

## MUHIRWA ET AL v. NZEYIMANA

[Rwanda SUPREME COURT – RPAA0021/16/CS – RPAA0002/2016/CS (Kanyange, P.J., Nyirandabaruta and Gatete, J.) May 12, 2017]

*Criminal Procedure Law – Filing an action by private prosecution procedure – The jurisdiction of the Supreme Court over the second appeal in criminal cases – Only the penalty that has been provided for shall determine the competence even though the plaintiffs sued by private prosecution procedure – Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28(3).*

**Facts:** The case started in the Primary Court of Rusororo where the plaintiffs instituted a criminal action against Nzeyimana Bertin and Mukayisenga Cecile through the private prosecution procedure for the offences of breach of trust, forging documents and use of counterfeited document and fraudulently receiving funds or cash instruments. That court found that some of the offences were not under its jurisdiction and transferred the case to the Intermediate Court of Gasabo, that Court decided to remove Mukayisenga Cecile in the case basing on the fact that she was not interrogated on the offences for which she was prosecuted whereas it convicted Nzeyimana Bertin for the offence of breach of trust as well as fraudulent acquisition of documents issued by the competent authorities and sentenced him to one year (1) of imprisonment, the fine equivalent to 500,000Frw and to refund court fees to the plaintiffs.

Both parties lodged an appeal to the High Court, the Court found Nzeyimana Bertin not guilty of the offences is being charged of and the appeal of the claimants of damages was found to be without merit. They appealed to the Supreme Court where the Court first examined whether their appeal is under the jurisdiction of the Supreme Court. On this issue the appellants demonstrated that the competence of the Supreme Court is based on the evidence of the sale contract between Nzeyimana and Mukayaramba Verediyana which was referred to in the ruling whereas it was presented to the Court after the closure of the hearing. They also stated that the competence of the Court is based on the value of the money equivalent to 1,178,668,446Frw. The defendant argued that the evidence was presented and debated upon in hearing, it is contained in the case file and it was also communicated to them. Furthermore, he argued that in the determination of the jurisdiction of Court, the amount requested by the parties is not considered, rather, the amount ordered by the court. They also argue that in criminal cases, the penalty that has been provided for shall determine the competence of the Supreme Court.

As for the Prosecution, since the appellants filed an action through private prosecution procedure, it would continue in such procedure, but in the interest of justice, the case should follow the same procedure as other criminal cases. They kept on explaining that even if the prosecution did not sue, the issues is whether the appeal would be based on damages, and the grounds on which the Court would base in determination of the damages in case such action is admitted, whereas there is no criminal action.

**Held:** Only the penalty imposed is the one to determine the competence of the Supreme Court over the second appeal, even though the plaintiffs would have sued by the procedure of private prosecution. The plaintiffs' appeal is therefore not in jurisdiction of the Supreme Court.

**Appeal does not fall into the jurisdiction of the Supreme Court.  
Court fees to the appellants.**

**Statute and statutory instruments referred to:**

Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28, paragraph 2(7°, 8°, 9°) and paragraph 3.

Organic Law N°51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, article 164.

Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, article 187.

**No case referred to.**

## **Judgment**

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

[1] Muhorakeye Grâce and Muhirwa Alexandre state that they founded a school known as Collège de l'Espoir de Gasogi jointly with Nzeyimana Bertin and his wife Mukayisenga Cécile, Nzeyimana Bertin became the legal representative of the school being in charge of following up daily activities of the school as well as its extension. It is in this context that he used the school's funds to buy plots of land on its behalf but he has registered them in his names, he later built students' accommodations and registered them in her wife's names Mukayisenga Cécile. They further explained that later, they constructed the building in the school's names for the purpose of its extension but he also misappropriated them and an audit was carried out and found that the use of some funds is not justifiable.

[2] Muhorakeye Grâce and Muhirwa Alexandre sued Nzeyimana Bertin for breach of trust, forging documents and use of counterfeited document and fraudulently receiving funds or cash instruments. After finding that the elements of the offences were not complete, the Prosecution decided to close the file.

