

## PROSECUTION v. HAKIZIMANA

[Rwanda SUPREME COURT – RPA0002/GEN/13/CS (Kayitesi Z., P.J., Nyirinkwaya and Mukamulisa, J.) November 11, 2013]

*Criminal procedure law – Appeal – Appeal against the court decision confirming its jurisdiction to try the case – If the court rules that it has jurisdiction, the party that is not contented with the decision appeals against it with the main suit – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 18, 90 and 162.*

*Criminal procedure law – Appeal against judgment which has been adjudicated through review – The judgment resulting from a case review is not subject to appeal even in case it was adjudicated on the first instance – Organic Law N°03/2012/OL of 13/06/2012 Determining Organization, functioning and the competence of the Supreme Court, article 34(11°) – Law N°21/2012 of 14/06/2012 Relating to the civil, commercial, labour and administrative procedure, article 193.*

**Facts:** In the First Instance Court of Kigali, Special Chamber with jurisdiction to try the crime of genocide, crimes against humanity and other related crimes, Hakizimana Augustin was convicted of genocide, murder and constitution of a criminal gang. He was sentenced to death penalty and a payment of moral damages equivalent to 10,000,000Frw.

He appealed to the Court of Appeal of Kigali. The latter held that his appeal was not substantiated. He requested for cassation of the judgment by the Court of Cassation. After the judicial reform, his case was heard by the Supreme Court but was not admitted as it was not filed in compliance with the rules of procedure.

He applied for review against the judgment before Intermediate Court of Gasabo alleging that after the judgment, it was known that some of the alleged people were still alive while some others died just after the genocide. He insisted that he was convicted of having killed some other persons while there are people who had been convicted for having murdered them by Gacaca Court and who did not witness against him. He stressed that there are witnesses who could testify that he played no role in the perpetration of genocide.

The Intermediate Court of Gasabo found that his application had merit in parts. However some grounds of appeal about the judgments of Gacaca Courts and the testimonies exculpating him of the murder of various alleged people were not considered.

He appealed to the High Court and the Prosecution raised an objection of lack of jurisdiction submitting that the judgment resulting from case review can never be subject to appeal. The High Court held that the objection raised had no merit. It acquitted him of all charges and ordered immediate release.

The prosecution appealed to the Supreme Court alleging that the judgment which had been adjudicated through review is not subject to appeal.

The counsels for the accused raised also the objection of inadmissibility of the action since, according to them; the Prosecution is not allowed to lodge an appeal against the decision of the court declaring itself competent to try the case.

As to the Prosecution, the objection lacks merit because the provisions of the law relating to civil procedure referred to by the counsel for the accused does not prohibit the appeal against

the judgment on issue of lack of jurisdiction. Rather, the law states that in case the Court declares itself competent to try the case, that decision is appealed against with the decision of judgment in merit.

**Held:** 1. If the court rules that it has jurisdiction, the party that is not contented with the decision appeals against it with the main suit; therefore it is prohibition while the case in merit is still pending.

2. The judgments which were rendered through review cannot be appealed because review is an extra ordinary remedy which allows the judge to review the judgment after he/she finds one of the grounds provided for by the law, indicating that the case would have been adjudicated otherwise if that ground was known. However, it does not aim at opening the appeal for the final judgment since the judgment subject to review takes the same nature as that it replaces which is final as well, that is, it cannot be appealed against even in case it became final after it was adjudicated at the first instance.

3. With regarding to being governed by equity as it is a tradition in common law system, this cannot be considered because, apart from the fact that the system does not leave out its decided case law, the legal issue of the case is not whether or not the accused is guilty; rather it is the competence of the High Court

**Appeal has merit.  
The High Court lacks jurisdiction.  
The judgment RPA/GEN/0001/12/HC/KIG is invalidated.  
Court fees to the public fund.**

**Statutes and statutory instruments referred to:**

Organic Law N°03/2012/OL of 13/06/2012, determining the Organization, functioning and competence of the Supreme Court, articles 18, 34(11°) and 90.

Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, articles 162 and 193.

**Cases referred to:**

Nzabandora v. Government of Rwanda, RADA 0026/10/CS, Rendered by the Supreme Court, on 4 March 4, 2011.

Mulemba v. Kabona, RCAA 0065/09/CS, rendered by the Supreme Court on July 2, 2010.

