PROSECUTION v. FAYIRARA

[Rwanda SUPREME COURT – RS/REV/PEN0016/10/CS (Kayitesi Z., P.J., Mugenzi and Munyangeri, J.) October 18, 2013]

Criminal procedure – Review – An evidence the accused knew the whereabouts at the time of the trial and did not produce it or did neither notify the Court of its existence nor provides the Court with a irreversible cause as to why he could not present it cannot be considered as a new evidence which can entail review – Law n° 13/2004 of 17/5/2004 relating to the code of criminal procedure, article 180.

Facts: The Intermediate Court of Rusizi convicted Ananias Fayirara of Counterfeit and falsification of Rwandan monetary symbols and their circulation and sentenced him to 10 years of imprisonment. He lodged an appeal to the High Court stating that the Intermediate Court disregarded his statements but rather focused solely on witnesses inculpating him. The Court noted that his appeal was not valid. He appealed again to the Supreme Court stating that he was convicted of an offence he had never committed. The Court upheld the appealed judgment. Later on, he seized the same Court applying for review. The screening of the case indicated that the appellant was not allowed to use this remedy because he could not demonstrate the novelty of the evidence he produced. He appealed against this order stating that he had an invoice that he could not find and consequently had not produced it because he could not invoke evidence that he could not provide to the court.

The Prosecution requests the Court not to consider the accused defense since he forged the invoice with an individual whom he declares was his employer. Additionally, the Prosecution states that, in the course of the trial, he knew about the existence of the invoice. Therefore, even though he could not provide it to the Court, he could have declared its existence so that it could be searched and be provided to the Court. The Prosecution insisted that in case it is found otherwise, nothing could have prevented him from forging it after the judgment was rendered and attempt to match his former defense with the forged document.

Held: Evidence that the accused knew the whereabouts at the time of the trial and did neither produce it nor provide a conclusive cause as to why he could not present it to the Court cannot be considered as new evidence which can entail review. For all these grounds the Court rejected the appellant's application for review.

Appeal against screening of the case order is inadmissible.
The screening of the case order no RP 0410/09/Pré-ex/CS Appealed is upheld.

Statutes and statutory instruments referred to.
Law n° 13/2004 of 17/5/2004 relating to the code of criminal procedure, article180.

No case was referred to

Doctrine
M. Franchimont et al., *Manuel de Procédure Pénale*, 2ème ed., Bruxelles, Larcier, 2006, p.1200.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The case commenced in Intermediate Court of Rusizi whereby Fayirara in complicity with and Joseph MUNYANEZA and Kazungu, were accused of having counterfeited and circulated in the population Rwandan monetary symbols by way of exchange. The Intermediate Court noted that Fayirara collaborated with some Congoleses whom he did not want to list names in counterfeiting the money which was handed to Munyaneza for sale. The Intermediate Court inflicted on him the penalty of 10 years of imprisonment.

[2] Fayirara filed an appeal to the High Court, Rusizi Chamber arguing that Intermediate Court did not consider his statements and convicted him only basing on the statements made by the Prosecution. The High Court declared that Fayirara's appeal lacked merit and upheld the appealed judgment.

[3] He lodged an appeal against that decision to the Supreme Court stating that he was convicted and inflicted the penalty for the offence committed by Joseph Munyaneza and that he neither knew Congo nor the Congoles mentioned in the case file. In the Judgment nº RPAA0103/08/CS/ the Supreme Court declared Fayirara's appeal invalid and upheld the previous courts' verdicts.

[4] Fayirara applied for review against that judgment in the Supreme Court and his application was enrolled under nº RS/REV/PEN0039/09/CS-RPAA0103/08/CS/. The preliminary judge examined the application and noted that the applicant does not provide any new evidence. In the order nº RP 0410/09/ Pré-ex/CS of October 26, 2009, the judge ruled that Fayirara was not allowed to apply for review since he does not provide any legal basis for his application.

[5] Fayirara appealed against this order in the same Court where his appeal was recorded under RS/REV/PEN 0016/10/CS. The public hearing was held on October 2, 2013; Fayirara appeared and assisted by KAYITARE Dieudonné, the Counsel and the Prosecution represented by Alain MUKURARINDA.

II. ANALYSIS OF THE LEGAL ISSUE

Whether the invoice that Fayirara produced after the final judgment can be taken as new evidence.

