letter did not waive responsibilities of Access Bank Rwanda Ltd. When asked if the Bank can transfer the money without asking the reason of the transfer, he replied that it is done when it is about debt payment, but not necessary at the time of money transfer.

DETERMINATION OF THE COURT

[78] According to the case file, the Court finds that on 02/05/2013 Ruhando Ndatira Ernest requested Access Bank Rwanda Ltd to transfer \$ 76,835 to the account no 503149270301 from Bank OCBC in Singapore that was intended to be transferred to Aluzinc Asia Pte Ltd. The purpose of transfer was to pay iron sheets as indicated by a payment order issued by Ruhando Ndatira Ernest. It also finds that on 24/03/2013 Aluzinc Asia Pte Ltd had sent an invoice to Rwatole Enterprises, Ruhando Ndatira Ernest's company with an account number 503149270301 registered under the name of West Atlantic Ltd.

[79] The Court finds that in the case file there is a document entitled Payment TT197013 Details, filed by Access Bank Rwanda Ltd indicating that it has paid \$ 76,835.00 on 30/12/2014 (at 12:03:53 (Page 6). It indicated that the value date was on 02/05/2013. The ordering party was Ruhando Ndatira Ernest and

the Beneficiary account or ID was account no 503149270301. The beneficiary name was West Atlantic Pte Ltd, whereas the Beneficiary Bank Account or other ID was OCBC CENTER, SINGAPORE. The recipient was different from Aluzinc Asia Pte Ltd written on the “Payment Order” issued by Ruhando Ndatira Ernest.

[80] However, the Court observes that, although it would focus only on the aforementioned document in the previous paragraph, as it is the basis of which Ruhando Ndatira Ernest invokes by stating that his money was transferred to the recipient not written on the payment order, in the case file there is another document entitled Payment TT197013 Details of 02/05/2013 written on 02/05/2013 at 16:55:05, filled by Access Bank Rwanda Ltd indicating that Access Bank paid 76,835.00 USD, with the value date of 02/05/2013, Ordering Party is Ruhando Ndatira Ernest, Beneficiary account or ID is account no 503149270301, Beneficiary Bank Account is OCBC CENTER, SINGAPORE and the Beneficiary Name is ALUZINC ASIA Pte Ltd, which is matching to the one written on payment order issued by Ruhando Ndatira Ernest (Quote 4).

[81] The Court also finds that in the case file there are various documents indicating that after being requested to transfer \$ 76,835, Access Bank Rwanda Ltd has transferred it to Account number 503149270301 at OCBC Bank in Singapore. Among them, there is a document entitled Start of message, a letter of 06/05/2013 that Ruhando Ndatira Ernest wrote to Bala asking him for help tracking dollars for not being debited to account because the payment was based on a fake invoice (Page 28), a document entitled Account statement details indicating how and which method dollars were transferred to reach the account

required. It indicated that dollars reached the Account number 503149270301 ; this is also confirmed by the intermediary bank (New York CITI Bank) in a message to Access Bank Rwanda Ltd informing that the dollars had been credited to the account but the operation could not be canceled because it was too late.

[82] The Court finds that during an investigation conducted by the Supreme Court on 11/07/2018 in the National Bank, the staff authorized by its Administration explained to the Court the functioning of *SWIFT* (as international money transfer between banks), and how to resolve the issue related to the names of the recipient. They explained that after transferring money by bank, next process is performed by other banks (*intermediary bank-correspondent bank and receiving bank*) so that it cannot have access to full details of the beneficiary account including the linkage of the credited account with the account name to make sure of its holder. The investigation report indicated that when an issue arises that the account number is different from the account holder's name, the account number is considered instead of the account name.

[83] The Court finds that Ruhando Ndatira Ernest's Counsel did not deny that \$ 76,835 was transferred to the account no. 503149270301 paid by Ruhando Ndatira Ernest himself through the payment order submitted to Access Bank Rwanda Ltd, but his denial is related to the name ALUZINC ASIA Pte Ltd written on the payment order different from the name ATLANTIC PTE LTD appearing on the account opened in Bank Oversea Chinese Banking Corporation Limited Singapore (OCBC) ; he did not also accept the invoice indicating WEST ATLANTIC PTE LTD as dollars recipient.

[84] As described above, the Court finds that the invoice bearing the name WEST ATLANTIC PTE LTD was on beneficiary account N° 503149270301 written on the payment order by Ruhando Ndatira Ernest was issued for him and no one else has brought it to Access Bank Rwanda Ltd, except him. It means that Access Bank Rwanda Ltd transferred money to the account and number provided by Ruhando Ndatira Ernest ; thus it has implemented its mandate.

[85] The Court also finds that, based on the report of the Supreme Court's investigation into the aforementioned National Bank, the fact that Access Bank Rwanda Ltd transferred \$ 76,835 to the account No. 503149270301 from Ruhando Ndatira Ernest, opened in Oversea Chinese Banking Corporation Limited Singapore (OCBC), also corroborates the implementation of its mandate because in the event of a dispute over the names of the account holders what should be considered is the account number rather than the name of the sender. This is also the same case in the document “Agreement of Participation in Automated Transfer System ”, in its paragraph 39.2 where it is stated that “Where there is discrepancy between a beneficiary account number and beneficiary name and address in a message, the account number will take precedence”.

[86] With regard to the amount of dollars on the invoice different from the amount on the payment order filled by Ruhando Ndatira Ernest, it would not also help to know the holder of the beneficiary account because what was needed in the money transfer was the account number. As indicated above, the fact that Ruhando Ndatira Ernest has sent less or more money would be a matter of concern to him and to whom he has sent

dollars, it has nothing to do with the bank required to transfer money.

[87] Therefore, the Court finds that, according to this interpretation and to the Civil Code Book III (CCLIII), Article 532 stipulating that : "The mandatary is required to perform the mandate as long as he/she remains responsible for it, and is liable for damages and interest which could result from its non-performance. He/she is bound to complete the activity begun if there is any danger despite the death of his/her principal", Access Bank Rwanda Ltd implemented the assigned mandate and should not be liable to pay \$ 76,835 and related damages ; therefore, the case RCOMAA0054/15/CS tried by the Supreme Court on 21/04/2017 should be changed in whole.

- **A. Whether other damages claimed in this case are fair**

[88] Ruhando Ndatira Ernest's Counsel filed a cross-appeal seeking damages to be counted until the case is ruled as declared by the Supreme Court in case RCOMAA 0054/15/CS ; and be calculated on the basis of value of the dollar equivalent to 890 Frw. The damages claimed should therefore be calculated as follows : $76,835 \text{ USD} \times 890 \text{ Frw} = 68.383.150 \text{ Frw}$. Access Bank Rwanda Ltd's damages, from May 2013 to February 2019, for 5 years and 8; it is 1860 days. Interests are as follows : $(68.383.150 \times 17,56\% \times 1860/360) = 62.041.557 \text{ FRW}$, outstanding interests with the principal loan of 76.835 USD.

[89] Access Bank Rwanda Ltd's Counsels stated that the damages claimed by Ruhando Ndatira Ernest are unfounded, but so far Access Bank Rwanda Ltd was continuing to spend money

due to being dragged into unnecessary lawsuits ; but they did not indicate amount of such damages in their submissions.