Nzabamwita v. SONARWA, RCOMA 001/06/CS, rendered by the Supreme Court on February 2, 2007.

Prosecution v. Rwahama, RS/REV/GEN 0005/07/CS, rendered by the Supreme Court on July 24, 2009.

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] In the judgment RP209/CSK rendered on April 6, 2001 the First Instance Court of Kigali, Special Chamber trying the crime of genocide, the crimes against humanity and other related crimes convicted Hakizimana Augustin of genocide and crimes against humanity and

other related offences. He was sentenced to death penalty and ordered to pay the moral damages equal to 10,000,000Frw to the victims the killing he committed.

[2] Hakizimana Augustin appealed against the judgment to the Kigali Court of Appeal which held in turn that his appeal has no merit. He applied for cassation of the judgment in the Court of Cassation. After the judicial reform, his application was heard by the Supreme Court which dismissed it on the grounds that it was filed in contradiction with the rules of procedure.

[3] Hakizimana Augustin applied for review against the judgment RP209/CSK to Gasabo Intermediate Court alleging that after the delivery of the judgment, there are people who were still alive and some other who died after the genocide while he had been convicted of their murder during genocide. He emphasized that there are persons of whom he had been convicted of having killed while Gacaca Courts convicted some other people for being liable of their death. He explained that those convicts had never accused him of being their coauthor. He added that there are witnesses who testify that he had never played any role in the perpetration of genocide.

[4] In the judgment RP/GEN0001/10/TGI/GSBO rendered on February 2, 2012, Gasabo Intermediate Court decided that his application had merit with regard to the wife of Célestin whom he was accused of having killed, yet she died of ordinary death after the genocide as well as Ndayisenga Bernard who is still alive. However, the Court rejected other grounds of his application as based on the judgments decided by Gacaca Court of Kacyiru Sector as well as the testimonies deposited by various witnesses exculpating him of the alleged death of other individuals.

[5] Hakizimana appealed the judgment to the High Court. The Prosecution then raised an objection of lack of jurisdiction stating that the judgment that had been decided under review can never be subject to appeal. In the interlocutory judgment of February 8, 2013, the Court decided that the objection has no merit.

[6] The Court precised that the judgment which had been tried through review and which is at appeal before it, had been heard by the Intermediate Court of Gasabo at the first instance level since it was of the same nature as of the one rendered at the first instance and hence there is no reason for the High Court to dismiss it at appeal level because the Law determining organization, functioning and competence of courts grants the competence to the High Court to hear at appeal level the judgment rendered by Intermediate Court at the first instance.

[7] With regard to the case laws cited by the Prosecution in order to indicate that the case which had been heard under review cannot be subject to appeal according to the position of the Supreme Court, the Court held that they cannot be applicable in the case because they are not criminal cases and, in addition, they had been decided at the last instance in a such a way that they cannot be subject to any other judicial remedy which differs from the case at hand which had been decided at the first instance.

[8] Furthermore, the Court held that the article 193 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure prohibiting the appeal against the judgment heard under review cannot be applicable in the case since it is referred to in criminal cases in case of absence of specific provisions, which is not the case since the review of criminal cases is provided for by articles 180 - 183 of the Law N°13/2004 of

17/05/2004 relating to the code of criminal procedure and with regard to the appeal against such cases is provided for in general in the law determining organization, functioning, and competence of courts which states that criminal cases decided at the first instance by Intermediate Court are appealed for to the High Court.

[9] After that interlocutory judgment, the Court acquitted Hakizimana of all charges and ordered his immediate release in the judgment on merit rendered on June 21, 2013.

[10] In its appeal of July 12, 2013 to the Supreme Court, the Prosecution alleged that the High Court disregarded that the law does not provides for the possibility of appeal against the judgment decided under review.

[11] The hearing was held in public on July 10, 2013 Hakizimana assisted by counsel Murinzi Jean de Dieu, counsel Mutarindwa Félix and counsel Protais Mutembe, while the Prosecution was represented by National Prosecutor Ruberwa Bonaventure.

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

### **A. Whether the appeal filed by the Prosecution must not be admitted.**

[12] Counsels for Hakizimana raised an objection of inadmissibility of the action of the Prosecution indicating primarily that the latter is not allowed to lodge an appeal against the court decision declaring itself competent. They added that the action should not have been recorded in the court's registry. Finally they requested the court to order for rectification of the mistake made by the Chief Registrar of the Supreme Court.