[3] Muhorakeye Grâce and Muhirwa Alexandre filed an action before the Primary Court of Rusororo through private prosecution procedure, in judgment RP0012/013/TB/RUS rendered on 22 March 2013. The Court found that some of the offences were not under its jurisdiction and transferred the case to the Intermediate Court of Gasabo, which decided to remove Mukayisenga Cecile in the case basing on the fact that she was not interrogated about the offences for which she was prosecuted.

[4] In regard to Nzeyimana Bertin, the Court rendered the judgment RP0191/13/TGI/GSBO on 19 June, 2014 and found him guilty of breach of trust as well as fraudulent acquisition of documents issued by the competent authorities and sentenced him to one year (1) of imprisonment and a fine of 500,000Frw and ordered to refund court fees equivalent to 8,000Frw to Muhirwa and Muhorakeye.

[5] Nzeyimana Bertin and the parties who filed the action through the procedure of private prosecution, both appealed to the High Court/Kigali, whereby Nzeyimana Bertin stated that the Intermediate Court disregarded his explanations demonstrating that the plots of land mentioned in case file were bought by himself and her wife as their personal property, whereas Muhirwa Alexandre and Muhorakeye Grâce's appeal was meant to explain that

Nzeyimana Bertin's penalty was illegally reduced, that the Court was given the audit report proving that 1,178,668,446Frw was lacking but it omitted to react on it, and that it was disregarded that Nzeyimana Bertin has to refund the proceeds of the offences he was convicted for and deliver his plaintiffs the procedural damages for the trials in which he induced them.

[6] That Court rendered the judgment RPA0488/HC/KIG-RPA0501/HC/KIG on 22 December 2015, deciding that the appeal for Nzeyimana Bertin has merit; that he is not guilty for the offences he is charged with. The court also decided that the appeal of the claimants for the damages has no merit.

[7] Muhirwa Alexandre and Muhorakeye Grâce appealed to the Supreme Court, the case was heard in public on 03 April, 2017, Muhirwa and Muhorakeye represented by Counsel Kazungu Jean Bosco, Counsel Bayingana Janvier, Counsel Gasominari Jean Baptiste, Nzeyimana Bertin was represented by Counsel Katushabe Mary, Counsel Shema Gakuba Charles and Counsel Ntaganda Kabare Festo while the Prosecution was represented by Harindintwari Côme. The Court examined the objection of lack of jurisdiction raised by Nzeyimana Bertin.

## **II. ANALYSIS OF LEGAL ISSUE**

### **Whether Muhirwa Alexandre and Muhorakeye Grâce's appeal is not in jurisdiction of the Supreme Court.**

[8] Counsels for Nzeyimana Bertin state that Muhirwa and Muhorakeye base the jurisdiction of the Supreme Court on the element of evidence of the sale contract between Nzeyimana and Mukayaramba Verediyana because it was based on in the ruling whereas they were not aware of it because it was not included in the hearing, rather, that evidence was debated on and it is found on the identification mark 38 of the case file, it is also among the pieces of evidence communicated to the adverse parties by the Court bailiff and communicated to Counsel Rutabingwa Athanase who represented them by Counsel Shema Gakuba Charles.

[9] They further argue that the plot of land Nzeyimana Bertin bought from Mukayaramba which registered under N°309 is not linked in any way to the plots of land in litigation which are N°725 and 301 and that it was not referred to in the ruling of judgment because Nzeyimana used it intending to justify the way he had got his properties located at Gasogi.

[10] In addition, they state that there are no damages equivalents to 50,000,000Frw awarded by the Court, and that in the determination of the Courts competence, the amount ordered by the court is considered instead of the amount requested by the parties. They further state that in criminal cases, the penalty imposed determines the competence of the Supreme Court whereas Nzeyimana Bertin was found not guilty and the civil action is based on the criminal one. They explain that although the plaintiffs used the private prosecution procedure, it does not prevent the case to be criminal nature and damages are awarded when one is convicted for an offence, hence the damages should not be considered in determining the jurisdiction of this Court, and instead the will of the legislator should apply.