DETERMINATION OF THE COURT

[90] The Court finds that the damages claimed by Ruhando Ndatira Ernest's Counsel are unfounded because he has won nothing in this case ; in addition, Access Bank Rwanda Ltd had the right to seize the Court when it had the right to be defended.

III. DECISION OF THE COURT

[91] The Court declares that the application for review of the case RCOMAA0054/15/CS ruled by the Supreme Court on 21/04/2017, filed by Access Bank Rwanda Ltd is admitted and has merits ;

[92] Declares that the case RCOMAA0054/15/CS tried by the Supreme Court on 21/04/2017 is changed in whole ;

[93] Declares that Access Bank Rwanda Ltd must not pay Ruhando Ndatira Ernest 76,835 USD and related damages.

[94] Hereby orders that **the** court fees deposited equal to the proceeding fees.

CASES IN MERITS

CIVIL CASE

NTAGANZWA v MUNYANTORE ET AL

[RWANDA SUPREME COURT – RS/ INJUST/ RC
00002/2019/SC (Ntezilyayo, P.J, Nyirinkwaya, Cyanzayire,
Rukundakuvuga, and Hitiyaremye, J.) 28 February 2020]

Auction– Successful bidder– When the creditor becomes the successful bidder of his/her debtor’s property, he cannot possess that property without paying the price on the pretext that the owner owes him money, because he/she is equally treated like the other bidders.

Facts: The case started before the Primary Court of Kacyiru, whereby Ntaganzwa filed a claim against the Court Bailiff Munyantore and Uwitonze, requesting the Court to invalidate the auction on the ground that his house was sold at a low price, auction procedures were not followed since no notices were posted and the money from the auction was not deposited on the Court’s account as provided by the law. The Primary Court found his claim without merit.

The plaintiff was not satisfied with the Court’s decision and appealed before the Intermediate Court of Gasabo and the that Court found his appeal without merit.

The appellant was not satisfied with the court’s decision and decided to write to the President of the High Court requesting the review of that judgment on the grounds that it was vitiated by injustice. After examination, the President of the High Court wrote to the President of the Supreme Court requesting him to review that case due to the injustice. The President of the

Supreme Court ordered for the review of that case due to injustice.

The case was heard by the Supreme Court, whereby Ntaganzwa stated that the Intermediate Court did not consider the real value of the property as it was held in the judgment which was being executed, rather the defendants connived with the property valuer and they lowered the value of his house. He also stated that the notices for auction were not posted as provided by the law because it was not posted where it was supposed to be as indicated by the evidence they produced, he concluded by stating that Uwitonze illegally possessed his house since there was no evidence proving that he paid for the house in accordance with the law.

The defendants argue that the appellant's allegation that the value of his property was lowered by conniving with the property valuer is misleading because the property valuer was appointed by the President of the Primary Court, and they have no relationship with him, and regarding the value that the appellant claims to have been set during the execution of the judgment is not true because he is the one who paid for the valuation and submitted it to the Court and the Court did not request for it or base on it. With regards to illegal notification of the auction, they argue that all procedures were followed and this is proved by the fact that it was postponed four times. The house was purchased by Uwitonze legally, because he was also allowed to make a bid and he is the one who offered the highest price.

Held: 1. When the creditor becomes the successful bidder of his/her debtor's property, he cannot possess that property without paying the price on the pretext that the owner owes him money, because he/she is equally treated like the other bidders.

Therefore, the fact that Uwitonze possessed the house of Ntaganzwa without paying for it is a ground for the auction to be invalidated.

2: When the notification of the auction was not conducted in compliance with the provided procedures, the auction is invalidated.

**The review of the case due to injustice has merit;
The ruling of the judgment is overturned.**

Statutes and statutory instruments considered:

Law N°12/2013 of 22/03/2013 governing the bailiff function, article 60;

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure articles 147, 263, 295, 306, 307, 312 and 315.

No cases were referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] In the judgment RCA 0175/15/HC/KIG rendered on 30/12/2015, in which Uwitonze Innocent was suing Ntaganzwa Faustin and Kabahire Louise praying that they be ordered to offer him the house they purchased which is located in the plot UPI 1/02/02/05/583 in Nyamugali Cell, Gatsata Sector, Gasabo District, Kigali City, as they agreed on 28/10/2013. The High

Court held that there has been no sale, that the purpose was the loan with an interest rate (*Banque Lambert*), but because it is illegal, they rather drafted a fake agreement, and ordered Uwitonze Innocent to give back the house titles to other parties to the case, and also ordered Ntaganzwa Faustin to pay back to him the debt equivalent to 16,000,000 Frw.

[2] After the pronouncement of the judgment, the Professional Bailiff Munyantore Bonaventure started the process of forced execution of the judgment in order to recover the money awarded to Uwitonze Innocent, and wrote to the President of Kacyiru Primary Court requesting him to appoint the valuator of immovable property belonging to Ntaganzwa Faustin and Kabahire Louise located in the aforementioned plot in order to execute the judgment RCA 0175/15/HC/KIG.

[3] On 01/04/2016, the President of Kacyiru Primary Court ordered that the house of Ntaganzwa Faustin and Kabahire Louise be evaluated Eng. Sebakwiye Théophile. The latter carried out his duties and in his report of 08/04/2016 he indicated that the value of the house and its plot is equivalent to 13,033,020 Frw.

[4] On 19/04/2016, the President of Kacyiru Primary Court held that the property will be auctioned on 26/05/2016 at 10 am. He also ordered on the auction modalities and places of posting the auction notices.

[5] On 04/08/2016, the Bailiff Munyantore Bonaventure made an auction deed indicating that the auction was conducted on that day and that Uwitonze Innocent was the successful purchaser (who is also the creditor in the judgment under execution) because he was the one who provided the highest price

equivalent to 16,500,000 Frw among eight bidders who attended, and also on 04/01/2017 the house ownership was transferred from Ntaganzwa Faustin to Uwitonze Innocent.

[6] On 13/06/2017, Ntaganzwa Faustin filed a claim before Kacyiru Primary Court praying for the invalidation of the auction for it was not conducted in compliance with the law. He stated the following in his claim:

Bailiff Munyantore Bonaventure and Uwitonze Innocent connived with the valuer Sebakwiye Théophile and lowered the value of the house and he did not inform him on that value report which lowered the value of his house;

The decision on the appointment of a valuer, Munyantore Bonaventure received it on 12/04/2016 and it was clear that the valuation was carried out on 08/04/2016, and it is questionable how it had been done before a court's decision was released;

The Bailiff disrespected the law governing the entire process of the auction because all notices for the auction of 04/08/2016 have not been posted in all places as provided by the law;

Munyantore Bonaventure refused to register the other bidders who placed their bids for the auction prior to the one of 04/08/2019, he rather registered the commissionaires brought by Uwitonze Innocent, whom he copied in the deeds of the auction of 04/08/2019;

The money from the auction has not been deposited on the court's account.

[7] On 09/02/2018, the Primary Court of Kacyiru rendered the judgment RC 00411/2017/TB/KCY and held that the claim of Ntaganzwa Faustin lacked merit since the auction was conducted in accordance with the law.