[6] Fayirara Ananias states that the case screening judge dismissed his application because he did not consider the evidence about an invoice between him and Joseph Munyaneza on which he bases his application and which shows that the machine referred to in the case file was actually used for tailoring and not for counterfeiting money. He adds that he did not previously raise the invoice before the court of law since it was lost. He added that even though he knew about it he could not invoke it as he could not provide it to the Court.

[7] He argues that this ground would constitute a valid cause for his application for review basing on article 180 nº 4 of the Law n° 13/2004 of 17/5/2004 relating to the code of criminal procedure which was into force at the time he filed an appeal. His Counsel, Kayitare Dieudonné, adds that his request to the Court is to see justice rendered for Fayirara by

considering the invoice between him and the one who hired him and that since Fayirara declares that the invoice is original, the court would take his declaration as the truth.

[8] The Representative of the Prosecution disputed that the invoice that Fayirara provided to the judge as a new evidence when applying for review should not be admitted because he forged it himself together with the individual he claims to have hired him and that in the previous proceedings, he knew the existence of the invoice and though he could not provide it for the court, he could have notified the Court of its existence for it to be searched and handed over to the Court. He adds that, as long as Fayirara does not show that he had never known about it at the time of the trial, nothing could remove the assumption that he forged it after the judgment was rendered and then try to match the previous pleadings with the forged document. He finally states that the order of the screening judge is valid.

THE VIEW OF THE COURT

[9] Regarding the grounds for the application for review to be admissible , article 180 of the Law n° 13/2004 of 17/5/2004 relating to the code of criminal procedure which was into force at the time of application provides: "an application for review of a criminal judgment which has been finally decided can be made for the benefit of any person who has been convicted of a felony or misdemeanor if:

[10] 1°After a person convicted of homicide, there is latter discovered enough evidence indicating that the person alleged to have been killed is actually not; 2° After a person convicted of an offence there is discovered another similar judgment which punished a different person for the same offence and the contradiction in the two cases show that one of the convicted persons was innocent; 3° One of the witnesses to a case is subsequently found to have given false testimony against the accused person and the former has already been convicted for the offence. The person convicted of perjury cannot be called as a witness in the new case; 4° after judgment, there is discovered new evidence, indicating that the convicted person was innocent".

[11] The Court finds that the case screening order n^{o} RP 0410/09/Pré-ex/CS of 26/10/2009 indicates that the so called new evidence provided by Fayirara after the trial of the case as considered by the judge in taking the decision are : 1) that the money which is the basis of the criminal proceeding was delivered by Bellancille who has taken it to her parents from Kayiranga 2) That money has been counterfeited at Mwaga at Kalinda Antoine's house who was hired by the one called Kayiranga. 3) The offence he is charged with has been reclassified and the words making up his statements were altered many times to write what they wanted their wants 4) There is a witness who clearly explains how the plan to get him imprisoned was prepared and the master minders.

[12] Yet, the Court notes that in the case file there was a letter dated July 26, 2009 written to the Supreme Court by Fayirara applying for review whereby he states that the grounds on which he bases his application include the invoice found that he could not recall the existence. That invoice between Fayirara and Munyaneza Joseph is attached to that letter (mark 1, page 4). It is clear that the judge did not examine it since Fayirara did not turn to it in his submissions and even in his letter dated March 10, 2010 that he submitted to the Supreme Court when he applied again for review (mark 1, 2, 3). Indeed, if the judge had examined it, he would have not admitted it as a new evidence because Fayirara admits that he knew about its existence but did not use it in the previous courts because he could not find it.

This highlights that this invoice is not a new evidence. Moreover, Legal scholars state that is inadmissible, the application for review based on an invoice in possession of the applicant in course of the trial and which he does not declare he was in impossibility of production during the debates[1] and therefore the evidence produced by Fayirara would not be valid as a ground for review.

DECISION OF THECOURT

[13] Rules that Fayirara Ananias appeal against the case screening order no RP 0410/09/Pré-ex/CS of 26/10/2009 lacks merit.

[14] The court upholds screening order n° RP 0410/09/Pré-ex/CS of 26/10/2009.