[11] They also find that the case law RPAA0001/15/CS that their adversary want it to give guidance, differs from the present case because it was about the appeal on damages where the

accused was not prosecuted for prescriptive reasons, whereas for this case, the accused was found not guilty, hence he cannot be sued for damages.

[12] Counsels for Muhirwa and Muhorakeye argue that the jurisdiction of the Supreme Court is based on article 28 of Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court as there is evidence of the sale contract between Nzeyimana and Mukayaramba Verediyana which was used in the ruling of the appealed judgment on page 4 paragraph 6, whereas it was presented to the court after the closure of the hearing because they saw it in the judgment and the fact that his opposing party states that he possesses the document proving that his opposing parties received it, it is not enough because there is no inventory done to demonstrate the content of the book containing that evidence and the burden to prove that the contract was contained in the book lies with Nzeyimana.

[13] They further state that the jurisdiction of the Supreme Court is based on part 7, paragraph 2 of article 28 of the Organic Law N°03/2012/OL of 13/06/2012 aforementioned, because the embezzled funds equivalent to 1,178,668,446Frw and the value of the money of the classrooms exceeds 50,000,000Frw, and the fact of the absence of contradictory positions on the value of the subject matter proves that the parties agreed on it. They added that these comply with the damages sought in the judgment and it is therefore in conformity with the ruling of the judgment RPAA0001/15/CS rendered by this Court on 14 October 2015 as it decided that when the value of damages is under its jurisdiction, the appeal is to be admitted even in case the accused was sentenced to the imprisonment of less than ten years.

[14] They argue that Counsels for Nzeyimana Bertin confuses the facts in stating that there is no damages of 50,000,000Frw awarded by the High Court, because the present judgment derives from an action filed by the private prosecution procedure, the monetary value or that of the properties was not disputed because it would have been done by counter expertise, and that Muhirwa and Muhorakeye sued purposely to be awarded damages and this is the reason they appealed the judgment rendered by the Intermediate Court. In addition article 187 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure and article 164 of the Organic Law N°51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts allow the claimant for damages to appeal with respect to the civil conviction, that the issue is not that Nzeyimana was acquitted, instead, what matters is to consider that Muhirwa and Muhorakeye sued for damages.

[15] With regard to the issue raised by the Court, to know how they interpret paragraph 3 of article 28 of the Organic Law N°03/2012/OL of 13/06/2012 aforementioned, they state that paragraph is common to criminal cases, that it needs to be interpreted as it was done in the judgment RPAA0001/15/CS, and that this paragraph has to conform to the value of the requested damages as the action was not instituted by the prosecution but rather Muhirwa and Muhorakeye. They explained that when an action is filed by private prosecution procedure, there are two parallel actions, but the major aim is civil damages which again are based on the criminal action.

[16] The prosecution states that the fact that the appellants filed an action by the private prosecution procedure, it should continue in such way, but that in interest of justice, he finds, basing on article 28 of the Organic Law N°03/2012/OL of 13/06/2012 aforementioned, this case would not be separated from other criminal cases even if the prosecution did not sue, that in case there are no penalties provided for in the appealed judgment, there is the question to know whether the party could appeal basing on damages; that in case such action is

admitted, the issue is where the Court would base the determination of damages whereas there is no criminal action.

## **THE VIEW OF THE COURT**

[17] Article 28, paragraph two, 3<sup>o</sup> of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court provides that “the Supreme Court shall also have appellate jurisdiction over cases heard and decided in the second instance by the High Court, if such cases are based on evidence and submissions presented to court after the closure of hearings yet no application to reopen the matter was made”.

[18] In paragraph three, that article provides that in criminal cases, only the penalty that has been provided for shall determine that competence.

[19] With regard to the element of evidence which the appellants allege that it was presented after the closure of the hearing which constitutes of the sale contract of the plot between Nzeyimana Bertin and Mukayaramba Verediyana, the court finds that the contract is mentioned in paragraph six of the appealed judgment, but it finds that contract (as for other various contracts), are referred to in the defense of Nzeyimana Bertin and his Counsels for the purpose of proving that there are plots of land he bought for himself or bought by his wife.