[8] In making that decision, the Court motivated that the valuator was appointed by the Court and there is no way Ntaganzwa Faustin could pretend that he was not informed about it or it was done through the fraudulence of Munyantore Bonaventure and Uwitonze Innocent since they did not contribute to this appointment, and the money from the auction even exceeds the one mentioned in that valuation report.

[9] The Court also motivated that the statements of Ntaganzwa Faustin that the valuation report was presented before the decision appointing the valuator was made is not true because he was appointed on 01/04/2016, and the valuation report was released on 08/04/2016.

[10] Regarding the auction notice, the Court motivated that the case file clearly indicates that notices had been posted in all places stipulated by the law, and with regards to the fact that the money used to purchase the house had not been deposited on the Court's account, the Court motivated that, even though it is provided by the law, it was not necessary because the creditor was at the same time successful purchaser of the house subject to the payment.

[11] Ntaganzwa Faustin appealed before the Intermediate Court of Gasabo arguing that the Primary Court of Kacyiru disregarded that the value of his house was lowered and that the auction notices have not been posted in all places provided by the law.

[12] On 17/10/2018, the Intermediate Court of Gasabo rendered the judgment RCA 00052/18/TGI/GSBO and held that the appeal of Ntaganzwa Faustin had no merit because the Primary Court motivated that the auction was conducted in accordance with the law based on the evidence produced, and Ntaganzwa Faustin did not produce any new element of evidence in the appeal refuting the elements of evidence it based on, and it ordered him to pay to Uwitonze Innocent and Munyantore Bonaventure 1,000,000 Frw for the counsel fee.

[13] After that judgment was rendered, Ntaganzwa Faustin wrote to the President of the High Court requesting for its review due to injustice, and the latter after examining that request wrote to the President of Supreme Court requesting him to review it after analysing whether it has been vitiated by injustice.

[14] In his decision 0102/CJ/2019 of 09/05/2019, the President of the Supreme Court ordered that the judgment RCA 00052/18/TGI/GSBO be registered to be reviewed.

[15] The case was heard in public on 04/02/2020, Ntaganzwa Faustin was represented by Counsel Nzeyimana Lusinga Innocent while Munyantore Bonaventure and Uwitonze Innocent were represented by Counsel Twizeyimana Innocent.

[16] Counsel Nzeyimana Lusinga Innocent representing Ntaganzwa Faustin argued that the Intermediate Court of Gasabo disregarded that the auction was not conducted in accordance with the law, be it on the value given to the house, the notification of the auction, or the way Uwitonze Innocent was appropriated the property without purchasing it. For Counsel Twizeyimana Innocent representing the defendants, he argues that the Court disregarded nothing.

[17] Legal issues analyzed in this case were about to know whether in the judgment RCA 00052/18/TGI/GSBO the Intermediate Court disregarded that the valuation report of the house of Ntaganzwa Faustin was not prepared in compliance with the law; that the auction was not published as provided by the law; that Uwitonze Innocent was illegally appropriated the house of Ntaganzwa Faustin.

II. LEGAL ISSUES AND THEIR ANALYSIS

A. Whether the value of the house of Ntaganzwa Faustin was not determined in compliance with the law

[18] Counsel Nzeyimana Lusinga Innocent representing Ntaganzwa Faustin states that the Intermediate Court of Gasabo did not consider the real value of the auctioned property because in the judgment RCA 0175/15/HC/KIG under execution it was held that the value of the property was 51,720,900 Frw, but during its execution, Bailiff Munyantore Bonaventure in collaboration with Uwitonze Innocent and the valuer Eng. Sebakwiye Théophile frauded, and lowered the value of his house, and assigned to it the value of 13,033,020 Frw and they did not even submit to him that valuation report so that he could comment on it and carry out a counter-valuation report before auctioning the house.

[19] He also states that before appointing the valuer, they should have considered the one both parties agree on rather than considering only the one proposed by Uwitonze Innocent who wanted to be appropriated the house, which led to the downgrading of the house, and they later fraudulently said that

the house was sold on 16,500,000 Frw with the purpose to make this price equivalent to the debt he owed him equivalent to 16,000,000 Frw and they added 500,000 Frw as the bailiff fee.

[20] Counsel Twizeyimana Innocent representing Munyantore Bonaventure and Uwitonze Innocent support that the statements of Ntaganzwa Faustin that his property was downgraded by his clients in complicity with Ir Sebakwiye Théophile they appointed themselves are baseless because they are not the ones who appointed the valuer, the latter was rather appointed by the Primary Court of Kacyiru.

[21] He also states that the statements of Ntaganzwa Faustin that he did not receive the valuation report carried out by Eng. Sebakwiye Théophile are baseless because he did not produce any evidence to prove that he did not receive it or he requested for it and his request be rejected, and in addition he was present every time the auction had been postponed, so he should immediately claim any time he noticed an illegal act.

[22] He added that the valuation equivalent to 51,720,900 Frw, which Ntaganzwa Faustin claims to be disregarded, the latter used it in the judgment RCA 0175/15/HC/KIG for invalidating the sale agreement he had concluded with Uwitonze Innocent, therefore he should not base on it because it has never been requested by the Court.

[23] He also states that he himself knows that that value is not real because after the sale agreement of the house he had concluded with Uwitonze Innocent on 05/10/2013, he sold it to Kamana Kanani on 10,000,000 Frw as mentioned in the sale agreement they uploaded in case file.

DETERMINATION OF THE COURT

[24] Article 263 of Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, paragraph 3, stipulates that: “Before the sale of movable or immovable property with a value that exceeds three million (3,000,000) Rwandan francs, the court bailiff has to look for an expert in property valuation. Fees allocated to the expert shall be approved by the President of the Court who ordered for public auction, and shall be deducted from the sale price.”

[25] Article 54 of the Practice Directions by the Chief Justice governing civil, commercial, labour and administrative procedure also stipulates that : “ Without prejudice to Article 263 of the law n°21/2012 of the 14/06/2012 relating to civil, commercial, labour and administrative procedures, the court bailiff seeking to conduct a public auction first provides the President of the Primary Court of the area where the property is situated, with a written request to appoint an expert and determine his/her fees. The President shall reply within ten working days. The decision of the President of Court is administrative; it may be changed any time if it is proven in writing that it was taken erroneously”.

[26] The court finds that the aforementioned law and practice directions were respected because the decision of the President of the Primary Court of Kacyiru of 01/04/2016 indicates that he is the one who appointed Ir Sebakwiye Théophile as an expert to value an immovable property of Ntaganzwa Faustin and Kabahire Louise upon receipt of the letter of court bailiff Munyantore Bonaventure requesting him to appoint an expert to value that property in order to execute the judgment RCA

0175/15/HC/KIG, therefore what the Counsel of Ntaganzwa Faustin is stating that Ir Sebakwiye Théophile was suggested by Uwitonze Innocent as the value reporter is groundless, and his statements that the Judge should have appointed an expert agreed on by both parties are baseless since it is not provided by any law or directive in place at that time.

