

## PROSECUTION v. HABIMANA

[Rwanda SUPREME COURT – RPAA0321/10/CS (Mugenzi, P.J., Nyirinkwaya and Rugabirwa, J.) March 18, 2016]

*Law of evidence – Oath of an expert – The value of a report not preceded by an oath of its issuer – Although the Law provides that an expert’s report must be preceded by an oath, failing to do so nullifies the report, nothing prohibits such a procedural error rather than substantial to be rectified, like when the issuer appears before the court and make an oath before providing explanations thereof – Law N°15/2004 of 12/04/2004 relating to evidence and its production, article 93.*

*Damages – Award of damages – Damages awarded by the previous court in its discretion cannot be changed unless proven to be excessive.*

**Facts:** The accused was prosecuted for having defiled a six-year-old child, when her grandmother entrusted her to him, on their way from church so that he can bring her to her mother who was his neighbor and on the way, he refused that the girl goes with another man who is their neighbour but instead, he defiled her behind a house. The Intermediate Court of Nyarugenge convicted and sentenced him to ten years of imprisonment and the fine of one hundred thousand Rwandan francs (100,000Frw), his penalty being reduced because he was young, aged of 25year old. Furthermore, the victim’s mother was granted moral damages of five hundred thousand (500.000Frw).

He lodged an appeal to the High Court, whereby his appeal was found without merit, on the grounds that his defence that the victim was consulted by a doctor three days later, and the medical report is not clear in a clear way that cannot be considered, because the court requested the explanations from the doctor who made the report and she proved that the child was defiled and the fact of being examined three days later does not wipe off the offence. He appealed to the Supreme Court, stating that he was convicted without tangible convicting evidence, that his defence was not considered, whereby he stated that he brought the victim near her home and pointed a finger at her home. He added that even the testimony of the teacher was not supported by evidence and the medical report does not prove that he is the one who defiled the victim.

The prosecutor states that the medical report was issued without being preceded by the oath but the issuer wrote her names and then signed, therefore, it cannot be annulled because such irregularities were caused by the fact that the doctor is not a lawyer, in addition it was not the sole evidence based on to convict the accused.

**Held:** 1. Although the law provides that an expert’s report must be preceded by the oath, failing to do so annuls it, nothing prohibits such procedure error instead of substantial to be rectified, for instance by summoning its issuer before the court and take oath before providing related explanations, something that happened in the course of hearing, when the physician took oath before the court, before displaying the content of the report. Therefore, the medical report must be considered.

2. Damages granted by the previous court in its discretion cannot change unless proved to be excessive.

**Appeal without merit.**

**Appealed judgment sustained.  
Court fees reserved to the public treasury.**

**Statutes and statutory instruments referred to:**

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 93.

Law N°15/2004 of 12/04/2004 relating to evidence and its production, articles 93 and 108.

**Cases referred to:**

RPAA0039/12/CS, Prosecution v. Ntakiyimana and Mugirwanake, rendered by the Supreme Court on 26 February 2016.

RPA0018/10/CS, Prosecution v. Rubyiruko et al rendered by the Supreme Court on 25 November 2011.

RPA0227/08/CS, Prosecution v. Sibomana rendered by the Supreme Court, on 19 February 2010.

## **Judgment**

### **I. BRIEF BACKGROUND**

[1] Habimana Jean Claude was prosecuted for having defiled a six-year-old child named U.Y on 14 June 2008, when her grandmother entrusted her to him, so that he can bring her to her mother who was his neighbor and on the way, he refused that the girl goes with another man who is their neighbor but instead, he defiled her behind a house. In the judgment RP0540/08/TGI/NYGE, rendered on 27 March 2009, he was convicted and sentenced to ten years of imprisonment and a fine of one hundred thousand Rwandan francs (100,000Frw), his penalty being reduced because he was young and aged 25 years. Furthermore, Umumararungu Sylvie, the victim's mother was granted moral damages of five hundred thousand (500,000Frw).

[2] Habimana appealed to the High Court, which rendered the verdict of the judgment RPA0440/09/HC/KIG on 18 February 2010, whereby it found his appeal to be without merit stating that his defence that the victim was consulted by a doctor three days later, and the medical report is not clear in a clear way cannot be considered, because the court requested the explanations from the doctor who made the report and she proved that the child was defiled, and that the fact of being examined three days later does not wipe off the offence.

