PROSECUTION v. MBABAJENDE ET AL

[Rwanda SUPREME COURT – RPA0148/11/CS (Mukamulisa, P.J., Munyangeri and Hitiyaremye, J.) December 11, 2015]

Criminal Procedure Law – Felony – Prescription of a criminal action – The fact that there have been some acts of investigations and that the case was submitted to the court within the time limit, but without any act of prosecution does not interrupt the prescription of a criminal action – Law N°30/2013 of 24/5/2013 relating to the Code of criminal procedure, articles 2(1&2), 5, 7(1) and 8(1&2).

Facts: As a consequence of the death of two children of Samunane that happened on 5 January 1993, Nyirandegeya was suspected to have poisoned them. Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Uwizeyumuremyi Claude, Sebahire Lucien, Ruzindana Augustin and their other colleagues immediately plotted to kill her and then attacked her home covered up with herbs with intention of misleading people to avoid being recognized. When they reached her home, they beat her first and thereafter beat Mukamusoni and her daughter Mukansanga since they said that they are her accomplices in poisoning. They beat all of them until they died. At the same time they also seriously beat the person named Mukandanga, but fortunately, she did not die.

After opening investigations, the Prosecution has accused different people including the appellants and during their interrogation some of them pleaded guilty while others pleaded not guilty. On 11/11/1993, the case was filed before the Court of First Instance of Byumba through the letter N° 1/0097/RMP 15076/GTBO/MF, but the case was not heard until the Judicial reform in 2004 after which the case was transferred to the High Court on 13/10/2004 and after on 24/7/2009 that Court took the decision N° RP0038/05/HC/KIG whereby it ruled that it does not have territorial jurisdiction and thus ordered its transfer to the High Court, Rwamagana Chamber, for trial by the latter.

The High Court, Rwamagana Chamber, considering their guilty plea during investigations and before the court, ruled that the appellants are convicted of that offence and sentenced each of them to twenty (20) years of imprisonment while it ruled that there has been prescription of the criminal action since they have died.

Ntuyenabo Simon and others were not satisfied with the verdict and then appealed before the Supreme Court stating that they should not have been tried since there has been prescription of the criminal action and regarding the judgment in substance, they alleged that there was no evidence of the cause of death of the deceased. They also alleged that the judge ruled *ultra petita* and that they did not benefit from penalty reduction while they pleaded guilty. The Prosecution state that there is no prescription of the criminal action since the case reached the High Court from The Court of First Instance of Byumba. The court ruled on one ground of appeal regarding the prescription of the criminal action.

Held: The fact that there have been some acts of investigations and that the case was submitted to the court within the time limit, but without any act of prosecution does not interrupt the prescription of the criminal action.

The objection raised by the appellants has merit.
There has been prescription of the criminal action.

The appealed judgment is reversed.
The court fees are allocated to public purse.

Statutes and Statutory instruments referred to:
Law N°30/2013 of 24/5/2013 relating to the Code of criminal procedure, articles 2(1&2), 5 and 7(1) and 8(1&2).

No case referred to.

Authors cited:
Henri Bosly et Damien Vandermeersch, Droit de la procédure pénale, Ed. 2005, p.209 in fine.
Michel Franchimont et alii, Manuel de procédure pénale, 2e Edition Larcier, 2006, p.109.
Serge Guinchard et Jacques Buisson, Procédure Pénale, 3ème édition, p.619, paragraph 1162.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 5 January 1993, two (2) children of Samunane died and it was suspected that they were poisoned by Nyirandegeya. Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Uwizeyumuremyi Claude, Sebahire Lucien, Ruzindana Augustin and their other colleagues immediately plotted to kill her and then attacked her home covered up with herbs with intention of misleading people to avoid being recognized. When they reached her home, they first beat her and after beat Mukamusoni and her daughter Mukansanga since they said that they are her accomplices in poisoning. They beat all of them until they died. At the same time they have seriously beaten the person named Mukandanga, but fortunately, she did not die.

[2] Investigations commenced immediately and Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Sebahire Lucien, Nzamwita Félicien, Ruzindana Augustin, Uwizeyumuremyi Claude, Ngiruwonsanga Alphonse, Bizimana Théogène, Harerimana Faustin, Harerimana Théogène, Ntuyenabo Simon and Kamuhanda Théoneste were charged and, during their interrogations, some of them pleaded guilty while others pleaded not guilty.

[3] After investigations, the Prosecution submitted a case to the Court of First Instance of Byumba on 11/11/1993 through the letter N° 1/0097/RMP15076/GTBO/MF, but the case was not heard until the Judicial reform in 2004 after which the case was transferred to the High Court on 13/10/2004 and after on 24/7/2009 that Court took the decision N° RP0038/05/HC/KIG and ruled that it does not have territorial jurisdiction and thus ordered its transfer to the High Court, Rwamagana Chamber, for its trial by the latter.