[27] With regards to the statements of the Counsel of Ntaganzwa Faustin that Munyantore Bonaventure and Uwitonze Innocent have been accomplices with Eng. Sebakwiye Théophile in the fraud because the house worth 51,720,900 Frw as declared in the judgment RCA 0175/15/HC/KIG under execution, was valued to 13,033,020 Frw, the Court finds it groundless because the contradiction of experts on the property valuation itself is not an element of evidence for fraud, therefore he does not produce any other evidence to prove that there was a fraud in valuating his property.

[28] Basing on provided motivations, the Court finds that the house of Ntaganzwa Faustin was valued in accordance with the law.

B. Whether the auction was not published in accordance with the law

[29] Counsel Nzeyimana Lusinga Innocent representing Ntaganzwa Faustin argues that the auction notice was not posted as provided by the law, and this is contrary to the provisions of the article 295 of the law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure.

[30] He states that the proof he has for not posting the auction notice in all places are the documents written by the local

institutions where that notice should be posted which indicate that it was not posted on their offices, and a copy of the book in which the Intermediate Court of Gasabo records all received documents submitted by its clients which indicates that there is no auction notice submitted by Munyantore Bonaventure to be posted at that Court, if it was so, it should have been recorded in that book as it is the case for other auction notices.

[31] Counsel Twizeyimana Innocent representing Munyantore Bonaventure and Uwitonze Innocent argues that all steps provided by the law as regards to auction notice have been respected, and for that reason people attended all auction process from the first time up to the fourth time, the time by which an auction was finally being concluded, and in addition, this has been examined in the case under review, and the Intermediate Court of Gasabo held that the statements of Ntaganzwa Faustin are groundless.

[32] He also states that the documents used as elements of evidence by Ntaganzwa Faustin were written by the leaders of different institutions should not be based on in holding that the auction notices have not been posted at the offices of those institutions because they did not get a copy of them before posting, and the law in place at that time was not providing it.

DETERMINATION OF THE COURT

[33] An auction is a public event where goods or property are sold to the highest bidder. It goes without saying that the objective cannot be achieved when all information items related to that auction is not made public to a wide audience possible, and that is why, as regards to auction decided by the Court in

order to pay the creditor in the final judgment, the legislator provided notification modalities for the auction.

[34] Article 295 of the law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, in its paragraph three, stipulates that: “Upon request by the distrainer, and after verification that all the formalities for seizure have been met, the President of the Primary Court of the place where the auction will take place, or the President of Commercial Court, for execution of a judgment delivered by commercial court, fixes the date and place of sale, the places where it must be publicized by posting, and the conditions under which the posting is to take place. The order of the President of the court shall also be publicized, at least fifteen (15) days before the public auction, in one public newspaper and in another independent countrywide read newspaper determined by the President of the court or through the radio or television or any other technology. The President of the Primary Court or the President of Commercial Court may also determine other measures to give more publicity to the auction”.

[35] As regards to the auction under examination in this case, the President of Kacyiru Primary Court, based on the power entrusted to him by the article 295 of the aforementioned law, ordered that the house of Ntaganzwa Faustin and Kabahire Louise be auctioned on 26/05/2016 at 10 am, and for its publicity, the auction would be announced once on Radio Rwanda and published once in Imvaho, at least 15 days before auction and that it would be posted for 15 days before it is concluded at the following places:

At offices of all Districts of Kigali City;

At offices of Intermediate Courts in Kigali City;

At offices of local government entities in Gasabo;
At the office of Nyamugali Cell and Gatsata Sector.

[36] Regarding to where the auction should be posted, the Court finds that in the judgment RCA 00052/18/TGI/GSBO the Intermediate Court of Gasabo held that it was posted in all places as provided by the law without any motivation because in its decision it only stated that the Primary Court of Kacyiru indicated that it was posted, but in relation to the judgment rendered by that Court, it is obvious that it held so baselessly, and this is itself contradicts the provisions of the law because a judge is obliged to explain the legal provisions and evidences he/she bases on it making a decision as provided in the article 147, sub-section two of the law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure.

[37] With regards to evidence produced by Ntaganzwa Faustin, including the following documents:

- 1° A letter of 06/05/2018 from the Executive Secretary of Nyamugali Cell indicating that no auction notice had been posted at the office of that Cell;
- 2° A letter of 07/05/2018 from the Executive Secretary of Gatsata Sector also indicating that no auction notice had been posted on the building of that Sector's office;
- 3° A letter of 15/05/2018 from the Executive Secretary of Nyarugenge District indicating that once there is no receipt evidence for the posting of a notice, that posting has no longer the value, it is considered as not posted at the office of that District;

4° A letter of 07/06/2018 from the Executive Secretary of Kicukiro District indicating that once there is no receipt evidence for the posting of a notice, that posting has no longer the value, it is considered as not posted at the noticeboard of office of that District;

5° A letter of 31/05/2018 from the President of the Intermediate Court of Gasabo stating that the person who brought the auction notice should be held liable of the acknowledgement of receipt of it since it is put on the copy he/she remains with;

6° A letter of 03/05/2018 from the Vice- President of the Intermediate Court of Nyarugenge stating that the one arguing that an auction notice was received should be held liable of its acknowledgement of receipt by the Court before it was posted;

7° A letter of 08/05/2018 from the President of the Primary Court of Kacyiru stating that the information about the posting of the auction at that Court should be asked from the one claiming he/she posted it;

8° A book in which the Intermediate Court of Gasabo records received documents indicating that there is nowhere a notice submitted by Munyantore Bonaventure is mentioned among the documents the Court received from 20/07 up to 04/08/2016, however, the book contains other auction notices submitted by other court bailiffs.

The Court finds that the letters and that court's book indicate that the person claiming to have posted the auction notice should prove it. The fact that the defense, except saying that it was posted, they cannot produced required evidence, and this means that it was not posted in all required places as stated by

Ntaganzwa Faustin, since Munyantore Bonaventure, as a professional court bailiff, who is among the people assigned the activities of general interests and qualified as an auxiliary of justice as stipulated by article 60 of Law N° 12/2013 of 22/03/2013 governing the function of bailiff, and that he/she must perform his/her duties with due diligence, professionalism and discernment in respect of the laws, as stipulated in the article 69 of that law, he knew that it was his responsibility to produce, in case it is deemed necessary, evidence that he respected the Court's decision.

[38] Basing on the aforementioned motivations, the Court finds that the posting of the auction was not done in accordance with the provisions of the article 295 of Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure.

C. Whether Uwitonze Innocent was not appropriated the house of Ntaganzwa Faustin in accordance with the law

[39] Counsel Nzeyimana Lusinga Innocent representing Ntaganzwa Faustin states that Munyantore Bonaventure took his house and appropriated it to Uwitonze Innocent without purchasing it because there is no proof of payment for the price of that house, and this is contrary to the provisions of the article 306, paragraph 2, 307 and 3015 of Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, since the so called purchaser failed to present a bank deposit slip proving that he deposited the money on the Court's account.

[40] He also states that another evidence that Uwitonze Innocent was appropriated the house in contradiction with the

law, is that the list of the so called bidders is made up of the names of the commissionaires mobilized by Uwitonze Innocent himself, and those names often appear in different auctions to fraudulently indicate that the auction attended by many bidders.