[3] The court went on to explain that his defense that the injuries to the victim's sex were caused by the defilement and that even the teacher of the victim testified without evidence lack merit because Habimana did not prove what had hurt the victim who was entrusted to him so that he could bring her home. In addition, the teacher proved how the victim missed class and Habimana's sisters went to see her at school and apologized to her mother.

[4] Habimana appealed to the Supreme Court, stating that he was convicted without tangible convicting evidence, regardless of his defence whereby he stated that he brought the victim near her home and pointed a finger at her home. He added that even the testimony of the teacher was not supported by evidence and the medical report does not prove that he is the one who defiled the victim.

[5] In the court hearing, Habimana and his counsel stated that the claim for damage should not have been received in the previous courts because they have no basis.

[6] The hearing was held in public on 5 October 2015 and 15 February 2016, Habimana Jean Claude being assisted by Counsel Habimana Adolphe, Umumararungu Sylvie, the civil party was not present though legally summoned, while the prosecution was represented by Bunyoye Grâce. In course of the hearing of 15 February 2016 Dr. Rumanya Liliane was present.

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

### **Whether Habimana Jean Claude was convicted without evidence.**

[7] Habimana states that the court convicted him without facts because the testimony given by the teacher was not supported by evidence, medical report was confusing, rather, it relied on testimony given by the victim's mother that he did not bring the child home, disregarding his defence.

[8] He keeps explaining that the testimony given by the teacher whereby he stated that the child missed class; this was not supported by attendance book. He adds that even in case she had missed class, it would not have proved that she was defiled by Habimana.

[9] He states that the victim's mother testimony repeats of what was told by the victim and the latter stated that he defiled her and one can wonder why she did not immediately inform her mother once she reached home, she did not cry for help when she was being defiled, and her mother did not immediately file the claim against him while he knew him, rather, she waited to arrest him on his way when they met, tricking him that he could help her to resolve an issue she had at the police station.

[10] Habimana states that the medical report could not be relied on to convict him because it is inconsistent with the law as the doctor did not take oath and it does not prove that injuries found on the victim were caused by defilement and committed by Habimana.

[11] He argues that the grounds of his defence were not considered while he proved that he was requested by Safi, an old woman who used to teach them bible, to take the victim home, and when he reached near, he showed her home by pointing finger and he went back home, he was surprised that he was arrested three days later when he met the victim's mother and the latter tricked him that he could help her with an issue she had at the police station, and if he was guilty, he could not go there.

[12] The prosecutor states that the medical report was issued without being preceded by the oath but the issuer wrote her names and then signed, therefore, it cannot be annulled because such irregularities were caused by the fact that the doctor is not a lawyer, especially that it was not the sole evidence based on to convict Habimana. He adds that another report in the same conditions as this was considered by the Supreme Court in the case RPA0227/08/CS of 19 February 2010, Prosecution vs Sibomana Nathanaël.

[13] He argues that it is not a medical Doctor who certifies that the victim was defiled, rather, he exposes what was remarked on the victim's body as he stated that there were wounds on the victim's thigh and sex and that she was no longer a virgin. These have to be confronted with the victim's statements to let the court convict the accused.

[14] With regard to the testimony given by Mukakabego, the teacher of the victim, the prosecutor states that she did not contract herself because she was not heard before, but she was heard by the court and Habimana was given the time to react on it, As for attendance book, he did not claim it. He states that his defence that she had missed class due to other sicknesses, is contradicted by the medical report proving that the child had signs that she was defiled.

## **OPINION OF THE COURT**

[15] As demonstrated in the case file, Habimana acknowledges that he was entrusted with Ugirimbabazi at evening when they came from church to bring her home but he did not. Moreover, her mother states that she reached home late and when she asked her the reason of that, she replied that she was with Habimana and two days later, she noticed that the girl could hardly seat and walk until she checked her private parts and noticed small wounds and when she asked her what happened to her, replied that when she came home with Habimana, the latter removed her short and inserted his sex into hers, telling her that if she makes it known, he would kill her.

[16] The testimony of Mukakabego, teacher of the victim also proves that she noticed that she missed class several times and when she came she was bored and she could hardly sit down, she called her mother and the latter told her that she was defiled and that the matter was notified to the police station.

[17] The medical report issued on 15 June 2008, 3 days after Habimana escorted Ugirimbabazi, proved that she was no longer virgin, that lesions in the thigh, vagina and vulva were noticed on her, and the doctor proved the same once he appeared before the court on 15 February 2016, adding that the power to determine whether she was defiled or the person who committed it does not belong to him.

