

## PROSECUTION v. HABYARIMANA ET.AL

[Rwanda SUPREME COURT – RPA0154/13/CS (Mugenzi, P.J., Muhumuza and Mukamulisa, J.)  
December 08, 2017]

*Criminal law – Concurrence of the offences – Joint criminal enterprise – Derivative criminal liability in the circumstances where the commission of an offence causes another offence – In case the commission of an offence causes another offence, the accused are criminally liable of both those offences even though the author of the last offence did not inform others that he/she was about to commit that offence – Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 98.*

*Criminal law – Concurrence of the offences – Sentencing – In sentencing of various related offences, the penalties must be in the form of ideal concurrence and the convicted sentenced to the penalty provided for the most severe offence– Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 84.*

**Facts:** This case started in the High Court, Nyanza Chamber, the appellants were prosecuted for violation of person's domicile and for murder, and these offences were committed when Habyarimana, the then executive secretary of the sector took his co-accused in his car in an operation which the appellants allege that it was a night patrol, they went to Sebera' home about midnight, knocked at his door but Sebera refused to open, rather, he made an alarm calling for help, and when he later got out he was shot by Uwiragiye, who also shot Mutuyimana as he came to rescue. Mukambanda and Nkurirehe filed a civil action within criminal proceedings but Nkurirehe's claim was not admitted as she failed to prove his capacity to file such claim.

That Court found them guilty of those offences, and sentenced them to a reduced penalty of 25 years of imprisonment due to the fact that it was their first time prosecution before Courts, the Court further ordered them to jointly pay Mukambanda damages equivalent to 10,000,000Frw. Not contented with the rulings, the accused appealed before the Supreme Court stating that they should not have been prosecuted them for violation of person's domicile without prior complaint of the victims, they also did not admit having committed the acts which constitute that offence, explaining that they were fulfilling their duty of ensuring security by supervising the patrol. The prosecution explained that the accused violated Sebera's domicile as they could not talk to him from outside when he was inside the house, they did not also have search warrants when they reached his home at around midnight.

With regard to the offence of murder, except Uwiragiye who pleaded guilty, admitting that she shot Sebera and Mutuyimana in self defense as they had injured her, she further demonstrated that she was provoked, the other appellants explained that they were wrongly convicted of those offences, because the author of that offence confessed to it, for Habyarimana, he denied having command over police personnel.

The prosecution explained in its pleadings that Habyarimana's role is based on the fact that he was the superior in that operation and he transported them in his car, he also had disputes with Sebera as it was testified by those interrogated during the investigation. The claimant in civil action instituted a cross appeal stating that she was awarded less damages and she requested the Court to award her appropriate damages. In their defense, Habyarimana, Rugamba and Karemera argue that they should not pay damages as they are not the authors of the offence and they are innocent, whereas Uwiragiye argues that she was ordered to pay damages which are not proportionate to the offence committed and that the

government should be forced to intervene in the case because the offence was committed while she was on duty.

**Held:**1.The fact that Mukambanda whose domicile was violated, she repeatedly explained that her husband was murdered after their domicile was violated at night, and thereafter claimed for damages, this proves that she had the interest to follow up on her case, therefore, the accused should be prosecuted for violation of person's domicile.

2. The accused are guilty of violation of person's domicile on the ground that they went to Sebera's domicile in the night and ordered him to open without a search warrant.

3. The fact that the offence of the violation of person's domicile sparked the offence of the murder, the link between those offences makes the accused criminally liable of all those offences even though the author of the murder did not inform others that he/she was about to commit that offence.

4. In sentencing of various related offences, the penalties must be in the form of ideal concurrence and the convicted sentenced to the penalty provided for the most severe offence.

5. The fact that the requested damages are excessive and there is no proof that the ones awarded on the first instance are insufficient, those awarded on the first instance are confirmed to be appropriate.

**Appeal has merit on some grounds;  
Cross appeal is without merit;  
Court fees charged to the public treasury.**

**Statute and statutory instruments referred to:**

Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 45,74, 76,78,84, 98, 99,105,106,140, 280 and 291

Decree Law of 30/07/ 1888 relating to contracts or conventional obligations, article 258

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 118

**Case law referred to:**

Prosecution v. Sezikeye, RPAA038/15/CS rendered by the Supreme Court on 15/09/2015

**Authors cited:**

Isabelle Rolive & D.Bosquet, "La renonciation au meurtre: une limite au système de l'imputation automatique du meurtre à tous les participants au vol", Revue de Droit Penal et de Criminologie, Avril 2002, p.371.

## **Judgment**

## I. BRIEF BACKGROUND OF THE CASE

[1] In High Court, Nyanza Chamber, Habyarimana Festus, Uwiragiye Fabiola, Rugamba Frank, Karemera Steven alias Maridadi and Ngezahayo David were prosecuted for violation of person's domicile and murder of Sebera Laurent and Mutuyimana Innocent, the latter had come for rescue, in the night of 02 July 2012, when at around midnight, Habyarimana, the then executive secretary of the sector drove the co-accused in his car to Sebera's home and knocked at his door but he refused to open, instead, he made an alarm calling for help, later when he came out , he was shot by Uwiragiye, who also shot Mutuyimana who was coming to rescue.