[41] He keeps on arguing that another evidence that the auction was frauded is the deeds of the auction issued by Munyantore Bonaventure on 06/07/2016 where he stated that the successful purchaser of the house was Musoni Jean Bosco since he offered 16,500,000 Frw, and he was supposed to pay on 07/07/2016 that day at 8 am, but at around 4 pm he issued another deed stating that the auction was postponed, and this contradicts with the provisions of the article 301 paragraph 3 of the Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure..

[42] Counsel Twizeyimana Innocent representing Munyantore Bonaventure and Uwitonze Innocent argues that the statements of Ntaganzwa Faustin are groundless because Uwitonze Innocent was also allowed to make the bid as other bidders based on the provisions of the article 315 of the aforementioned law, and he was the one who offered the highest price for the auction.

DETERMINATION OF THE COURT

[43] Regarding the ground that the auction of 04/08/2016 was attended by commissionaires mobilized by Uwitonze Innocent and which are familiar in the fraudulence of auctions to show that there are many bidders for them, the Court finds that apart from stating it, the counsel for Ntaganzwa Faustin cannot prove it, therefore finds those statements baseless.

[44] With regards to the fact that the house of Ntaganzwa Faustin was firstly appropriated to Musoni Jean Bosco in the auction of 06/07/2016 because he was the highest bidder, but on that day, the court bailiff Munyantore Bonaventure issued another deed of the auction stating that the auction was postponed on 04/08/2016 due to the fact that the successful purchaser of the house informed him that he was no longer able to purchase it because there was a problem with his source of funds, the Court finds this is not a proof of fraud in the auction because the article 312 of Law N° 21/2012 of 14/06/2012 mentioned above, which Munyantore Bonaventure referred to in postponing the auction as it is mentioned in its deed, that provides that “If the highest bidder does not pay as he/she agreed, the property shall be reauctioned.” This article gives him the right to postpone the auction in case the highest bidder does not pay as he/she agreed.

[45] Regarding the payment modalities for the auctioned property, the Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure that was in place at that time of auctioning, in its article 306 , paragraph two, provides that “The successful purchaser of movable or immovable property shall make payment within one (1) working day after the auction and the payment shall be made into a bank account of the Intermediate Court in the jurisdiction of which the public auction took place.” Its article 307 also provides that “The creditor shall be paid by the accountant to the Intermediate Court that received the money from the auction after deduction of court fees, the remaining amount shall be given back to the proprietor of the property sold, in case there are no other persons to be paid after fifteen (15) days.” Its article 315 provides that “A distrainer cannot appropriate the seized property without participating in the auction like others.”

[46] The Court finds that the aforementioned legal provisions mean that the successful purchaser is appropriated the property after he/she pays for it in due time and in accordance with the law, and also the creditor is paid in due time and as provided by the law.

[47] The Court finds then that the fact that the creditor is at the same time the successful purchaser, it does not entail that he/she has to be appropriated the auctioned property without paying on the grounds that he/she is the creditor because when he /she participates in the auction of the property of the debtor he/she is considered like others, this is intended to avoid selling the property on unreal price.

[48] Basing on the aforementioned motivations, the Court finds that Uwitonze Innocent was appropriated the house of Ntaganzwa Faustin in contradiction with the law, as stated by the latter, because it was appropriated to him without paying, rather on the ground that he was the creditor.

[49] To conclude, the Court finds that the auction concluded on 04/08/2016 has to be invalidated as prayed by Ntaganzwa Faustin, because it was not conducted in compliance with the law, be it on posting or the payment of the auctioned house.

D. With regards to the damages requested in this case

[50] Ntaganzwa Faustin prays for 3,000,000 Frw for moral damages for being dragged in unnecessary lawsuits, 1,500,000 Frw for counsel fee and 100,000 Frw for procedural fee, and the entire amount has to be awarded by both Munyantore Bonaventure and Uwitonze Innocent, the defendants.

[51] Uwitonze Innocent states that the damages requested by Ntaganzwa are baseless since he is the one who provoked all lawsuits instead of executing the Court's decision which declared him the loser.

[52] He also states that Ntaganzwa Faustin dragged him in many unnecessary lawsuits, and there are up to now calculated to six (6) lawsuits and he lost all of them and never satisfied and he continuously dragged him in lawsuits that costed a lot of money for counsel fee, and he requests to be awarded that money he spent worth 6,000,000 Frw which includes 4,000,000 Frw for the previous lawsuits and an addition of 1,000,000 Frw at this instance and 1,000,000 Frw for procedural fee.

[53] Munyantore Bonaventure did not comment on the damages requested by Ntaganzwa Faustin, he rather request also that he should award him 500,000 Frw as moral damages, 1,500,000 Frw for counsel fee and 500,000 Frw for procedural fee.

DETERMINATION OF THE COURT

[54] The Court finds that the damages requested by Munyantore Bonaventure and Uwitonze Innocent are baseless because they lost the case.

[55] The Court finds that Ntaganzwa Faustin has to be awarded the moral damages he requested because he was disowned from his property in contraction with the law, but he has to be awarded 1,000,000 Frw because the amount he is requesting is excessive, and he cannot prove the reason for it.

[56] The Court finds also that he should be awarded the counsel and procedural fees, and in the Court's discretion, he has to be awarded 500,000 Frw as counsel fee since he cannot prove 1,500,000 he is requesting, and he also has to be awarded 100,000 Frw for procedural fee because this amount is reasonable.

[57] The Court finds that both Munyantore Bonaventure and Uwitonze Innocent have to share the liability of paying that money since they both contributed to the selling of the house belonging to Ntaganzwa Faustin in the auction conducted in contradiction with the law.

III. DECISION OF THE COURT

[58] Declares with merit the claim filed by Ntaganzwa Faustin requesting the review due to injustice of the judgment RCA 00052/18/TGI/GSBO rendered by the Intermediate Court of Gasabo on 17/10/2018;

[59] Decides that the judgment is reversed in whole, and the auction of the immovable property of Ntaganzwa Faustin of 04/08/2016 is invalidated;

[60] Orders Munyantore Bonaventure and Uwitonze Innocent to pay to Ntaganzwa Faustin 1,600,000 Frw which includes 1,000,000 Frw as moral damages, 100,000 Frw for procedural fee and 500,000 Frw for counsel fee.

COMMERCIAL CASE

RWANDA TEA TRADING LTD v GT BANK LTD

[Court of Appeal – RCOMAA 00037/2018/CA- RCOMAA
00023/2018/SC (Karimunda, P.J., Ngagi and Mukanyundo, J.)
22 February 2019]

Contract – Force majeure – Case of force majeure shall have the following criteria: It shall be irresistible, caused by an external circumstance other than parties to contract and unpredictable.

Facts: Rwanda Tea Trading Ltd entered into a three hundred and fifty million rwandan francs (350.000.000 Frw) loan contract with GT Bank Ltd to be repaid for six months; and entered into a surety contract with Karyabwite Claver, Mukandori Eugénie, Karyabwite Désiré, Karyabwite Eric and Karyabwite Jean Claude.