[20] Even if the contract indicated in Nzeyimana Bertin’s defense as well as in the appeal submissions issued by Counsel Shema Gakuba Charles demonstrating that contract is on the appendix 38, the case file shows it was not presented, as the inventory of the appendices attached to those submissions demonstrate that there is no appendix 38 in the case file. The court finds therefore that contract would not be considered as evidence stated in article 28 paragraph two, 3<sup>o</sup> of the Organic Law N°03/2012/OL of 13/06/2012 mentioned above, because that article states the evidence presented after the closure of hearing.

[21] In addition, apart from the fact that contract would not be considered as evidence presented after closure of hearing as just explained, and it was also not based on in the appealed judgment, as among the grounds that the court based on found from the paragraph 41 of that judgment, that contract is not invoked anywhere because even their users in hearing saying that it is found in paragraph 6 of the judgment, but as has been said, that paragraph concerns Nzeyimana Bertin’s hearings whereas article 28 mentioned above convinces that the evidence must have been used in the ruling of the judgment, hence the evidence constituted of the contract between Mukayaramba Verediyana and Nzeyimana Bertin would not render Muhirwa and Muhorakeye’s appeal to be in the jurisdiction of the Supreme Court.

[22] With regard to the value of money equivalent to 1,178,668,446Frw that the appellants are claiming against Nzeyimana Bertin and it highly exceeds 50,000,000Frw provided for in article 28, paragraph 2,7<sup>o</sup> of the Organic Law N°03/2012/OL of 13/06/2012 mentioned above, the Court finds the fact that the case being heard is criminal despite that the claimants sued by private prosecution procedure, the jurisdiction of the Supreme Court has to be analyzed pursuant to paragraph 3 of article 28 of the just mentioned Organic Law which provides that only the penalty that has been provided for shall determine the competence, that paragraph implies that neither damages nor the value of the subject matter stated in part 7<sup>o</sup> of the paragraph 2 of that article are the one to be taken into consideration.

[23] The Court further finds the jurisdiction of the Supreme Court would be based on neither what is provided for by article 187 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure nor article 164 of the Organic Law N°51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts as the appellants argue, because those articles are not linked in any way to the competence of the Supreme Court provided by article 28 (with regard to the ordinary competence) of the Organic Law N°03/2012/OL of 13/06/2012 cited above.

[24] The Court finds, the fact that in the appealed judgment, no penalty was imposed on Nzeyimana Bertin because even the penalty of one year sentenced to him on first instance was overruled in appeal after being acquitted, it is understood that the appeal lodged does not fall under the jurisdiction of the Supreme Court as it hears the case in which a convict was sentenced to life imprisonment or to a term of imprisonment of at least ten (10) years if there was serious violation of legal provisions as provided in parts 8° and 9° of the paragraph two of the article 28 of the Organic Law N°03/2012/OL of 13/06/2012 mentioned above.

[25] With regard to the judgment RPAA0001/15/CS rendered by this Court on 14 October, 2015, which the appellants request to be referred to in deciding that Muhirwa and Muhorakeye's appeal is in the jurisdiction of the Supreme Court, the Court finds that in the ruling of that judgment in the competence of this court based on the article 28 of the Law N°03/2012/OL of 13/06/2012 mentioned above was not analyzed so that it would be useful in the present judgment.

[26] Considering all that have been explained, the court finds that Muhirwa Alexandre and Muhorakeye Grâce's appeal does not fall under the Supreme Court jurisdiction.

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

[27] Finds the objection of lack of jurisdiction of the Supreme Court raised by Muhirwa Alexandre with merit.

[28] Decides that Muhirwa Alexandre and Muhorakeye Grâce's appeal does not fall into the Supreme Court jurisdiction

[29] Orders Muhirwa Alexandre and Muhorakeye Grâce to jointly pay Court fees equivalent to 100,000Frw.