[2] Mukambanda Dorothée and Nkurirehe Eugenié filed a civil action within criminal proceedings but Nkurirehe's action was not admitted on the ground that she failed to prove her capacity to file that action and the decision was not appealed.

[3] The High Court, Nyanza Chamber, convicted the accused of criminal participation for violation of person's domicile and murder of Sebera Laurent and Mutuyimana Innocent, it sentenced each of them to a reduced penalty of 25 years of imprisonment on the ground that it is their first time to be prosecuted before Courts, the Court further ordered them to jointly pay the widow of Sebera, Mukambanda 10,000,000Frw in damages.

[4] In convicting the accused, the High Court motivated that they conspired in the murder of Sebera, this is proved by the acts which preceded the offence, in their common consent, they sent Karemera Steven and Rugamba Frank to Sebera and informed the latter that Habyarimana, Executive Secretary has sent for him, this was followed by the shooting of Sebera and Mutuyimana who came to rescue at night, therefore there are guilty of ideal concurrence.

[5] The High Court based on the ground that the accused admit to have gone to Sebera's home during night with no search warrant, and they fail to prove the commotion coming from his residence as motive to go to Sebera's home, he has never been warned as someone causing commotion to others, this was even refuted by the witnesses Mukamana Jeanne and Muhawenimana Josephine.

[6] With regard to Habyarimana's role in the offence of murder, the Court has based on the fact that he induced the violation of Sebera's domicile, in addition, he harboured that plot because even before shooting Sebera, Habyarimana sent Karemera Steven and Inkeragutabara to inform him that he has to report himself to his office at the Sector ( identification mark 94) and it is the same day he was shot , Habyarimana having abetted the author by his presence , and Mutuyimana Innocent was killed when he came to rescue.

[7] As regards to Uwiragiye Fabiola, the Court motivated that there is no proof that she murdered two persons in self defence as nothing proves that the victims had machetes and - they hit her on head as she alleges in her pleadings, and this was emphasized by the statement of certified physician that Uwiragiye had 3 minor wounds which could easily heal and their cause is not determined. It further held that even if she would have been hit with machete, it would not have been considered as self defense because she could not use a gun against those who had machetes which were also not shown and she does not prove that she had no other means to use.

[8] With regard to Karemera Steven alias Maridadi, the Court motivated that he is guilty of the offence as he admits that he went together with his co-accused to Sebera's home, he violated the domicile and Sebera was shot in his presence, and also it was confirmed by the witnesses Uwanzuwe (identification marks 64-65) and Baramé Samuel (71-72) that he first came with others to spy on Sebera, and when he tried to handcuff him, Sebera refused.

[9] With regard to Rugamba Frank, the Court explained that during the hearing he confessed that he shot in the air, to prevent the killings, but he had come prior to the killings to spy on Sebera as testified by Nsanzimana JMV, *motorcyclist*, who transported them (identification mark 64-65).

[10] As regards to Ngezahayo David who was tried in absentia, although he was legally summoned, the Court explained that he was also involved in the plot to commit offence as his co-accused.

[11] Habyarimana, Uwiragiye, Rugamba and Karemera<sup>1</sup> appealed to the Supreme Court arguing that they were prosecuted for the offence of violation of person's domicile without prior complaint of the victim, that they were convicted with no incriminating evidence against them and the Court disregarded their statements, for Uwiragiye, she states that the Court disregarded that she shot Sebera in self defence because they fought with her with machete intending to kill her. Other accused state that they had no role in the murder.

[12] In cross appeal, Mukambanda, the claimant for the damages argues that what she was awarded is insufficient, hence those damages should be increased.

[13] The public hearing was held on 03 April 2017, 24 July 2017 and on 09 October 2017, Habyarimana being assisted by counsel Nsengiyumva Viateur and Nsengiyumva Enos, Karemera Steven assisted by counsel Habyarimana Flavienne and Gatabazi Nuru Claudine, Rugamba Frank was assisted by Counsel Hakizimana Martin, Habiyaambere Aphrodis and Gatabazi Nuru Claudine, Uwiragiye Fabiola was assisted by counsel Kabasenga Berthilde, Gatabazi Nuru Claudine and Hakizimana Martin, whereas Mukambanda Dorothée, the claimant for the damages was assisted by counsel Karamira Jacques.

## II. ANALYSIS OF LEGAL ISSUES

[14] In this case, the Court examines whether the accused should not have been prosecuted for the offence of violation of person's domicile, and whether there is incriminating evidence against them for that offence as well as for murder, and lastly, the Court examines the issue relating to damages.

### **a. Whether the accused should not have been prosecuted for violation of person's domicile because the complaint was not lodged by the victim.**

[15] Habyarimana Festus, Uwiragiye Fabiola, Rugamba Frank, Karemera Steven together with their counsels state that let alone that they don't agree that they violated Sebera's domicile, they should not

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<sup>1</sup> Ngezahayo David who was tried in absentia did not appeal.

have been prosecuted for that offence without prior complaint of the victims as provided by article 291 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code.

[16] The Prosecution argues that even if the victim did not file a complaint, the Prosecution acts in public interests, that it cannot sit aside and let offence being committed without prosecuting the offenders.

## **THE VIEW OF THE COURT**

[17] Article 291 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code provides that for offences against privacy, legal action shall be instituted by the Public Prosecution upon request by the victim, his/her legally authorized representative or rightful claimant, article 280 of the same organic law provides violation of person's domicile among those offences.