Rwanda Tea Trading Ltd did not respect the contract, consequently, it entered into another agreement of loan restructuring with GT Bank Ltd and they agreed on that Rwanda Tea Trading Ltd got another loan amounting to 415.445.080 Frw to be repaid for a single payment together with interests.

Rwanda Tea Trading Ltd did not again respect the contract. Therefore, GT Bank Ltd filed a case to Nyarugenge Commercial Court against Rwanda Tea Trading Ltd and its guarantors requesting repayment of loan and its interests amounting to 623.353.711 Frw, and various damages

The Nyarugenge Commercial Court declared that the request filed by GT Bank Ltd has merits and ordered Rwanda Tea

Trading Ltd and its guarantors to repay the principal loan with interests.

All the parties to the case made an appeal to the Commercial High Court, GT Bank Ltd stating that it is not satisfied with the loan to be repaid ordered by Court, while Rwanda Tea Trading Ltd and its guarantors denied breach of contract, but rather it was annulled by GT Bank Ltd before the beginning of repayment period. The Commercial High Court declared that the appeal by Rwanda Tea Trading Ltd and its guarantors lacks merits, while those of GT Bank Ltd has merits in part.

Being dissatisfied with the ruling of the case, Rwanda Tea Trading made an appeal to the Supreme Court. After the establishment of the Court of Appeal, the appeal was referred to the latter stating that the Commercial High Court had ruled that Rwanda Tea Trading and its guarantors had not respected the contract; and the Bank would write to it requesting the payment while the due date was not reached.

GT Bank Ltd made defence by stating that the Commercial High Court made no mistake to declare Rwanda Tea Trading Ltd's non-performance of loan agreement because it did not prove if the granted loan has been repaid. Therefore, GT Bank Ltd maintained that there was no reason for Rwanda Tea Trading Ltd to keep the loan unpaid, as its main purpose no longer existed.

In its defence, Rwanda Tea Trading Ltd stated that the project suspension that was not caused by its own mistakes should be considered as case of force majeure which led to the breach of contract because no provision had been made to what would happen if the project was suspended. It further noted that after the project was suspended, the situation would be reinstated to initial contract, GT Bank Ltd should be repaid the loan it had granted

indicated in the agreement of loan restructuring without paying interests nor damages.

GT Bank Ltd stated that Rwanda Tea Trading Ltd's statement that GT Bank Ltd should not claim the interests is unfounded as the reason for loan granting was about getting interests. The suspension of factory construction by the Government of Rwanda should not prevent the Bank from getting the interests of granted loan.

GT Bank Ltd requested that Rwanda Tea Trading Ltd and its guarantors be compelled to pay the outstanding loan. It stated that the Commercial High Court had calculated interests at 17.5% whereas it should have added 2% as provided for under the contract.

According to Rwanda Tea Trading Ltd, 594,052,834 Frw has already been paid as written in the provisional execution of judgment and it estimated that the Bank has received enough money, the interests should be calculated until 22/04/2016, the date on which the project of factory construction was suspended.

Held: 1. Failure to comply with an obligation to repay the loan until the expiration of deadline provided for under the contract is considered as the non-performance. Thus, the borrower is required to pay the principal loan, its interest and the penalties for delayed payment in case of non-compliance with the payment deadline provided for under contract.

2. The case of force majeure must meet the following criteria: it shall be irresistible, caused by an external circumstance other than parties to contract and unpredictable. Consequently, no one shall invoke preventable case as force majeure, though it is expensive; no case of force majeure related to repayment

obligation shall happen as it can be made from his/her properties; and the loss does not protect the borrower.

**Appeal lacks merit.
The cross-appeal has merits.
The court fees cover the expenses of the case equivalent to
all proceedings.**

Statutes and statutory instruments referred to:

Law n° 45/2011 of 25/11/2011 Governing Contracts, Articles 80 and 60.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Rwanda Tea Trading Ltd entered into a loan agreement with GT Bank Ltd on 25/09/2013 in which GT Bank Ltd granted a loan of three hundred and fifty million Rwandan francs (350.000.000 Frw) to Rwanda Tea Trading Ltd to be repaid within a period of six months. On the same day, GT Bank Ltd entered into a surety contract with Karyabwite Claver, Mukandori Eugénie, Karyabwite Désiré, Karyabwite Eric and Karyabwite Jean Claude as guarantors of Rwanda Tea Trading Ltd for loan granted by GT Bank Ltd.

[2] Rwanda Tea Trading Ltd did not respect the contract and after negotiations it entered into another agreement with GT Bank Ltd for restructuring the loan, they agreed that Rwanda Tea Trading Ltd was granted a loan amounting to 415,445,080Frw to be repaid and its interest for a single payment not later than 30/10/2016¹.

[3] Rwanda Tea Trading Ltd did not also respect the contract. Therefore, GT Bank Ltd filed a claim to Nyarugenge Commercial Court against Rwanda Tea Trading Ltd and its guarantors requesting the repayment of loan and its interests equivalent to 623.353.711 Frw provisionally calculated until 11/01/2017, it also claimed various damages and requested for the provisional execution of the judgement on the loan recognized by the defendants.

[4] On 19/05/2017, Nyarugenge Commercial Court pronounced the judgement RCOM 00093/2017/TC/NYGE and decided that the claim filed by GT Bank Ltd had merits, it ordered Rwanda Tea Trading Ltd and its guarantors to repay the principal loan equivalent to 594,052,834 Frw plus its interests, 500,000 Frw as court fees and lawyer's fees, 50,000 Frw as court fees deposited by GT Bank Ltd by filing the claim as well as the provisional execution of judgement regarding the loan and the interests recognized by the defendants.

[5] All the parties to the case filed an appeal to Commercial High Court against this judgement. GT Bank Ltd stated that it

¹ However, GT BANK Ltd alleged that there was a mistake, the new loan was equivalent to 431,102,236 Frw credited to the account of Rwanda Tea Trading Ltd on 30/10/2015, instead of 415,445,080 Frw.

was not satisfied with the loan confirmed by the Court to be repaid and the principal loan with its interests amounted to 769,564,268 Frw, it requested to be repaid such amount; whereas Rwanda Tea Trading Ltd and its guarantors supported that they were not liable for the breach of contract, but it was GT Bank Ltd that annulled the contract before the repayment deadline and they maintained that they were against the provisional execution of the judgement ordered by Court at the first instance.

[6] On 05/01/2018, the Commercial High Court pronounced the judgement RCOMA 00393/2017/CHC/HCC-RCOMA 00395/2017/CHC/HCC and ruled that the appeal of RTT Ltd and its guarantors lacked merits and the one of GT Bank Ltd had merits in part, the principal loan with its interests to be repaid to GT Bank Ltd amounted to 657,430,909 Frw. The Court also ruled that the provisional execution decided at the first instance on the loan equivalent to 594,052,834 Frw was sustained. The Court ordered Rwanda Tea Trading Ltd and its guarantors to pay GT Bank Ltd a sum of 500,000 Frw for the lawyer's fees on appellate level plus 500,000 Frw at the first instance.

[7] Rwanda Tea Trading Ltd was not satisfied with the ruling and appealed to the Supreme Court and after the establishment of the Court of Appeal, the appeal was transferred to that Court according to the Article 105 of Law n° 30/2018 of 02/06/2018 determining the jurisdiction of the courts².