[1] "Est irrecevable la demande en révision fondée sur une facture en possession du requérant lors du procès et qu'il n'allègue pas avoir été dans l'impossibilité de produire au cours des débats". Look at Michel Franchimont *et alii*, *Manuel de Procédure Pénale*, 2ème ed., Bruxelles, Larcier, 2006, p.1200.

PROSECUTION v. MPITABAKANA

[Rwanda SUPREME COURT – RPA0129/10/CS (Nyirinkwaya, P.J., Havugiyaremye and Mukamulisa, J.) March 7, 2014]

Criminal Law – Murder – It is considered murder, when proved that a person intentionally killed another – Decree – Law nº 21/77 of 18/08/1977 instituting the penal code, article 311.

Criminal Law – Penalty reduction – None could pretend the consequences of his/her offence to be the cause of the penalty reduction.

Criminal Law – Penalty reduction – Reporting him/herself to the judicial police immediately after committing an offence may apply as a mitigating circumstance – Mitigating circumstances applied by the previous Court are not to be reconsidered.

Facts: The appellant reported himself to the judicial police, confessing the killing of his wife. The Doctor who was requested to perform an autopsy, delivered a report that she got a hit on the head and especially on belly, as the cause of her death because she was pregnant of seven months. The High Court, Rusizi chamber, ruled on the case on the first instance, convicted and sentenced the appellant to 20 years of imprisonment. The Court reduced his penalty because he pleaded guilty and reported himself to the judicial police immediately after the offence.

He appealed to the Supreme Court, alleging that the High Court confirmed that he deliberately killed his wife while it was by accident and it sentenced him to the heavy penalty despite his guilty plea and that he facilitated the justice. The prosecution contends that his allegation that he killed his wife by accident is groundless, because to kick a pregnant woman is enough to kill her. He added that another proof that he intended to kill her is that before hitting her, he closed the door to prevent any rescue for her, and those who came for help tried to demolish the door but in vain. "He used violence against the victim every day, which is even the cause of his separation from his first wife", the prosecutor added.

Held: 1. The evidences gathered in the case file, such as the fact that he kicked on belly the pregnant of seven months and refused to take her to hospital, the fact that he firstly beat the kid and the latter ran away, and the fact that he closed the door before killing the victim to prevent any rescue, prove that the accused intentionally killed his wife.

2. Though the appellant reported himself to the judicial police and partially explained his role in the death of the diseased, even if he lies on some details, it facilitated the justice, but this was considered by the previous court as he was sentenced to 20 years of imprisonment rather than life imprisonment.

3.With regards to the accused request of the penalty reduction for him to take care of the orphans left by his wife, the Court finds that he is the one who made them orphans, and he cannot rely upon the horrific consequences of the offence he committed to benefit the penalty reduction.

Appeal without merit.

The appealed judgment is upheld.
The Court fees are charged to the public treasury.

Statute and statutory instruments referred to:
Organic Law nº 01/2012/OL of 02/05/2012 instituting the penal code, article 140 and 142.
Decree - Law nº 21/77 of 18/08/1977 instituting the penal code, article 311.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The High Court, Rusizi chamber, ruled on the case on first instance and on 10 March 2010 convicted and sentenced Mpitabakana to 20 years of imprisonment. The Court reduced his penalty because he pleaded guilty and reported himself to the judicial police immediately after committing the offence.

On 1 September 2008, at 6 AM, Mpitabakana reported himself to the judicial police, confessing the killing of his wife, Yaduhaye Asinati. The Doctor who was requested to perform an autopsy, delivered a report that she got a hit on the head and especially on belly, as a cause of her death because she was pregnant of seven months.

In the judicial police, Mpitabakana explained that he slapped and kicked his wife when they were on their way home, because he found her with another man. He added that she fell down against her tummy, he raised her up and she died later on when they arrived home. In the High Court, he explained that they fought in their house because his wife joined him in a cabaret, without having cooked, she insulted him and spat on his face. He slapped her, she fell down and he kicked her on the back but that she did not immediately die because when they went to bed, she was asking him to take her to hospital, but as he was drunk, he did not pay attention until she died.

Mpitabakana appealed to the Supreme Court alleging that the High Court confirmed that he deliberately killed his wife while it was by accident and that the Court sentenced him to the heavy penalty despite his guilty plea and that he facilitated the justice.