[18] The Court finds, the pleadings of the accused that the complaint was not initiated by the victim lack merit, because the case file demonstrates that in all organs from judicial police, the Prosecution and in Courts, Mukambanda a widow of Sebera, whose domicile was violated repeatedly explained that her husband was murdered after their domicile was violated at night, she went further filed an action for damages originating from those offences, and the accused don't demonstrate that Mukambanda lost the interest to follow up on her case.

### **b. Whether there is incriminating evidence based on to convict the accused for the offence of violation of person's domicile.**

[19] The appellants deny violating a person's domicile as they were executing their duties of ensuring security to people and their properties, by making night patrol, because of the commotion they went to Sebera's home the same way as they went to other places.

[20] Uwiragiye, Rugamba, Karemera and their counsel admit having reached Sebera's home, but that they didn't commit the offence of violation of person's domicile as they were all on duty of ensuring security to people and their properties, because of the commotion they went to Sebera's home as they went to other places while they were on the night patrol.

[21] They further explained that together with Ngezahayo went to Sebera's residence to supervise the night patrol which was conducted in his surrounding, that they found nobody on the patrol but they heard people talking from Sebera's house, they went there, Ngezahayo and Rugamba knocked at the door but they returned back when Sebera got out with a machete.

[22] Rugamba and counsel Hakizimana, Habiyambere and Gatabazi Nuru, state that he was wrongly convicted for violation of person's domicile, because they entered after knocking and were denied to enter which proves that they didn't reach the extent provided by article 280 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code as they were outside the house, he states that before the judicial police, he explained that they knocked and informed Sebera that they are together with Executive Secretary of the Sector.

[23] Karemera, counsel Habyarimana and Gatabazi Nuru assisting him, explain that he is not guilty of violation of person's domicile, that he went at Sebera's home on his superiors order to supervise the

patrol, he went with two police personnel, Uwiragiye and Rugamba purposely to ask him reasons why he was selling late at night.

[24] Habyarimana together with his counsel Nsengimana Viateur and Nsengiyumva Enos, argue that he did not go to Sebera's home; that he stayed in the car, that even Mukambanda told the Court during investigation that Habyarimana did not enter the domicile; therefore he should not be sentenced for the offence he did not commit.

[25] The Prosecutor argues that the accused entered Sebera's home because it was impossible for them, to talk to him from outside while he was inside they went there at midnight without search warrants, The Prosecutor adds that Habyarimana cannot evade from his role in the commission of the offence whereas he is the one who sent and transported the authors.

[26] Mukambanda, the claimant for the damages and her counsel Karamira explain that Uwiragiye, Rugamba, Karemera and Ngezahayo entered her home in wee hours with no authorization, threatening Sebera so that he gets out of house, all this was on request of executive secretary Habyarimana.

## **THE VIEW OF THE COURT**

[27] With regard to Uwiragiye, Rugamba and Karemera who entered Sebera's home, the Court finds, as it was held by the High Court, Nyanza chamber, the accused are guilty of violation of person's domicile because they admit having gone to Sebera's home, ordered him to open during night without search warrant and article 280 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code prohibits entering person's domicile without lawful authority except in case the law provides otherwise.

[28] The court finds, the appellants failed to prove the commotion which they use as a pretext to enter Sebera's home arguing that it was caused by those boozing from his home, and they don't indicate any other person who is not member of the family they found there, except Mutuyimana who was shot when he came from his home to rescue, in addition, during the interrogation in judicial police, Habyarimana stated that Sebera got out of the house alone.(identification mark 117)<sup>2</sup>

[29] With regard to Habyarimana who did not enter Sebera's domicile as affirmed by Mukambanda herself, the Court finds, like Uwiragiye, Rugamba and Karemera, even if he would not have entered, his co-accused state that he is the one who ordered them to arrest Sebera, and that he is the one who transported them and was the one coordinating that patrol as the executive secretary of the sector.

[30] Article 98 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code provides that a person who incites the offender is accomplice, article 99 of that Organic Law provides that an accomplice is punished by the judge in case he/she finds that the accomplice's responsibility in the commission of the offence is the same as or greater than that of the principal offender.

[31] The Court finds that even if Habyarimana wants to evade his role in the commission of the offence of violation of person's domicile alleging that he did not enter Sebera's domicile, that he stayed

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<sup>2</sup> We noticed that Sebera is the one we saw who got out the house; I don't know whether others exited later, as we had already ran, and scattered.

on the roadside in the car he disregards that as the executive secretary of the sector, who brought those who entered Sebera's domicile during night with no lawful authorization, and ordered them to arrest Sebera, his orders render him an accomplice pursuant to article 98 mentioned above.

[32] With regard to the pleadings of Habyarimana, that he has no authority over police, the Court finds it lacking merit because as the executive secretary of the sector, who was coordinating the night patrol, the police personnel he was together with, were to assist him in that patrol, that is the reason, he gave them orders to go to Sebera and they went there as he attested it himself in the hearing of 03 April 2017 as follows: I stayed in car and I sent them, thus, he does not deny that he gave them orders as a leader.

[33] Basing on above motivations, the Court finds that Habyarimana, Uwiragiye, Rugamba and Karemera are guilty of violation of person's domicile, provided and punishable by article 280 of Law N°01/2012/OL of 02/05/2012 mentioned above, therefore, this ground of appeal is without merit.