[4] On 6/5/2011 the High Court, Rwamagana Chamber, basing on their guilty plea during all investigations carried out and before the court, ruled that Mbabajende Jean Baptiste, Nzamwita Félicien, Uwizeyumuremyi Claude, Ntuyenabo Simon and Kamuhanda Théoneste are convicted of assassination of late Nyirandegeya, Mukamusoni and Mukansanga sentenced each of them to twenty (20) years of imprisonment. As regards Hategekimana Dismas, Turikunkiko Jean Claude, Sebahire Lucien, Ruzindana Augustin, Ngiruwonsanga Alphonse,

Bizimana Théogène, Harerimana Faustin and Harerimana Théogène, the Court ruled that there has been prescription of the criminal action since they have died.

[5] This decision did not please Ntuyenabo Simon and his colleagues and they appealed against it before the Supreme Court stating that they should not have been tried since there has been prescription of the criminal action and regarding the judgment in substance, they alleged that there was no evidence of the cause of death of the deceased. They also alleged that the judge ruled *ultra petita* and that they did not benefit from penalty reduction while they pleaded guilty.

[6] The hearing was publicly held on 26/10/2015 where Ntuyenabo Simon and Kamuhanda Theoneste appeared being assisted by Counsel Ndutiye Yussuf while Nzamwita Felicien and Uwizeyimana Claude did not appear, but having been lawfully summoned while for Mbabajende Jean Baptiste, the court bailiff proved that he had died as confirmed by Nyamirama Cell leaders and the Prosecution was represented by Mutayoba Alphonse, the National Public Prosecutor. On this day, there have been discussions on one ground of appeal regarding the prescription of the criminal action.

II. ANALYSIS OF LEGAL ISSUE

Whether there has been prescription of the criminal action for the offense Ntuyenabo Simon and his fellows are charged with by the Prosecution.

[7] Counsel Ndutiye Yussuf states that there has been prescription of the criminal action for the offense Ntuyenabo Simon and his co-accused are charged with since it was committed on 5/1/1993 while the document that closed the investigations was drafted on 28/9/1993. He stated that despite the existence of a letter of 11/11/1993 that transferred the file to the Court of First Instance of Byumba, there is no proof that it was received, but it is only clear that the dossier reached the High Court in 2005, after 12 years without any thing done upon the dossier. Therefore, he stated that there has been prescription of the criminal action basing on article 112 of the Decree Law N°21/77 of 18 August 1977 instituting the penal code that was into force at that time and he thus realizes that this case should not have been examined by the High Court.

[8] The representative of the Prosecution states that as accepted by the legal counsel for the accused himself, the offense was committed on 5/1/1993 and the file was prepared and filed to the Court of First Instance of Byumba on 11/11/1993 which implies that there was no prescription of the criminal action at this time. He stated that the case file that appeared in the High Court in 2005 was coming from the Court of First Instance of Byumba and not from the Prosecution and it is rather clear that it delayed in the court. He concludes stating that, basing on the grounds invoked by the appellants, there is no prescription of the criminal action since the Prosecution seized the court within the period provided for by the law.

OPINION OF THE COURT

[9] Article 5 of Law N°30/2013 of 24/5/2013 relating to the Code of criminal procedure provides that "Except the crime of genocide, crimes against humanity and war crimes which are not subject to prescription, a criminal action for other offenses shall lapse after a period of ten (10) years for felonies; a period of three (3) years for misdemeanors; a period of one year for petty offences".

[10] Article 7(1) of this Law provides that "The prescriptive period of a criminal action shall be interrupted by conducting investigation or prosecution within the period provided for under article 5 of this Law".

[11] As for article 2(1&2) of this Law, it explains that "Investigation is any act aimed at detecting offences, gathering evidence, whether of an incriminating or exculpatory nature and any act aimed at determining whether or not to prosecute the suspect and that prosecution is any act aimed at referring a matter to the court, summoning parties, appearing before court, preparing the hearing, litigating and using procedures of appeal".

[12] Article 8(1&2) of the above mentioned Law provides that "The prescriptive period of a criminal action shall be suspended whenever investigation or prosecution is precluded by an inevitable obstacle arising from the law or by an event of force majeure. When such an obstacle is removed, the prescriptive period which was suspended shall continue to run from the removal of the obstacle".

[13] Concerning this case, all documents included in the case file prove that the offense alleged against the accused was committed on 5/1/1993, and after investigations, the Prosecution submitted the case to the Court of First Instance of Byumba on 11/11/1993 and the case was recorded in the court registers on 17/1/1994. These documents also prove that another action relating to this case was carried out on 13/10/2004 when the dossier was transferred to the High Court for its trial.

