

PROSECUTION v. MUZATSINDA

[Rwanda SUPREME COURT – RS/REV/INJUST/PEN.0001/16/CS (Mugenzi, P.J., Mutashya and Gatete, J.) June 10, 2016]

Criminal Law – Cohabitation – Living as cohabitants permanently – It is qualified as cohabitation, considering the period they spend together, with effect of being considered by neighbours and others as spouses, without taking into account the length of that period, but their cohabitation must be accompanied by the facts leading to believe beyond doubt that those persons live together as wife and husband – Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 247.

Criminal procedure – Discretion of the prosecutor to prosecute – The fact that one of the cohabitants was not prosecuted, does not release the prosecuted co-offender from his criminal liability – Law N°13/2004 of 17/05/2004 relating to the code of criminal procedure, article 43.

Damages – Damages resulting from criminal liability between spouses – It is not forbidden to order one of the spouses to pay his/her partner moral damages resulting from criminal liability, even if they live under the community of property regime.

Facts: The accused was brought before the Primary Court of Nyarugunga charged with the offence of cohabitation, the court acquitted him basing on the fact that the Judge found no proof of cohabiting with his claimed cohabitant as husband and wife permanently, because he resides in Belgium, in addition to that, the witnesses heard did not reveal that they live together permanently.

The claimant for damages appealed to the Intermediate Court of Nyarugenge, submitting that the court disregarded witness declarations proving that the accused had a cohabitant, she also appealed for damages that the Primary Court denied granting her. The court decided that, the appeal lodged by the claimant for damages has merit, that the accused is criminally liable for cohabitation and sentenced him to 6 months of imprisonment and fine of one hundred thousand Rwandan francs (100,000Frw). The court further ordered him to pay moral damages to the claimant.

The accused applied for review due to injustice to the Supreme Court under the procedure stating that the Intermediate Court of Nyarugenge disregarded the evidence by relying on false statements of witnesses as well as the provisions of the law punishing cohabitation where the court found him criminally responsible to have permanently stayed at Nyirantakirutimana Espérance’s home, which is not possible because he cannot reside at Nyirantakirutimana Espérance’s home and in Belgium where he resided at once.

The prosecutor requested the court to interpret the words “live together permanently”, because the law does not explain it, in order to find out whether it means living together on daily basis up to death, living together permanently, coming repeatedly, or come and stay for one week, one, two, three months, or a year is enough to be qualified as such.

Held: 1. For the offence of cohabitation, the word “live together permanently” does not mean living together to death or living as legally married, it is rather being considered as husband and wife by people and neighbours basing on their behaviours during the period they spend together regardless of its length. In addition, their cohabitation have to demonstrate tangible

facts that leave no doubt to confirm that such persons live as husband and wife such as living, sleep, welcoming guests, shopping, accompanying kids to school, etc... together.

2. The prosecution has privilege of prosecuting or not, for that reason, the fact that one of cohabitants was not prosecuted does not release the prosecuted co-offender from his criminal liability.

3. It is not forbidden to order one of the spouses to pay his/her partner, moral damages resulting from criminal liability, even if they live under the community of property regime, therefore, there is no injustice in ordering the accused to pay moral damages.

Application for review of judgment due to injustice has no merit.

Statute and statutory instruments referred to:

Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, articles 247 and 249.

Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, articles 2(4°) and 21(2°).

Law N°13/2004 of 17/5/2004 relating to the code of criminal procedure, article 43.

Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 65.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case begun in the Primary Court of Nyarugunga where Muzatsinda was accused of cohabitation upon complaint of her wife Umutesi Afisa claiming that he is cohabiting with another woman known by names of Nyirantakirutimana Espérance. The court found him not guilty because the judge found no proof of cohabitation as husband and wife permanently, as Muzatsinda was domiciled in Belgium and witnesses heard did not demonstrate that they live together permanently.