[13] In support of that, they explain that their objection is provided for in articles 18 and 90 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[14] The Prosecution declared that the objection lacks merit since the cited articles of civil, commercial, labour and administrative procedure do not prevent to lodge an appeal against a decision on the competence of the court; rather, they provide that in case the court deems itself competent to hear the case this decision is subject to appeal together with the judgment in merit, that is, the prohibition relates to the lodging of appeal against the interlocutory judgment in which the court declared itself competent while the hearing of the case on merit is still pending.

[15] The Prosecution further contends that even article 28 of Organic Law N°03/2012/OL of 13/06/2012 determining organization, functioning and competence of the Supreme Court emphasizes the competence of the Supreme Court to hear the appeal of the judgment delivered by the High Court at appeal level in case such judgment were rendered by the incompetent court.

[16] Article 90(2°) of the Law relating to civil, commercial, labour and administrative procedure provides that "if the court rules that it has jurisdiction, one of the litigants who is not contented with the decision appeals against it with the main suit" while article 18(6°) of the same law which concerns the nature of actions that the Court registrar cannot receive and record in the registers of the courts precises that he/ she cannot receive and record in the court register in case of appeal on a judgment rendered upon a case review.

[17] The Court finds that article 90(2°) of the law referred to above concerning civil, commercial, labour and administrative procedure does not prohibit appeal against a decision of the court declaring itself competent to try the case, rather it prohibits to anticipate the appeal against it before the delivery of the judgment in merit.

[18] The Court finds that when article 18(6°) is analyzed together with article 90(2°) imply that the claim that the Court Registrar is prohibited from receiving is the appeal against the decision of the court which declared itself competent to hear the case while the main case is awaiting trial.

[19] The Court finds further that the analysis of articles 18(6°) and 90(2°) made by counsels for Hakizimana does not pay attention to the fact that the reason as to why such an order must be appealed with case on merit is that it is in the context of the interlocutory judgment whereby article 162(2°) concerning civil, commercial, labour and administrative procedure provides that appeal against interlocutory judgments is only done after the main claim had been ruled on, and it must be done together.

[20] Based on all those holdings, the Court decides that the objection raised by Hakizimana's counsels regarding inadmissibility of the claim has no merit and hence there should be an examination of the appeal lodged by the Prosecution.

**B. Whether the High Court had no competence to receive appeal of the judgment that Hakizimana has applied for review to Intermediate Court of Gasabo.**

[21] The Prosecution alleged that the appealed judgment must be quashed since the law does not provide for the possibility of appeal against the judgment which had been heard upon review.

[22] The Prosecution explains that reference made to the case RS/REV/GEN0005/07/CS where prosecution sued Rwahama Anaclet, the Supreme Court clearly held that the judgment decided upon review takes the nature of the original judgment, hence becomes also final and not susceptible of any judicial remedies. The Prosecution also stated that there are many other decided cases which emphasized this position among others RADA0026/10/CS (Nzabandora Alex v. State of Rwanda), RCAA0065/09/CS (Mulemba v. Kabona Justin) and RCOMA001/06/CS (Nzabamwita Emmanuel v. SONARWA). He concluded that the High Court might have taken the same position given that the decisions of the Supreme Court are binding to other courts.

[23] The Prosecution further submitted that though the law relating to criminal procedure which was into force at the time when the case was decided before the High Court, was silent vis-à-vis appeal against the judgment decided upon review, the High Court might have based on the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure which states that the case decided upon review cannot be subject to any other judicial remedy.

[24] Counsels for the accused argue that article 192 raised by the Prosecution in their plea has no relationship with their defense because it only provides that application for review becomes impossible in regard to the judgment which had ever been decided upon review "révision sur révision ne vaut".

[25] They further argue that article 373(3°) of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provide that that law is not referred

to in case it is likely to obstruct the rights the litigant had prior to its promulgation, therefore the Court should not rely on that law since it is prejudicial to Hakizimana.

[26] Regarding the case laws cited by the Prosecution in the context of clarifying its action, they responded that the cited cases have no relationship with the case of Hakizimana since those case laws had been tried at the last instance while the case at hand was decided at the first instance which is not an impediment to appeal.