² From the day this Law comes into force, except cases already under trial, all cases that are no longer in the jurisdiction of the court seized are transferred to the court with jurisdiction in accordance with the provisions of this Law".

[8] The case was tried in public on 17/01/2019, Rwanda Tea Trading Ltd was represented by Counsel Nkongoli Laurent and Counsel Rwagatare Janvier while GT Bank Ltd was represented by Counsel Bimenyimana Eric.

II. ANALYSIS OF THE LEGAL ISSUES

A. APPEAL BY RWANDA TEA TRADING Ltd

- 1. Whether Rwanda Tea Trading Ltd has complied with the loan agreement

[9] According to Rwanda Tea Trading Ltd, the Commercial High Court decided that Rwanda Tea Trading Ltd and its guarantors had not complied with the agreement, whereas it has explained that after the suspension of Gatatare Tea Factory by the Government of Rwanda on 22/04/2016, GT Bank Ltd immediately wrote a letter requesting immediate payment by Rwanda Tea Trading Ltd while the agreed date was not elapsed because it remained a period of six (6) months. It further stated that it has not failed to repay the loan, but it was GT Bank Ltd which made annulment of the contract because the purpose for loan non longer existed when the construction project of Gatatare Tea Factory had been suspended, the terms of agreement should have been reinstated to the initial contract.

[10] GT Bank Ltd stated that the Commercial High Court made no error to decide Rwanda Tea Trading Ltd did not fulfill the loan agreement because it has not proved if it repaid the granted loan. It noted that there was no reason for Rwanda Tea

Trading Ltd to retain the loan as the project purpose no longer existed; it observed that if Rwanda Tea Trading Ltd and its guarantors repaid the loan on time, it would have helped for reducing the increase of interests. It further stated that even though the total loan would have been repaid on 30/10/2016, it is evident that even later, Rwanda Tea Trading Ltd did not repay the loan on the date agreed on under the contract, so that GT Bank Ltd wrote to Rwanda Tea Trading Ltd requesting the repayment of 594,052,834 Frw, but it did not immediately repay; but during the court trial at the first instance they accepted the same loan and the Court ordered the provisional execution of the judgement.

DETERMINATION OF THE COURT

[11] Paragraph 2, Article 80 of Law N° 45/2011 of 25/11/2011 Governing Contracts provides that: “When the performance of obligations under the contract is due, the non-performance shall be a breach”.

[12] Documents included in the case file indicated that on 25/09/2013 GT Bank Ltd entered into a loan agreement with Rwanda Tea Trading Ltd equivalent to 350,000,000 Frw to be repaid within six (6) months. This agreement was renewed on 16/10/2014 with both parties by agreeing on Rwanda Tea Trading Ltd's loan owed to GT Bank Ltd equivalent to 415,445,080 Frw³ that would be repaid on 30/10/2016 by single payment. Before the expiration of the deadline, GT Bank Ltd realized that the project of which Rwanda Tea Trading Ltd had applied for the

3 GT BANK Ltd stated that there is was an error in contract on the loan of 431,102,236 Frw instead of 415,445,080 Frw.

loan was suspended and immediately asked Rwanda Tea Trading Ltd for early repayment of the granted loan Rwanda Tea Trading Ltd was unable to repay the loan. Therefore, after issuing notice, GT Bank Ltd filed a suit to Nyarugenge Commercial Court on 06/11/2016. The Court ordered Rwanda Tea Trading Ltd and its guarantors to repay 594,052,834 Frw of loan plus its interests. This decision was subjected to appeal in Commercial High Court, which decided also that Rwanda Tea Trading Ltd violated the contract and was ordered to repay 657,430,909 Frw of loan plus interests owed to GT Bank Ltd.

[13] The case file indicated that in the contract of 16/10/2014 amending the contract of 25/09/2013, Rwanda Tea Trading Ltd has agreed to repay, by single payment, the loan of 415,445,080 Frw and its interest calculated at 17.95% on 30/10/2016.

[14] For this issue, the Court finds that the party to the case still liable to comply with the contract was Rwanda Tea Trading Ltd of which primary obligation was to repay the loan as provided for under the contract of 16/10/2014 aforementioned. The fact that the the deadline agreed on was expired without repayment of the loan by Rwanda Tea Trading Ltd to GT Bank Ltd means that Rwanda Tea Trading Ltd became party that has not complied with its obligations as set forth in the contract.

[15] The Court finds that the statement of Rwanda Tea Trading Ltd's Counsel that GT Bank Ltd did not respect the contract as it asked for the early repayment can be considered unfounded, given that, as the Commercial High Court realized it, due to the fact that GT Bank Ltd immediately asked for the payment of its money, after being aware that the project for which the loan was granted was suspended by the Government of Rwanda, it made no mistake, as the repayment was in the interest of both parties,

especially, as indicated, Rwanda Tea Trading Ltd did not even repay until the expiration of the deadline provided for under the contract, this led GT Bank Ltd to file a claim to Nyarugenge Commercial Court as it observed that the notice it provided was no longer valid.

[16] Basing on the provisions of paragraph 2, Article 80 of the Law n°45/2011 of 25/11/2011 above mentioned, the Court finds that due to the fact Rwanda Tea Trading Ltd has not been able to perform its obligations to repay the loan granted by GT Bank Ltd until the period stipulated under the contract became expired and exceeded, it is the one that violated the contract, the Commercial High Court would have no ground to decide that Rwanda Tea Trading Ltd did not violate the contract and such is the observation of this Court.

- **2. Whether the fact that the suspension of Gatare Tea Factory project by the Government of Rwanda would be considered as case of force majeure for the breach of the contract so that the interests should not be calculated**

[17] Rwanda Tea Trading Ltd stated that the fact that the project suspension which was not resulted from its own mistakes should be considered as case of force majeure which led to the breach of the contract as provided for under the Article 92 of the Law Governing Contracts⁴ because no provision had been made

⁴ That article provides that Where a party's performance is made impossible for reasons beyond her/his control including the absence of the object matter of the contract or another case of force majeure, his/her obligation of

about what would happen if the project was suspended. It further stated that after the project was suspended, the terms of the contract would have been reinstated to the initial agreement and GT Bank Ltd should have been repaid the granted loan indicated in the additional agreement of 15/10/2014, but without paying damages and interests as set forth under paragraph one, Article 92 of the Law Governing Contracts⁵.

[18] GT Bank Ltd stated that Rwanda Tea Trading Ltd's statement that GT Bank Ltd's interests should not be claimed would be declared unfounded as the purpose for loan granting was about getting interests. The fact that the Government of Rwanda (MINECOFIN) has suspended the project of factory construction should not prevent the Bank from getting the interests of granted loan ; rather Rwanda Tea Trading Ltd should have sued MINECOFIN for damages.

DETERMINATION OF THE COURT

[19] Article 64 of Law N° 45/2011 of 25/11/2011 Governing Contract provides that: "Contracts made in accordance with the law shall be binding between parties." Article 92 of this Law provides that: "Where a party's performance is made impossible for reasons beyond her/his control including the absence of the object matter of the contract or another case of force majeure,

performance shall be extinguished, unless the circumstances indicate otherwise.