### **c. Whether there is incriminating evidence to convict the accused of murder**

#### **1. In regard to Uwiragiye Fabiola who shot Sebera and Mutuyimana**

[34] Uwiragiye states that she was convicted for criminal participation for murder whereas she is the principal offender as she is the one who shot Sebera and Mutuyimana Innocent, that she is not guilty of concurrence of offences because she didn't commit any other offence, that no one ordered her to kill, she rather shot the victims in self defence because they had wounded her as it is indicated in medical report of physician who treated, vaccinated and transferred her elsewhere, that she often attended Court trials having a medical bandage which proves that she was wounded.

[35] She explains that she had no plot of murder, that she was awoken by the police commander asking her to go and supervise patrol together with the administrator of the Sector and *Inkeragutabara*, that she joined others in the car and they traversed through various cells in supervision of the patrol, reaching Sebera's home, they heard people shouting and drinking, Rugamba and Ngezahayo asked Sebera to get out of the house, and when he realised that they were policemen, he told them to immediately leave his home, Mutuyimana also came with a machete, they ran away.

[36] She states that people who were at the home of Sebera ran after her with machetes, one of them hit her and fell down when he was trying to hit her for the second time, when the rest of them attempted to hit her, she shot three times and one of them died, she pushed Sebera's wife when she tried to beat her with a club and as they continued to run after her, she shot Sebera on the arm and another bullet hit him in the belly, that she shot as a last option when they found her in sorghum field where she was hiding, where Sebera died, she adds on that, she first shot in the air and they refused to withdrawal.

[37] She states that, in their statements, Mukambanda Dorothée and Nyiramata confirmed that she entangled with Sebera and they fought against her and during the investigation, the Court was shown the place where they fought as well as the spot where Sebera died and this proves that he was following after her, it is further proved by the fact that he was shot on his front side on the heart and Mutuyimana was shot in the rib.

[38] She says that she was not ordered by Habyarimana to shoot as he is not his superior, and that the alleged hatred between him and Sebera was not justified, that she did not go to spy during day time as

was stated, she adds that Nyiramata, Nsanzimana and Uwanzuwe never confirmed that they saw her at Sebera's home.

[39] Kabasenga, Counsel for Uwiragiye states that Uwiragiye was provoked because she shot after being hit by a machete and the blood stains could be spotted on her T-shirt (identification mark 59), that the minor wounds found on delicate parts of her body were not considered, she wonders why the machetes were not seized whereas the witnesses testified that the machetes were there. Counsel Kabasenga requests that the provocation be considered in sentencing Uwiragiye.

[40] With regard to the statements of the witnesses during investigation that Sebera was shot while fleeing, Counsel Kabasenga argues that the statements of Mukambanda and her daughter Nyiramata contradict because if Sebera was shot while fleeing, he would have been shot in the back.

[41] Counsel Hakizimana who also assists Uwiragiye states that she had not premeditated the murder because she took the gun when she was going on duty together with the executive secretary, she had no conflict with Sebera, it was rather an accident caused by being cut as indicated by the first medical report, in such circumstances she shot. He adds that the witnesses' testimonies should not be considered because they were prepared for interrogatory, that his client should have been present during the investigation and that at the beginning, Mukambanda said that they fought each other, therefore her statement that Sebera was shot while running should not be considered. Counsel Hakizimana concludes by praying that Uwiragiye should be sentenced in accordance with articles 105-106 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, provisions related to provocation.

[42] Karamira, the Counsel for Mukambanda who claims for damages states that Uwiragiye is misleading the Court, as there is no medical report issued by a certified Doctor to prove that she was cut with a machete, the report was rather issued by Habyarimana's wife who works at a dispensary, he adds that there is no imperfection in investigation carried out by the Court.

[43] Mukambanda states that during day time, Karemera came with a police person looking for Sebera, she told them that he is not around but they forcibly entered the domicile, when they saw him, they wanted to handcuff him but he refused and they went back murmuring, they came back at night and knocked at the door, once again she told them that he is not around, they insisted by kicking the door and Sebera instead of getting out, he called for a help, consequently, Mutuyimana came to rescue and he fell in an ambush of the others who had remained at the front courtyard, they hit him and as he groaned, Sebera got out of the house, they arrested him but he later escaped them and they ran after him until they shot him in sorghum field.

[44] She states that when police person were running after her husband, she also ran after them begging for mercy, she unfortunately reached them when they had already killed her husband, the executive secretary Habyarimana took the police woman to the dispensary which is managed by his wife.

[45] The prosecution contends that Uwiragiye did not commit the offence in self defense, because the medical report issued by certified medical Doctor affirmed that she had minor wounds with no certain causes, that if it was a machete, there would be a severe wound, the Prosecution adds that the judicial police had no interests in concealing the machetes which were not found, he further argues that, the fact that Sebera was shot in the shoulders proves that he was shot while fleeing, which is



contrary to self defense as nothing proves that the victims fought against Uwiragiye, to be qualified as provocation.