[27] They argue in addition that the Supreme Court as the highest to all other courts will have to base only on the truth in order to administer justice for Hakizimana instead of being enslaved by the written law while the accused is facing injustice; given that it is the practice in common law system that Rwanda is moving to.

## **THE VIEW OF THE COURT**

[28] In its many decided cases<sup>1</sup> at the time the law N°13/2004 relating to the code of criminal procedure was still into force as well as the Law N°18/2004 of 20/06/2004 relating to civil, commercial, labour and administrative procedure, the Supreme Court held that though those laws did not explicitly stipulate about it, the judgment which had been decided upon review are not subject to appeal because the application for review is an extraordinary remedy which allows the judge to retract his decision in case it is found a reasonable ground among those set for by the law likely to indicate that the judgment would have been adjudicated in the contrary manner if that ground was known. However, the Court reiterated that this remedy does not aim at opening appeal against the judgment which is final because the judgment decided upon review takes the nature of that it replaces, therefore being final as well.

[29] The Court finds that the holdings of the High Court that the position of the Supreme Court is only concerned with civil, commercial, labour and administrative cases have no merit because there are criminal cases which have been adjudicated alike for example Prosecution v. Rwahama Anaclet decided on July 24, 2009<sup>2</sup> in which the Court decided that there is no court assigned by the Organic Law to try appeal of cases which had been heard upon review. Moreover, there is no legal reason as to why criminal cases which had been decided upon review would be subject to appeal while the same cannot be done for civil cases.

[30] The Court finds that the holdings of the High Court that the position of the Supreme Court concerned only the judgment decided at the last instance has no ground since, even all the cases which had been decided at the last instance cannot be appealed through ordinary remedies of appeal.

[31] Furthermore, the Court reiterates that final judgment has the same effects regardless of the degree of instance to which it had been decided since the judgment decided at the first instance and never be appealed against or in respect of which the appeal became inadmissible are both executed in the same way as those decided at last instance. Therefore, the fact that the judgment decided upon review takes the nature of the one it replaces, which implies that

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<sup>1</sup>RADA0026/10/CS (Nzabandora Alex Vs State of Rwanda), RCAA0065/09/CS (Mulemba Vs Kabona Justin), RCOMA001/06/CS (Nzabamwita Emmanuel Vs SONARWA).

<sup>2</sup>RS/REV/GEN005/07/CS (MP vs Rwahama Anaclet).

it cannot be subject to any other judicial remedy though it might have been decided at the first instance since the one it replaces has already become *res judicata*.

[32] The Court reiterates that its position regarding appeal against judgments rendered upon case review was subsequently emphasized in the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure which was published in the official gazette prior to the decision of the High Court which states in its article 193 that a decision rendered upon review can never be subject to appeal or reviewed. It implies that judgment which is tried upon case review becomes final as the one it replaces.

[33] The Court notes further that the same position was again emphasized by Organic Law N°03/2012/OL of 13/06/2012 determining, organization, functioning and jurisdiction of the Supreme Court which was published in the official gazette on July 9, 2012 prior to the decision of the High Court. It states in its article 34(11°) that the Chief Registrar shall not register a lodged appeal in the event of appeal against the judgment rendered upon case review. This also implies that such cases are not appealable because there is no reason as to why such cases (either civil or criminal) cannot be subject to appeal before the Supreme while the same it is possible before lower courts.

[34] With regard to statements made by counsels for the accused that the Court would seek to know the truth instead of being a slave of the written law only as it is the practice in the Common Law System, the Court finds that it has no merit since, aside that Common Law System does not disregard its case law and applicable law, the legal issue at hand is not whether the accused is guilty or not; rather it is the examination on the competence of the High Court vis-à-vis appeal against a judgment resulting from a case review that was rendered by the Intermediate Court.

[35] Therefore, based on all those grounds, the Court finds that the High Court had no competence to try the case at the appeal level the judgment which had been reviewed by the Intermediate Court.

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

[36] Decides that appeal lodged by the Prosecution has merit.

[37] Rules that the High Court had no competence to admit the appeal lodged against the case RP/GEN 0001/10/TGI/GSBO rendered by Intermediate Court of Gasabo on February 2, 2012.

[38] Quashes the judgment RPA/GEN/0001/12/HC/KIG.

[39] Orders the court fees to be paid by the government.