[2] Umutesi Afisa, the aggrieved party, appealed to the Intermediate Court of Nyarugenge submitting that the court disregarded witness declarations proving that the accused had a mistress. She also appealed for damages that the Primary Court denied granting her.

[3] The case was tried in default of Muzatsinda who was duly summoned and the Court pronounced the verdict on 09 May 2013 whereby it decided that Umutesi Afisa's appeal has merit, and overturned the judgment rendered by the Primary Court of Nyarugunga on 31 July 2012. It found Muzatsinda Emmanuel guilty for the offence of cohabitation, sentenced him to six months of imprisonment and payment of fine equivalent to one hundred thousand Rwandan francs and ordered him to pay moral damages of 500,000Frw to Umutesi Afisa.

[4] The evidence by which the court has based on to find him guilty include, the testimony declared by several persons, among them, Nshimiyimana Jean Damascène, a village leader who has witnessed that he used to see him at Nyirantakirutimana Espérance home as her husband, ignoring that he was married to another spouse, Harerimana also known as Kazungu who also confirmed that Muzatsinda Emmanuel and Nyirantakirutimana Espérance lived together as husband and wife, Byukusenge Claudine who testified that she

used to be given a lift by Muzatsinda Emmanuel together with Nyirantakirutimana Espérance and Kamana Sylvestre who is in charge of night patrol, proved that summons were served at Nyirantakirutimana Espérance because she was considered as a spouse to Muzatsinda Emmanuel.

[5] With regard to moral damages requested by Umutesi Afisa, the court found them to be excessive and in its discretion, she was awarded five hundred thousand (500,000Frw), whereas for requested damages of 14,400,00Frw for Muzatsinda's family abandonment, the Court denied granting her these damages as she did not prove their basis.

[6] Muzatsinda Emmanuel applied for review of the judgment due to injustice before the Supreme Court, stating that the Intermediate Court of Nyarugenge disregarded the evidence, by considering the false statements of the witnesses as well as the provisions of the law reprimanding cohabitation.

[7] For the office of Ombudsman, the fact that Muzatsinda Emmanuel was prosecuted alone on the offence of cohabitation whereas according to article 249 of the penal code, it is compulsory that the prosecution be instituted against both accused spouse and the co-offender, there had been injustice due to the violation of the provision, especially that one of the grounds of Umutesi Afisa's appeal, Nyirantakirutimana Espérance was not prosecuted.

[8] In addition, the office of the Ombudsman was of the view that moral damages of 500,000Frw that Muzatsinda Emmanuel was ordered to pay her wife Umutesi Afisa was baseless and the judgment disregarded that they were married under community of property regime, for that reason, it petitioned for the review of the judgment RPA0250/12/TGI/NYGE due to injustice basing on articles 79 and 81 of Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court.

[9] After receiving the ombudsman's letter for the review of that judgment due to injustice, after examining the report from Inspectorate General of Courts on this case, with reference to article 80 of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, the Chief Justice approved the judgment RPA0250/12/TGI/NYGE to be recorded in the court registers for review.

[10] The hearing was held on 25 April 2016, Muzatsinda Emmanuel assisted by counsel Barahira Eric and counsel Ruberwa Pierre, Umutesi Afisa (the claimant for damages) assisted by counsel Ayifayi Augustin while the prosecution was represented by Mukunzi Faustin, the National Prosecutor.

[11] In addition to the ombudsman's grounds for the judgment review, Muzatsinda Emmanuel raised that he was found guilty of cohabitation whereas he was not living at Nyirantakirutimana Espérance permanently as provided for by article 249 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code.

II. ANALYSIS OF LEGAL ISSUES

[12] Among legal issues for determination in the present judgment, include the interpretation of the words "live together permanently" provided for by article 247 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, to examine whether there is tangible evidence proving that Muzatsinda Emmanuel and Nyirantakirutimana Espérance lived together permanently to the extent that it can be qualified as cohabitation, to

examine whether failure to prosecute Nyirantakirutimana Espérance consists of injustice and to know whether one of the spouses married under community of property regime can be ordered to pay damages resulting from the offence to his partner.