[46] Concerning the witnesses' statements during the investigation, the Prosecutor argues that when are considered together they demonstrate that the day on which Sebera was killed, *inkeragutabara* by the name of Karemera came with police personnel during day time and they came back at night intentionally to kill him, that all witnesses testified that Habyarimana and Sebera had disputes related to sand deposit. That people gathered at Sebera during day time, were in *ikimina* and that they were all no longer there at 4 PM and attack occurred during night with no people still at his home.

[47] The prosecutor argues that Habyarimana was among those who attacked, the victims were shot with more than one bullet, this proves the intent to murder, he finds the investigation's findings corroborate with the witnesses' statements.

## **THE VIEW OF THE COURT**

[48] Article 105 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, in its litera 2, provides that a person shall be considered to act in self-defense [...] when he/she commits an act to defend him/herself against perpetrators of theft or other criminals, and article 106 of that organic law provides that a person who, in case of an unjustified attack on him/herself or another person, acts in self-defence or in case of defence of another person shall not be criminally liable, except if there is excessive disproportion between the means of defence used and the gravity of the attack.

[49] The court finds Uwiragiye's arguments intending to prove that she shot Sebera and Mutuyimana after they hit her with a machete is groundless, because as it was proven by certified medical Doctor who examined Uwiragiye, affirmed that she had minor wounds and their causes are uncertain, this implies that if the injuries were caused by machetes when Uwiragiye was hit three times on the head by people who intentionally wanted to kill her as she alleges, the Doctor would not have failed to observe and to confirm it, besides, nothing proves that the victims had machetes as they were not seized and the witnesses did not affirm that they saw those machetes. The Court finds that those injuries may have been caused by a fight between Uwiragiye and Sebera when the latter refused the arrest as revealed by Mukambanda that before Sebera was shot, he fought with those who wanted to apprehend him.

[50] The Court finds that article 105 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code mentioned above which Uwizeye relies to demonstrate that she shot them in self defense is incompatible with the facts at Sebera's home as the latter cannot be considered as a thief or other wrongdoer because he refused to be arrested, so that they arrest him after violating his domicile, and one of the pre-conditions for the offender to invoke the excuse of self defense is that the act against him or her is unjust or unlawful, Sebera's refusal to be arrested cannot be considered as an unjust or an unlawful act.

[51] The Court finds that the provocation invoked by counsel for Uwiragiye, cannot be substantiated because Sebera cannot be considered as the cause of his murder, whereas as mentioned above, he was attacked late at night, in violation of laws, the fact that he refused the arrest, cannot be considered as the

one who provoked the offenders, furthermore, article 74 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code provides that it is qualified as provocation, if done by the victim<sup>3</sup>.

[52] Considering the above motivations, the Court finds Uwiragiye guilty of murder provided by article 140 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, her appeal intending to prove that she committed murder in self defense or under provocation is therefore without merit.

## **2. With regard to Habyarimana, Rugamba and Karemera**

[53] Habyarimana Festus states that he was convicted for the offence he did not commit, with no concrete evidence, that his defense was not considered, he adds that the real perpetrator who confessed it and did not testify against him, disregarding that criminal liability is personal. He explained that he went with police personnel to supervise the night patrol and to order pubs to close as per decisions of the security meeting, that they went to various cells with no intention to go to Sebera's place, they only went there when they reached where those on the patrol are always stationed and they found none, instead, they heard commotion coming from Sebera's place, and he sent people to go and check, while for him he stayed in the car on the roadside, that there was misunderstandings with those found at home, in such circumstances, Uwiragiye fired the gun, and at that juncture, he felt like traumatized, that he could do nothing, on her return, Uwiragiye told him that the disputes arose with people and she shot and that she has been wounded, hence, she was transported to hospital.

[54] He further explained that even if he was coordinating patrol activities, they were in different organs, each of them with distinct obligations to fulfill towards their respective organs, that Habyarimana as a civilian, he had no authority to give orders to police who had guns or *Inkeragutabara*, he concludes stating that he had no conflicts with the deceased relating to iron sheets or sand deposit to the extent that he kills him and that he did not send people at Sebera before.

[55] His Counsel Nsengiyumva Enos and Nsengiyumva Viateur assisting him argue that the High Court convicted Habyarimana without evidence, because the Prosecution did not demonstrate where the plot to shoot was masterminded and its preparation. Instead, as an executive secretary who was coordinating the supervision of night patrol, as per security meeting, Habyarimana transported others to supervise the patrols, they did not find any one on duty of patrol stations, rather, they heard noise. They further argue that the Prosecution does not prove that he gave orders to shoot and nothing proves that those who went at Sebera's place during the day were sent by him as they don't testify against him, Uwiragiye who shot two people does not also testify against him, the latter must be liable for her offence.

[56] With regard to the witnesses' statements during the investigation carried out by the Supreme Court, Habyarimana and his counsel Nsengiyumva state that the witnesses' statements cannot be relied upon to convict him because they contradict each other, because during the Court hearing, Mukambanda widow of the victim stated that she did not hear the voice of the executive secretary of the sector at her home, during investigation she stated that she saw him at her home, Uwihanganye and Rutebuka state that the offence was committed in absence of Habyarimana, Maguru stated that the dead bodies were

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<sup>3</sup> Court motivation rejecting provocation as an excuse of the commission of the offence was also held in judgment RPAA038/15/CS of 15 September 2017, Prosecution v. Sezikeye Emmanuel.

transported by Habyarimana's car whereas they were transported by an ambulance known as *imbangukiragutabara*. He stated that with regard to conflicts between Habyarimana and the deceased, that Mukambanda stated that Sebera had issues with other members of his cooperative but he reconciled them, Mbarushimana Zacharie stated that the disputes were related to sand deposit whereas the Sector confirmed that there is no sand deposit but it is rice farming, that the sand issues are new, at the beginning, the issue of iron sheets was the only one raised.