[18] Even Habimana during his provisional detention or release hearing<sup>1</sup> admitted that he was with the victim at around 7:00, entrusted to him by her grand-mother so that he brings her home but he did not. He furthermore stated that Ugirimbabazi wanted to go with her neighbour but he refused; rather, they waited about five minutes, waiting for another person who could bring her but finally, he did not take her home but showed her the way by pointing the finger so that she can go alone.

[19] The court finds that there are corroborated evidence convicting Habimana, namely the fact that Umumararungu, the victim's mother remarked small wounds on the private parts and she told her that she was defiled by Habimana, the medical report proving that the victim was defiled, especially that the time revealed by the victim is the same as when Habimana was given her to take home but he did not, while it was the night and Habimana stated himself that someone else wanted to take her home but he refused.

[20] The court finds that basing on article 108 of the Law N<sup>o</sup>15/2004 of 12/04/2004 relating to evidence and its production, which explains presumptions, all these evidence make

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<sup>1</sup>See the minute of provisional detention or release of 23 June 2008, p.17.

important precise and consistent presumptions,<sup>2</sup> leading the court to convict beyond any reasonable doubt that Habimana committed the offence of defilement,<sup>3</sup> therefore, his appeal lacks merit.

[21] The court finds without merit the defence of Habimana criticising the testimony made by the victim's mother and her teacher because it does not prove that they said lies when they revealed that the victim had problems and stated that she was defiled, but the medical report proved the same. Habimana failed to prove to the court the reason behind the victim's mother which would lead her to falsely incriminate him, but during his interrogation in the judicial police, he stated that there was no conflict between them.

[22] With regard to the medical report, the accused criticises the fact that it does not indicate the oath of the issuer as provided for by article 93 of the Law N° 15/2004 of 12/06/2004 relating the evidence and its production<sup>4</sup>, the court finds that although the report is not preceded by the oath as provided for by the law, and absence of the oath annuls it, nothing prohibits such procedure error instead of substantial to be rectified,<sup>5</sup> for instance by summoning its issuer before the court and take oath before explaining it,<sup>6</sup> something that happened on 15 February 2016, when Dr Rumanya Liliane took oath before the court before displaying the content of the report. Therefore, the report must be considered.

#### **With regard to damages granted by the High Court**

[23] Rwigema, the counsel for Habimana argued that the claim for damages was illegally initiated as it was by the minor and it was rectified by the Intermediate Court of Nyarugenge, in the course of the hearing of 1st October 2008 while it was not competent to change the subject matter of plaintiff, therefore, it could not be received to be analysed. However, he adds that although it could be given merit, damages were granted without relevant facts by the civil party.

[24] The court finds that the decision was made by the precedent courts with regard to the receivability of the civil claim, and the procedure in which it was initiated was rectified and Habimana did not appeal against it, therefore, he cannot be allowed to talk about it again.

[25] With regard to evidence of damages which was not demonstrated as claimed by Habimana, the court finds that he does not explain the kind of evidence needed, while 500,000Frw granted in the court's discretion are moral, and he does not prove them to be excessive.

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<sup>2</sup>Article 108 states: "Presumptions that have not been established by the law are left to the discretion and wisdom of the court. The court shall admit only those presumptions if they are important, precise and consistent".

<sup>3</sup>Presumptions were also based on other case laws rendered by this court: see judgment RPAA 0039/12/CS of 26/02/2016, Prosecution v. Ntakyimana and Mugirwanake and the judgment No RPA0018/10/CS of 25/11/2011, Rubyiruko Sylvestre et al v. the Prosecutor.

<sup>4</sup> Article 93 provides that the report is signed by all the experts. The signing of experts shall be invalid, if not preceded by the following declaration: I ....., swear that I have fulfilled my mission completely and conscientiously, with accuracy and honesty. May I face the law if I did not do it with the due accuracy.

<sup>5</sup> Article 93 of the Law No 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that procedural acts nullified due to irregularity in form shall regain validity upon corrections as long as corrections do not have any impact on the subject matter.

<sup>6</sup> See the judgment RPA0227/08/CS of 19/02/2010, Prosecution v. Sibomana Nathanaël.

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

[26] Finds the appeal lodged by Habimana Jean Claude without merit;

[27] Sustains the judgment RPA 0440/09/HC/KIG rendered on 18 February 2010 by the High Court;

[28] Orders the court fees to be charged to the public treasury.