A. Whether there is tangible evidence proving that Muzatsinda Emmanuel and Nyirantakirutimana Espérance live together permanently to the extent that it can be qualified as cohabitation.

A.1. To examine the issue of the interpretation of the words “live together permanently” provided for by article 247 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code.

[13] Muzatsinda Emmanuel states that he was found guilty of cohabitation basing on the fact of staying at Nyirantakirutimana Espérance permanently whereas he was not staying/living there permanently. He explains he used to pass by to visit her as his family friend and he adds that it was impossible to reside there because he cannot reside at Nyirantakirutimana Espérance’s and in Belgium at the same time.

[14] The aggrieved party, Umutesi Afisa argues that the cohabitation occurred since Muzatsinda Emmanuel used to come to Rwanda for 3 months and throughout this period, he was staying at Nyirantakirutimana Espérance and this is known by her neighbours.

[15] Counsel Ayifayi Augustin maintains that for the offence of cohabitation to be committed, there is no required period, as this may be short or long, a month or a year, therefore what is important is the perception of their behaviours by the public.

[16] The prosecutor requests the Court to interpret the words “live together permanently”, because the law does not explain it in order to find out whether it means living together to death, live together permanently, coming repeatedly, or come and stay one week, one, two, three months, or a year.

THE OPINION OF THE COURT

[17] Article 247 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code states that Cohabitation is *a de facto* union between a man and a woman who live together permanently; either one or both are legally married.

[18] The Court finds that the aforesaid article 247 did not provide the length of the period of staying together for a man and a woman to be qualified as cohabitation.

[19] The Court finds that the interpretation of the words “live together permanently” would not be living together to death, living permanently as legally married husband and wife, rather being considered as husband and wife by people and neighbors basing on their behaviors during the period they spend together regardless its of length. In addition, their cohabitation needs to demonstrate tangible facts that leave no doubt to confirm that such persons live as husband and wife such as living, sleeping, receiving guests, shopping, accompanying kids to school, etc....together.

A.2. Whether there was enough evidence to find Muzatsinda Emmanuel guilty of cohabitation.

[20] Muzatsinda Emmanuel contends that the judge based on inconsistent statements of witnesses, whereby he stated that witnesses testified against him for living with Nyirantakirutimana Espérance, which is wrong because he resides in Belgium, and that when he comes in Rwanda, he stays at his home in Rugunga.

[21] Counsels for Muzatsinda Emmanuel explains that he possesses Belgium residence permit which evidences that he resides in Belgium instead of Rwanda. They add that village and cell authorities have issued a document informing that Muzatsinda is not registered there, for that reason, the statements of witnesses cannot prevail over official documents.

[22] With regard to summons of Muzatsinda Emmanuel served at Nyirantakirutimana Espérance, they explain that they were not received by Muzatsinda because he was in Belgium, therefore the Court should not have considered statements of witnesses whereas they possess documents indicating Belgium as a place of residence for Muzatsinda Emmanuel.

[23] Counsel Ayifari Augustin contends that Muzatsinda Emmanuel cannot demonstrate documents of the hotel where he used to stay while in Rwanda, he rather used to stay at Nyirantakirutimana Espérance who is not her sister, and he says that despite the documents issued by village leaders stating that he doesn't reside in Rwanda, it does not mean that he had no stay in Rwanda.

[24] The Prosecutor states that contrary to Muzatsinda's position, there is no contradiction in statements of witnesses, because the declarations of Byukusenge Claudine found on identification mark 29 state that she used to see Muzatsinda Emmanuel and Nyirantakirutimana Espérance getting in and out of the same home and used to facilitate her transport when accompanying kids to school on their way to town in the morning. The Prosecutor adds that on identification mark 31, Nshimiyimana confirmed that Muzatsinda Emmanuel stays at that home and Kamana who is in charge of night patrol declares that when he was serving summons, they were received by Nyirantakirutimana Espérance as this can be found on identification mark 33. He adds that there is another witness Harerimana Jean on identification mark 35 who said that Nyirantakirutimana Espérance was cohabiting with a married man.