The hearing was held in public on 27 January 2014, Mpitabakana assisted by the Counsels, Mwizerwa Grace and Nsengimana Elie, the prosecution represented by Higaniro Hermogène, the National Prosecutor.

II. ANALYSIS OF THE LEGAL ISSUES

Whether Mpitabakana involuntarily killed his wife.

Mpitabakana argues that he did not voluntarily kill his wife as confirmed by the High Court; it was by accident because he slightly kicked her on the back due to the fact that she did not cook, she fell down and when asked to bring her to hospital, he denied and went to sleep. He added that his wife also went to sleep and after a moment, when he touched her, she found

her dead and he immediately went to report himself to the police. He also added that because of anger, he slightly slapped a child who was there and the latter ran way.

His counsel states that what proves that Mpitabakatana killed his wife by accident is that he only kicked her without using other material to hit her such as a machete or whatever.

The prosecution contends that the statements made by Mpitabakana and his counsel, alleging that he accidentally killed his wife are groundless because kicking a pregnant woman is likely to kill her. The prosecution also states that another ground which proves that he intended to kill her is that before hitting her, he closed the door to prevent any rescue for her, and those who came for help tried to destroy the door but failed.

The prosecution adds that Mpitabakana used violence to the victim every day that is even the reason why he separated from his first wife as attested by his brother Bariyanga Masomo.

The Court finds that Mpitabakana intended to kill his wife because of the following reasons:

The fact that he firstly beat the kid and the latter ran away, is the proof that he was preventing the child to watch what he was ready to do because he does not explain the reason why he beat the kid.

The fact that he kicked on the belly of a seven months pregnant woman as proven by the doctor.

The fact that he recognises that he denied her request of taking her to hospital.

The fact that the statements made by interrogated witnesses such as Bariyanga Masomo (mark 3) and Nyiraruzindaro Domitile (mark 9) prove that he closed the door before killing the deceased and those who came for rescue failed to enter the house; while Mpitabakana was beating the jercan, yelling that he was attacked.

The fact that during his interrogation he contradicted himself: in the judicial police, he stated that he slapped his wife when they were on their way home, because he found her with another man. She fell down because of the slap, he raised her up and she died later on when they arrived home. In the High Court, he declared that he beat his wife because she did not cook, but that she did not immediately die because when they went to bed, she begged him to take her to hospital, but as he was drunk, he did not pay attention until she died while before this Court, he stated that his wife came to bed and when he touched her later, he found her dead. These contradictions prove that he tries to hide the truth.

The Court finds that as explained above, there is no doubt that Mpitabakana intended to kill his wife Yaduhaye Asinati although he denies it.

Whether Mpitabakana deserves another penalty reduction.

Mpitabakana requests the Court to reduce his penalty, for him to join and take care of two orphans left by his wife. His counsel also requests the Court to reduce his penalty based on article 35 of Law relating to the code of Criminal Procedure that was into force at the time the offence was committed and on article 82 and 83,2° of the penal code in force at the time the offence was committed, because he pleads guilty and seeks forgiveness.

The prosecution contends that every prisoner is prevented from some obligations, if he had pity for his kids, he would have abstained from committing the crime. The prosecution also contends that Mpitabakana sufficiently benefited the penalty reduction.

The murder that Mpitabakana was convicted of, is punishable with life imprisonment as provided for by article 311 of the penal code which was into force when the offence was committed. It is the same penalty provided for by article 140 and 142 of the Law nº 01/2012/OL of 2 May 2012 instituting the penal code.

The Court finds that Mpitabakana reported himself to the judicial police and partially explained his role in the death of the deseased, even if he lies on some details, and it facilitated the justice.However, it was considered by theprevious Court as he was sentenced to 20 years of imprisonment rather than life imprisonment.

With regards to his requests of the penalty reduction, for him to join and take care of the orphans left by his wife, the Court finds that he is the one who made them orphans, and he cannot rely upon the horrific consequences of the offence he committed to benefit the penalty reduction.

Based on the above explanations, the Court finds Mpitabakana's appeal without merit, thus, the appealed judgment is to be upheld.

III. DECISION OF THE COURT

Finds Mpitabakana's appeal without merit.

Rules that the appealed judgment nº RP 0087/08/HC/RSZ that sentenced him to twenty years of imprisonment is upheld.

Orders that the Court fees are charged to the public treasury.