[57] Rugamba Frank states that he was convicted for the murder without concrete evidence because its author has confessed it and he did not abet in its commission, that what he did was among his duties, that he didn't go to spyas stated by the Prosecution, except that they passed at Sebera's home during day time as they were going to other cell to arrest people who had injured each other while fighting, that he was not ordered by the Executive Secretary because they don't take orders from him, that people from that area linked this with Sebera's death, and the Prosecution qualified it as spying whereas he did not go to Sebera's domicile or at least talk to him, he adds that spying cannot be conducted while bearing official document.

[58] He continues stating that on the day the offence was committed, he was woken up by his superior and he went with the executive secretary to supervise the night patrol, arriving at Sebera's place, they found people shouting, they knocked and asked to open but instead of opening, he made an alarm calling for help and came a man with a machete, that he(Rugamba) and his colleagues fled, he returned when he heard the gun shots and he found Uwiragiye circled by people, he shot thrice in air to scare them so that they leave her.

[59] In regards to the testimonies of the witnesses during the investigation, Rugamba argues that they should not be considered because they are contradictory, as Nyiramatama who testifies that she was at Sebera's place at 2 pm, she did not see any police personnel whereas Mukambanda states that *Inkeragutabara* and policeman named Rugamba came at Sebera's place at 4 pm, this is the first time she is testifying this and they testified that there was no wounded police personnel, moreover one was taken to hospital. He concludes stating that the High Court fell short in demonstrating how he would have been sent by Habyarimana and during Court investigation, the Court did not go to his work place to verify that he was not on duty.

[60] Counsel Nuru Gatabazi and Habiyaambere assisting Rugamba, state that the Prosecution does not prove his role in the victims' death, as it doesn't prove that he had a plot with executive secretary of murdering Sebera, rather, they went to supervise the patrol on the request of his superior, the issues arose when Uwiragiye shot and caused the death, that Rugamba fled with his gun avoiding participating in the commission of the offence, he returned when he heard gun shots, and he shot in the air to rescue his colleague.

[61] Karemera Steven states that he was convicted disregarding that he was on patrol as *inkeragutabara*, that his co-accused were all superior to him and they took him to Sebera's home, reaching there, they found no one on the patrol station, instead, they heard noises at Sebera's place, Rugamba knocked at the door and people inside the house asked him to identify himself, then Sebera instantly made an alarm calling for a help, as response, Mutuyimana came to rescue with a machete, Karemera ran because he thought that those inside were about to get out,, and the police personnel turned back and ran, he came back when Uwiragiye's clothes were full of blood and she was saying that she will shoot anyone who approaches her.

[62] He also argues that he did not come to spy at Sebera's home during the daytime; rather, they passed there when they came from arresting people when he was together with police personnel who are recently deployed in the sector and that they had no handcuffs.

[63] He states that the statements of the witnesses Mukambanda, Nyiramata and Muhawenimana are contradictory, they are also different from their statements made in previous interrogatory because Muhawenimana said that she was at school whereas there was no class on that day, Mukambanda stated that the police met her when she was sitting with the kids at her home, that she is not aware of their talks with Sebera, but she is now saying that she was told that Sebera was wanted by the executive secretary of the sector, Nyiramata states that she was at Sebera's place at 2 pm, in contrast, his wife said that there was no any other person at home.

[64] Counsel Habyarimana and Habiyaambere assisting him, state that his co accused took him from where he was on the patrol duty to direct them to the patrol station, that nothing proves his role in victim's death, they claim that the Court acquits him. Counsel Gatabazi Nuru argues that the witnesses' statements are confusing because they contradict in regards to spying invoked, and the fact that the dead body was transported in the executive secretary's car, then again they state that the body was transported by ambulance.

[65] Counsel Karamira assisting Mukambanda the claimant for damages, states that the investigation was well conducted and it proves that those brought at Sebera's home by Habyarimana, they constituted an attack and in the testimonies, it was revealed that the conflicts between Habyarimana and Sebera were the causes of that attack, he adds that all those who came in the attack should admit their respective roles.

[66] The prosecution contends that Habyarimana's role is based on the fact that he was coordinating those activities even if he first denied them, that he was not the one to give orders to police, he does not demonstrate reasonable motive to go to Sebera's home at midnight since in his interrogatory before judicial police admitted that Sebera got out the house alone (identification mark 117), Rugamba in his interrogatory said that Sebera was talking with the others in the rear of the house, they did not indicate the commotion (identification mark 110), in addition, during the day time there was a spying whereby Habyarimana instructed Sebera to appear before him with regard to the iron sheets' issues and the latter refused to report himself, this is also mentioned by Uwiragiye and Rugamba (identification mark 51-50), therefore, Habyarimana went at Sebera's home in revenge, this is also what was declared by the witnesses during the investigation, that the spies came first, that Habyarimana's car brought the perpetrators and that he was in conflicts with Sebera.