[25] He adds that article 247 states that Cohabitation is *a de facto* union between a man and a woman who live together permanently while each one is legally married. Therefore he compares living permanently with a situation where a public servant who works in province with a residence in Kigali, which does not mean that a couple is not living together permanently. He further requests the court to examine that provision since the law has differentiated cohabitation from adultery, but that it is not possible to deny a fact of living together permanently for a stay of three months.

THE OPINION OF THE COURT

[26] The article 2(4°) of the law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence and article 247 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, both provisions provide cohabitation as union of non-married couple as a husband and a wife who live together permanently; either one or both being legally married.

[27] The file contains the statements of the various witnesses including Nshimiyimana Jean Damascène, a leader for Muhabura village, who confirmed that he didn't know that Muzatsinda Emmanuel has any other wife than Nyirantakirutimana Espérance. He also mentioned that even Muzatsinda Emmanuel's summonses were served at her home, the place where Muzatsinda stayed.

[28] There is also a statement found in file from a witness called Harerimana Jean who has declared that Muzatsinda Emmanuel and Nyirantakirutimana Espérance live as a wife and a husband, rather he was not aware of the existence of any other legally married wife for Muzatsinda Emmanuel. There are also other witnesses including Byukusenge Claudine who has witnessed that they used to drop her when accompanying the kid to school, as they went to work in the morning, the witness Kamana Sylvestre who is in charge of night patrol has also said that he knows Muzatsinda Emmanuel as a husband for Nyirantakirutimana Espérance and summons were served at her home and received by Nyirantakirutimana Espérance.

[29] The court finds that even though Muzatsinda Emmanuel denies to have been cohabiting with Nyirantakirutimana Espérance permanently, alleging that he resides in Belgium and stays in his house located in Rugunga when he comes in Rwanda, this statement should not be considered due to the fact that he did not contradict the statements of the above said witnesses testifying that every time he came in Rwanda, his arrival used to be at Nyirantakirutimana Espérance home and they live as husband and wife and considered as such, to the extent summonses were served to the same address.

[30] The Court finds the statements of witnesses interrogated not contradictory as Muzatsinda Emmanuel intends to convince, rather they are complementary as they all testify the fact that Muzatsinda Emmanuel stayed at Nyirantakirutimana Espérance all along his stay in Rwanda. They added that they did not know that he has another legally married wife, for that reason, their statements must be considered basing on article 65 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production,¹ because they testify what they personally saw.

[31] With regard to the arguments of Muzatsinda Emmanuel, that he resides in Belgium instead of Rwanda, that there are supporting documents issued by village authorities, that it was impossible to live permanently at Nyirantakirutimana Espérance and in Belgium, the place of his residence, at the same time; the Court finds that this ground cannot be considered because the having no residence in Rwanda does not entail that he had not stayed in Rwanda.

[32] The court finds that the fact of coming in Rwanda and stay for more than two months at Nyirantakirutimana Espérance can be qualified as he lives there permanently as he stays there and living together in the manner known by all, having his address there, and this happened repeatedly as he always used to find accommodation in the same home when he came to Rwanda, and in addition to that, he also admits that he could not miss to go there because Nyirantakirutimana Espérance's husband was a friend to him.

[33] The court finds that on the basis of above findings, no injustice exists in the judgment as far as this issue is concerned.

¹ Only the court can assesses the relevance, pertinence and admissibility or rejection of testimonial evidence. It shall not be influenced by the number of witnesses. It shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonies.