[14] Basing on the laws and the case file elements explained above, the Court finds that the prescription of the criminal action of the case lodged in the Court of First Instance of Byumba on 11/11/1993 was interrupted by its recording in the registers of claims on 17/1/1994 as explained above; which implies that this action should have lapsed on 16/01/2004; that is in a period of ten (10) years from the day preceding the one on which the last act relating to the case was accomplished.

[15] Concerning the statement of the Prosecution that there is no prescription of the criminal action basing on the fact that some acts of investigations were carried out and that the case was referred to the court within the time limit, the Supreme Court finds that this cannot be considered since no act among those provided by article 2(1&2) of the above mentioned Law was performed from the time when the court was seized so that it may have interrupted the prescription. This is in line with opinions of legal scholars who state that, regarding the prescription of the criminal action, it is not enough to submit the case to the court within the time limit provided for, but that it is also necessary to hear it before its prescription (Il ne suffit pas que l'action publique soit introduite devant le juge pénal en temps utile, encore faut-il qu'elle soit jugée dans les délais de prescription)[1].

[16] Another legal scholar moreover states that it is on the date of judgment delivery that it is assessed whether there has been prescription of the criminal action or not. He states that it is the final judgment rendered on a criminal action in the presence of both parties that terminates the prescriptive period if there is no application for judgment cassation. (C'est au jour du jugement qu'il faut apprécier si la prescription est ou non acquise. Ainsi, le jugement qui statue définitivement et contradictoirement sur l'action publique met fin à celle-ci, en l'absence de cassation)[2].

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[1] Michel Franchimont et alii, *Manuel de procédure pénale, 2e* Edition Larcier, 2006, p.109.

[2] Henri Bosly et Damien Vandermeersch, Droit de la procédure pénale, Ed. 2005, p.209 in fine.

[17] The analysis of opinions of these legal scholars and provisions of article 2(1&2) of the above mentioned Law which provides for acts which interrupt the prescription of the criminal action shows that nothing interrupts prescription of a criminal action pending in court in case it was not heard before its prescription; especially that acts which interrupt the prescription of that action include those performed in court as provided by that article and stressed by legal scholars[3].

[18] However, the Supreme court finds that the genocide against Tutsi that happened in Rwanda from 7/4/1994 has suspended the prescription of the criminal action (a suspendu la prescription de l'action publique) and that suspension of prescription must be considered until the time when the Court of First Instance of Byumba that was seized has restarted its functioning after genocide; that is on 10/11/1994 as proved by the claims' registers that its Registry has given to the Supreme Court.

[19] The Supreme Court substantiates statements in the previous paragraph by article 8 par 1 and 2 of the Law mentioned above; of which content is similar to opinions of legal scholars who confirm that the reasons of suspension of prescription of a criminal action can derive from all unexpected factual hindrances constituting force majeure or insurmountable circumstances which cannot allow the prosecution to do anything· It could thus be the case for war, flood or disaster; but also when the accused has fled abroad, it is necessary to wait until the requested extradition is granted so as to start the prosecution (Les causes de suspension de la prescription peuvent aussi résulter de tous obstacles de faits, constitutifs de force majeure ou de circonstance insurmontable, empêchant la partie poursuivante d'agir. Ainsi pourrait-il en aller de la guerre ou d'une inondation ou d'une catastrophe, mais aussi du fait que la personne impliquée s'était réfugiée à l'étranger, il faut attendre que l'extradition sollicitée ait été accordée par l'Etat requis pour entrer en voie de poursuite)[4].

[20] The Supreme Court finds that from the time the complaint was recorded in the register of claims on 17/01/1994, that action should have lapsed on 17/01/2004; but the time of suspension of prescription as explained in paragraph 18 of this judgment should be added to the time of prescription; this means that from 7/04/1994 until 10/11/1994 which is equal to seven (7) months and four (4) days. It means that the prescription of that action has occurred on 4/7/200. Therefore, another act which was done on this file of transmitting it to the High Court on 13/10/2004 was carried out after the prescription of the criminal action.

[21] Basing on the above explanations, the Supreme Court finds that the High Court, Rwamagana Chamber, should not have received and tried this case which is the reason why this Court nullifies the judgment rendered by that Court on this case.

III. DECISION OF THE COURT

[22] The Court rules that the objection raised by Ntuyenabo Simon and Kamuhanda Theoneste regarding the prescription of the criminal action has merit,

[23] The Court rules that there has been prescription of the criminal action;

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[3] Idem, p.212-216.

[4] Serge Guinchard et Jacques Buisson, Procédure Pénale, 3ème édition, p.619, paragraph 1162.

[24] The Court rules that the judgment RP0043/09/HC/RWG rendered by the High Court, Chamber of Rwamagana on 6/5/2011 is vacated;

[25] The Court rules that the court fees are allocated to the Public Purse.