[67] With regard to Rugamba Frank, the Prosecution contends that he confessed for having gone to Sebera's home, and that this was considered as spying because in interrogatory he admitted that he asked Sebera to report himself before the executive secretary and that he also confessed for having knocked at Sebera's door asking him to come out, and informing him that they are police together with the executive secretary of the sector, that the Court would base on his contradiction since in his interrogatory he stated that he shot before they were cut with a machete, that he shot again after they were cut (identification mark 110), that he (Rugamba) further stated that he came to rescue his colleague, whereas before, he mentioned that they fled separately, the Prosecution concludes stating that he wants to evade his role in the commission of the offence.

[68] Concerning Karemera, the Prosecution argues that during the day time. He went with a policeman to spy to Sebera's home, that he also went there at the night with them, the murder was committed in his presence, that even if he had no weapon, his colleagues of the attack had the weapons, the Prosecutor requests the Court to refer to his contradiction to find him guilty because he says that they didn't see the patrol along way, in contrast he also says that they took him from patrol.

## THE VIEW OF THE COURT

[69] Article 98 of Law N°01/2012/OL of 02/05/2012 instituting the penal code defines three ways in which a person can be held responsible for committing an offence: offender, a person who commits an offence, co-offender, a person who directly cooperates in the commission of an offence, accomplice, a person knowingly aids or abets the offender in preparing, facilitating or committing the offence, or a person who incites the offender. The offence of murder charged to Habyarimana, Rugamba and Karemera has to be examined pursuant to that provision of the law.

[70] The Court finds that the murder committed by Uwiragiye is the act linked to the violation of Sebera's domicile, because the latter was shot after confrontation when Sebera refused to open the door, and when he came out the house, he refused to be arrested as ordered by Habyarimana, the executive secretary of the sector, the murder was committed when Sebera prevented the principal offence of the violation of his domicile, these offences are therefore interrelated and that of the murder seems to be aggravating the violation of person's domicile, the offence by which Uwiragiye, Rugamba and Karemera came to commit on request of Habyarimana.

[71] The above motivations comply with the doctrines such as those of law scholar Isabelle Rorive and D. Bosquet stating that without having physically collaborated in the criminal acts of others, a person can thus be held criminally responsible because he/she has encouraged those acts by the creation of a latent criminal offence or the commission of an offence,<sup>4</sup> the scholars give example of the murder committed by one of the thieves, his co-offenders have to be held criminally responsible because that murder is considered as aggravating circumstances of the theft as an offence itself instead of considering personal aggravating circumstances, the murder is linked to the theft, even if the author of the murder would not have previously informed the others.

[72] The Cassation Court of Belgium took the same position whereby it repeatedly decided in various cases that when murder is committed to enable the commission of the theft, the author of the thief shall also be held responsible for that murder even though his direct participation is not obvious<sup>5</sup>, in such perception, the Cassation Court of France demonstrated that an accomplice who deployed others in terrorism, he/she shall also be held responsible for using tear gas to the victim of terrorism, even if he/she was not aware that they would use that gas, the Court motivated that the co-author is held liable

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<sup>4</sup> Sans avoir physiquement collaboré aux agissement délictueux d'autrui, une personne peut ainsi voir sa responsabilité pénale engagée parce qu'elle a favorisé ces agissements par la création d'un état délictueux latent ou par la commission d'une faute" : Isabelle Rorive, in collaboration with D.Bosquet, "La renonciation au meurtre: une limite au système de l'imputation automatique du meurtre à tous les participants au vol", in Revue de Droit Pénal et de Criminologie, April 2002, p. 371.

<sup>5</sup> That is what qualified as system of automatic imputation of the objective aggravating circumstances, Ibid.p. 376

to all charges related to the offence he/she participated even though he/she was not informed of some acts.<sup>6</sup>

[73] The Court finds, considering the fact that the violation of Sebera's domicile provoked the offence of murder committed against him when he denied to come out, and when he came out, he refused to be arrested, that confrontation led him and Mutuyimana who came to rescue to be shot to death, it is convincing that the act of violating Sebera's domicile and the murder committed against him are interrelated, therefore, Habyarimana, Rugamba and Karemera are part of authors of violation of Sebera's domicile as mentioned above, they cannot evade their role in the commission of that murder even if nothing proves that Uwiragiye informed them that she was about to shot people.

[74] With regards to Habyarimana who defends himself in stating that he did not enter Sebera's domicile, where those both offences were committed, while he also admits to enter Sebera's home because he states that he saw Sebera getting out alone (identification mark 117), basing on article 98 of Organic Law N°01/2012/OL mentioned above, the Court finds him guilty as an accomplice of the offenders due to the fact that he is the one who ordered to violate Sebera's domicile as indicated above, the relation of that offence and the murder committed rendered him to be held liable of murder as explained above, especially that he was coordinating them.

[75] However, the Court finds that provided explanations intending to prove that the act of murdering Sebera was premeditated, that it was preceded by the act of spying during the day and that plot of that act might be resulted from the disputes of sand deposit arose between Sebera and Habyarimana, these do not prove that the murder committed was premeditated, what is obvious is that Habyarimana wanted Sebera to be arrested as testified by the witnesses like Mukamana Jeanne<sup>7</sup>, on the other hand, the reason of the arrestation was not proved, it cannot be considered as a premeditated plot of murdering Sebera, especially it is not reasonable that Habyarimana would have wanted to kill him by using security organs which include police personel and *inkeragutabara*, it is not shown that they had conspiracy and interests, hence, it has to be decided that it is not premeditated murder which is punished by article 140 of Organic Law N°01/2012/OL mentioned above, instead of premeditation.