B. Whether failure to prosecute Nyirantakirutimana Espérance would consist of injustice.

[34] Muzatsinda Emmanuel states that he was prosecuted alone contrary to the provision of article 249 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which provides that the prosecution is instituted against the accused spouse and the co-offender, for that reason, there is injustice in the fact that his co-offender was not prosecuted.

[35] The counsel for Muzatsinda Emmanuel is of the view that injustice happened, alleging that the provisions of the law relating to prosecution of the offence of cohabitation were disregarded because Nyirantakirutimana Espérance, the co-offender for Muzatsinda Emmanuel was not prosecuted.

[36] Counsel Ayifayi Augustin argues that the complaint was brought to the police against both, therefore the aggrieved party cannot be held responsible for prosecuting Muzatsinda Emmanuel alone, because she played her role.

[37] The prosecutor contends that there is no injustice for prosecuting Muzatsinda alone, because the fact that Nyirantakirutimana Espérance was not prosecuted is not likely to exclude Muzatsinda from liability.

THE OPINION OF THE COURT

[38] Article 21, paragraph 2 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence states that penalties provided for paragraph one of this article shall apply to any person accepting to become a concubine.

[39] Article 249 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code states that for the prosecution of adultery and cohabitation, it is instituted against the accused spouse and the co-offender.

[40] The court finds that the documents in the file demonstrate that Nyirantakirutimana Espérance and Muzatsinda Emmanuel were both investigated by the judicial police on the same offence of cohabitation and they were issued the statements of detention as found in the investigation file. They were also prosecuted by the Primary level of as found in their interrogation statements on identification marks 66-69, therefore it is found that Nyirantakirutimana Espérance was prosecuted despite she was granted a provisional release.

[41] The court finds that article 249 of the Organic Law N°01/2012/OL of 02/05/2012 mentioned above, on which Muzatsinda Emmanuel bases his arguments that the co-offenders for the cohabitation must be both prosecuted, should not be applicable to this judgment, because that law was not in force during the commission of the offence, rather the law into force was the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence and it does not provide for compulsory prosecution of both co-offenders for the offence of cohabitation.

[42] The Court finds only that this article means that when a cohabitant is prosecuted, he or she shall be sentenced to the same penalties as his or her co-offender.

[43] The Court finds in addition that, though both cohabitants were to be prosecuted, it does not imply the failure to prosecute one of them renders the rest innocent.

[44] In addition, basing on the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, the prosecution had privilege of prosecuting or not and sue an accused of their choice before the court as was provided for by article 43 of the Law N°13/2004 of 17/05/2004 relating to the code of criminal procedure, which was into force during the commission of the offence, where that provision bestows the prosecution with the discretionary power over the files transferred by the judicial police, and this power includes closing the file it finds the prosecution inconvenient.

[45] Basing on the grounds in the previous paragraphs, the court finds no injustice on this issue.

C. To examine whether Muzatsinda Emmanuel should not have been ordered to pay Umutesi Afisa damages while they are married under the community of property regime.

[46] With regard to the fact that Muzatsinda Emmanuel should not have been ordered to pay Umutesi Afisa damages while they are married under the community of property regime, the court finds this ground without merit because Umutesi Afisa claimed those damages basing on article 131 of the Law N°13/2004 of 17/05/2004 relating to the code of criminal procedure, which was in force when she filed her claim for damages due to moral prejudice of being victim of the offence committed by her husband Muzatsinda Emmanuel, the issues if any, would happen in execution but this is not likely prevent the victim from being awarded damages.

[47] The court finds that the fact that Umutesi Afisa and Muzatsinda Emmanuel are married under the community of property regime, does not impact the fact that Muzatsinda Emmanuel committed the offence against his wife and related damages as well and in addition, he did not advance any reason exempting one of the spouses to pay damages resulting from an offence to his or her partner.

[48] The court finds therefore no injustice on this issue.

III. THE DECISION OF THE COURT

[49] Finds the petition initiated by Muzatsinda Emmanuel for review of the judgment RPA0250/12/TGI/NYGE due to injustice without merit.