⁵ The obligation to pay damages for repudiation of obligations is extinguished if it appears that repudiated obligations would have been extinguished by their impossibility of performance or the impossibility of the purpose

his/her obligation of performance shall be extinguished, unless the circumstances indicate otherwise”.

According to the case file, it is stated that the agreement of 16/10/2014 between Rwanda Tea Trading Ltd and GT Bank Ltd, the article herein after called “*Les intérêts débiteurs*,” both parties agreed on annual interest rate of 17.95%, but that the rate may change (decrease or increase) due to movements in market prices.

[20] The Supreme Court finds that the High Court made no mistake while ruling that the interest should still be counted, but corrected the manner of which the interest was calculated. While it was found that GT Bank Ltd was not the party that violated the contract, but Rwanda Tea Trading Ltd and its guarantors which failed to comply with the terms of the contract, the Court finds that there was no reason for not calculating the interests.

[21] The Court also finds that Article 92 of Law N° 45/2011 of 25/11/2011 Governing Contracts invoked by Rwanda Tea Trading Ltd by stating that Commercial High Court used it to calculate the interests should not be considered for this case, except being used for Rwanda Tea Trading Ltd which was also declared as the one to breach the terms of the contract, the latter cannot claim for the interest exemption as the interpretation of this Article is contrary to the views of Rwanda Tea Trading Ltd's Counsel as explained in the following paragraphs.

[22] The Supreme Court finds that the purpose of the agreement between Rwanda Tea Trading Ltd and GT Bank Ltd was the loan amount provided by the Bank to Rwanda Tea Trading Ltd, rather than the construction of a tea factory, and

even if this was the case, the Court finds no case of force majeure that have prevented Rwanda Tea Trading Ltd from maintaining the construction as the force majeure must meet the following conditions : be irresistible, beyond parties control and unpredictable.

[23] It finds that the fact that MINECOFIN has suspended the tender of factory construction because it was not satisfied with the way it was executed, it is inconsistent with the provisions of Article 92 of the aforementioned Law under the pretext of its mistakes by invoking that the decision of MINECOFIN was case of force majeure. This statement is also underpinned by the notes from legal scholars where they stated that no one should invoke preventable case as force majeure, though it is expensive; no case of force majeure related to repayment obligation shall happen as it can be made from his/her properties; and the loss does not protect the borrower⁶.

[24] With respect to the statements by Rwanda Tea Trading Ltd's Counsels that GT Bank Ltd did not comply with the provisions of article 70 of the Law n° 45/2011 of 25/11/2011 Governing the Contracts⁷ by stating that if it really had a good faith and fair dealing to its client, it would have not considered the interest calculation after realizing that the purpose of which Rwanda Tea Trading Ltd applied for loan was suspended; but it would have only accepted the repayment of the principal loan. The Court also finds it cannot be declared as founded, because

⁶ Ph. MALAURIE, L. AYNES, Ph. STOFFEL-MUNCK, *Droit des obligations*, 7e edition, Paris, LGDJ, 2015, pp. 515-516.

⁷Each party shall have obligation to perform the contract in good faith and fair dealing between parties.

after realizing that the project was suspended, GT Bank Ltd requested Rwanda Tea Trading Ltd to repay its money, which Rwanda Tea Trading Ltd did not respect immediately, but it waited for the deadline provided for under the contract. Rwanda Tea Trading Ltd did not pay when the deadline was due after receiving a written notice from GT Bank Ltd. That's made GT Bank Ltd to seize the courts. Therefore, the Court finds that there was no bad faith or precondition in the behaviour of GT Bank Ltd. Therefore, there was no reason to prevent it from continuing to count interests as provided under the contract, especially since it was not concerned by the agreement between Rwanda Tea Trading Ltd and MINECOFIN. Furthermore, it was not involved in the suspension of the project such as making funds available for no reason to prevent Rwanda Tea Trading Ltd from complying with its obligations under a contract with the Government of Rwanda (MINECOFIN).

B. CROSS-APPEAL FILED BY GT BANK Ltd

- **1. Whether Rwanda Tea Trading Ltd and its guarantors should be compelled to repay the outstanding loan**

GT Bank Ltd requested that Rwanda Tea Trading Ltd and its guarantors should be compelled to repay the outstanding loan equivalent to 255,279,610 Frw calculated until 17/01/2019 as it accepted that the sum of 594,052,834 Frw has already been repaid. It stated that the Commercial High Court had calculated interests at 17.5% whereas it should have added 2% as provided for under the contract.

With respect to GT Bank Ltd's appeal, Rwanda Tea Trading Ltd maintained that a sum of 594,052,834 Frw had already been paid as written in the provisional execution of the judgement and it estimated that the Bank had received enough money and the interests should be calculated until 22/04/2016, the date of which the project of factory construction was suspended.

DETERMINATION OF THE COURT

[25] With respect to the statements by GT Bank Ltd's Counsel that the Commercial High Court had counted interests at 17.5% but it did not add 2% as provided for under the contract, the Court finds that Article 3 of the contract of 16/10/ 2014 stipulated that apart from the interest rate above (17.95%), an additional 2% would be deducted from the total amount in excess of the granted loan. The Supreme Court also finds that in the paragraph 16 of this judgment subjected to appeal, the Court did not give its position about 2% provided for under the contract.

[26] With respect to the amount of loan Rwanda Tea Trading Ltd had to pay to GT Bank Ltd, the Court finds that both parties agreed that GT Bank Ltd had already been paid the sum of 594,052,834 Frw as indicated above. But as stated by GT Bank Ltd in the hearing of 17/01/2019, RTT Ltd had to pay 255,279,610 Frw with the remaining principal loan inclusive, its interests and penalties for delay as it has not amended it ; rather Rwanda Tea Trading Ltd insisted on the fact that no interest should be counted due to a case of force majeure and the fact that it has paid enough money. The Court cannot roughly refer to this

because Rwanda Tea Trading Ltd did not provide evidence to contradict the amount of loan and its interests”⁸.

- **C. Determining the basis of the damages claimed**

[27] GT Bank Ltd requested the Court to order Rwanda Tea Trading Ltd to pay one million (1,000,000 Frw) for lawyers’ fees at this level because of being dragged into unnecessary lawsuits.

[28] Counsel Rwagatare Janvier, representing Rwanda Tea Trading Ltd requested the Court to examine the basis of damages claimed by GT Bank Ltd.

DETERMINATION OF THE COURT

[29] The Court finds that GT Bank Ltd has hired a lawyer to represent its interests at this level. It is evident that it has required a cost to do the job.

[30] However, the Court finds that 1,000,000 Frw claimed by the Bank has no evidence. Therefore, it must be awarded 700,000 Frw of lawyers’ fees determined according to its discretion.

III. DECISION OF THE COURT

⁸ Article 12 of Law n° 22/2018 of 29/04/2018 relating to the Civil, Commercial, Labour and Administrative Procedure, provides that: "*a party who alleges that he/she has been discharged from an obligation established by evidence must justify the cause as a result of which the obligation has extinguished. Failure to do so, the other party wins the case*".

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