[76] The Court finds, due to the relation between the murder and the violation of person's domicile as motivated above, both those offences have to be punished in ideal concurrence provided by article 84 of Organic Law N°01/2012/OL stated above<sup>8</sup> and the accused shall be sentenced by the most severe penalty which means the one provided to the offence of murder.

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<sup>6</sup> The accomplice incurs the responsibility of all the circumstances which qualify the act pursued, without being necessary that he/she was aware of them, Cass., 21 mai 1996, Bulletin criminel 1996, N° 206, p 584.

<sup>7</sup> Mukamana Jeanne declares « I heard car sound in front of my house, when executive secretary ordered them to bring him, in short while, I heard gun shots, executive secretary moved down and met a soldier who was murmuring that she has shot them and shooting any living thing, executive secretary asked her ceasing to shoot, Mukamana adds that she would have shot more people if executive secretary failed to take her.

<sup>8</sup> That article provides that if an offender would receive several penalties of imprisonment or fine as a result of one or several acts, the judge shall apply the most severe penalty and increase its duration or the amount depending on the circumstances of the offences, but not exceeding half (1/2) in addition to the maximum of the most severe penalty.

[77] The Court finds, in the determination of the sentences, it would be considered that the offences being pursued were caused by inattention instead of severe wickedness, this led the accused not to reflect the consequences of violating someone's domicile in wee hours while Sebera proved to them that he was not ready to be arrested, this can favour them as mitigating circumstances in order to reduce again the penalties basing on article 76 of organic law N°01/2012/OL mentioned above which states that the judge considers the appropriateness of mitigating circumstances which preceded, accompanied or followed an offence, and article 78 of that organic law which provides how the penalties are reduced in case of mitigating circumstances, in regards to the life imprisonment, the penalty for the offence of murder is replaced by a penalty of imprisonment of not less than ten (10) years.

### **3. With regards to the damages requested by Mukambanda**

[78] In cross appeal, Mukambanda and her counsel state that she was awarded insufficient damages equivalent to 10,000,000Frw in High Court whereas she claimed for 500,000,000Frw. They further state that it should be considered the value of human being, the fact that Mukambanda became a widow and that the children lost the chance to study, whereas his father had resources of generating income such as being a chairman of the rice farmers' cooperative. They conclude by praying the Court to award appropriate damages

[79] Habyarimana Festus, his Counsel Nsengiyumva Viateur and Nsengiyumva Enos state that he should not be ordered to pay damages because he is not the author of the offence and that the claimant for the damages does not link the fault with Habyarimana.

[80] Uwiragiye Fabiola and her counsel Kabasenga, Nuru Gatabazi and Hakizimana state that she was ordered to pay excessive damages comparing to the offence she committed, as she committed that offence under provocation, they further claim for the forced intervention of the Government in the case, because she committed the offence while she was on the duty as police personnel.

[81] Rugamba Frank and his counsel hakizimana, Habiyaambere and Gatabazi Nuru argue that he should not pay damages because he is not guilty, and that the damages equivalent to 10,000,000Frw which was awarded on the first instance are groundless.

[82] Karemera Steven, and his counsel Habyarimana and Gatabazi Nuru state that he has to be acquitted, and the calculation of damages equivalent to 10,000,000Frw was not justified.

## **THE VIEW OF THE COURT**

[83] Article 258 of the Decree Law of 30/07/1888 relating to contracts or conventional obligations provides that any act of a person that harms another, obliges that person who committed that fault to repair and article 45 of organic law N°01/2012/OL of 02/05/2012 instituting the penal code stipulates that all persons convicted of the same offence shall be jointly liable for the payment of the fine, restitutions, damages and court fees.

[84] The Court finds that in light of the provisions of the laws referred to above, Habyarimana, Uwiragiye and Karemera should pay damages to Mukambanda because they are found guilty of the offences, because they caused the death to her husband, but the fact that the requested damages equivalent to 500,000,000Frw are excessive with no convincing explanations that 10,000,000Frw

awarded on the first instance are insufficient, thus, the damages awarded on the first instance have to be confirmed as they are in appropriate range.

[85] With regard to Uwiragiye's pleadings that the Government of Rwanda has to be forced to intervene, so that it can be ordered to pay damages, the Court finds that forced intervention which was not invoked on first instance cannot be admitted pursuant to article 118 of the law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure states that forced intervention that could result in a sentencing judgment may not be made for the first time in appeal.

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

[86] Decides that the appeal lodged by Habyarimana Festus, Uwiragiye Fabiola, Karemera Steven and Rugamba Frank has merit in part

[87] Finds them guilty for violation of person's domicile and murder with no premeditation in ideal concurrence.

[88] Sentences to fifteen (15) years of imprisonment to each of them

[89] Orders them to pay Mukambanda in solidum, damages equivalent to 10,000,000Frw.

[90] Finds cross appeal of Mukambanda without merit.

[91] Overrules the appealed judgment RP0105/12/HC/NYA in part.

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