

PROSECUTION v. NDIKUBWAYO

[Rwanda SUPREME COURT – RPAA0057/15/CS (Mukanyundo, P.J., Munyangeri and Hitiyaremye, J.) May 11, 2018]

Evidence Law – Evidence – Confession – Confession of the accused is not a conclusive element of evidence, rather, it has to be corroborated with other relevant elements of evidence of the case.

Facts: This case started at the Intermediate Court of Nyarugenge whereby Ndikubwayo was prosecuted for having defiled a girl of eight (8) years, in the family he was working for as house boy for two months. The child's father states that he caught Ndikubwayo red-handed defiling his child, on asking him, Ndikubwayo replied that he was about to defile the child but she refused, that rather he committed it yesterday.

The accused pleaded not guilty, stating that he is innocent because the statements of confession were due to the flogging by the child's father together with *inkeragutabara*, thus he confessed to save his life, he adds that the reason behind the case was his salary that he was claiming. That Court found him guilty basing on his confession before village authorities and judicial police and sentenced him to life imprisonment.

The accused appealed to the High Court and he maintains to plead not guilty, that Court rendered the judgment deciding that his appeal lacks merit.

He appealed again before the Supreme Court demonstrating that his confession which was relied on by the previous courts was due to the flogging of the child's father together with *inkeragutabara* and that the child's father falsely accused him with the intention of not paying his two months wage. He further stated that the court based only on the the statement of U.A. whereas she is still minor and that the medical report does not indicate that the child was defiled, he also added that the High Court based on the rulings of the Intermediate Court instead of ordering the Prosecution to produce other elements of evidence which clear any doubt.

The Prosecution stated that the documents contained in the case file as well as the rulings of the judgment rendered by the High Court there is no statement of the child, therefore the child's statement was not considered, rather, the court based on the fact that the child's father found her being defiled and that the accused confessed it to the father of the child, before village authorities and in the judicial police. With regard to the medical report, the Prosecution argues that in the commission of the offence, the accused concealed the evidence because during his interrogation, he confessed having defiled the child but avoided injuring her.

Held: 1. The confession of the accused is not a conclusive element of evidence, rather, it has to be corroborated with other relevant elements of evidence of the case. Therefore, the appellant is not guilty despite his confession before village authorities and in the judicial police because nothing proves to the Court beyond any reasonable doubt that the offence was committed.

**Appeal has merit;
The ruling of the appealed judgment is overruled;**

Court fees to the public treasury.

Statute and statutory instruments referred to:

Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, article 165.

Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 4,65,119.

No case laws referred to.

Authors cited:

Jean Languier, La procédure pénale, 5ème édition mise à jour: 4ème trimestre 1981, p.45.

Henri-D-Bosly & Damien Vandermeersch, Droit de la Procédure Pénale, 2ème édition, 2001, p.929

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started at the Intermediate Court of Nyarugenge, whereby Ndikubwayo Emmanuel was prosecuted for having defiled a girl child of eight (8) years old named U.A, a child of the family he worked for as house boy for two months. Gasirikare Gaspard, father of the child states that he caught in red-handed Ndikubwayo Emmanuel defiling his child, that he asked him but the later replied that he was about to commit it but the child refused, that rather he committed it yesterday.

[2] Ndikubwayo Emmanuel pleaded not guilty, the allegations that he confessed, it was made as a result of flogging by the child's father together with *inkeragutabara*, consequently he confessed to save his life, he adds that the reason behind that was his salary he claimed. On 20/06/2014, the Intermediate Court of Nyarugenge rendered the judgment RP0241/14/TGI/NYGE and found Ndikubwayo Emmanuel guilty and sentenced him to life imprisonment.

[3] Ndikubwayo Emmanuel appealed to the High Court, maintained pleading not guilty, on 03/03/2015, the Court rendered the judgment RPA0454/14/HC/KIG holding that his appeal lacks merit.

[4] Ndikubwayo Emmanuel appealed to the Supreme Court, together with his counsel Mugabo Fidèle state that the court convicted him for having defiled a child basing on the statements of that child who is under 18 years old while it contradicts the laws, that the court disregarded the exculpatory elements of evidence which include medical report that proves that the child was not defiled.

[5] The hearing was held in public on 09/04/2018, Ndikubwayo Emmanuel was assisted by Counsel Mugabo Fidèle whilst the Prosecution was represented by Ntawangundi Béatrice, the National Prosecutor.

II. ANALYSIS OF LEGAL ISSUE

Whether there is incriminating evidence against Ndikubwayo Emmanuel for the offence he is accused of.

[6] Ndikubwayo Emmanuel states that his first ground of appeal concerns the fact that the previous Courts convicted him basing on his confession regardless of the fact that in his defense he explained that he confessed in village due to the flogging by the child's father together with *inkeragutabara*, that is the reason he pleaded not guilty before the Court, he adds that what the courts considered as the statements of the child to her father she was rather induced by her father in order to concoct a crime against him with the intention of not paying his two months wage which they failed to agree on the amount.

[7] Counsel Mugabo Fidèle states, the fact that the court relied on the testimony of U.A. who is underage child, below of 18 years, age of majority contradicts the provisions of article 63 of the evidence law which provides that Children of 14 years and below as well as adults persons with incapacity are allowed to testify in court but their testimony must be corroborated by other evidence, hence, the Court should not have solely relied on the testimony of Gasirikare, the father of the child because his statements base on what his child told him that Ndikubwayo Emmanuel defiled her.

[8] Ndikubwayo Emmanuel and his counsel state that courts convicted him for having defiled U.A. disregarding the medical report issued by physician Jules Mukeshimana after having examined that child on 08/04/2014, however this report contradicts itself as the physician indicated that the child was not defiled, but the child was treated with infection medicines whilst those medicines are recommended in case the defilement is suspiciously to have been committed in order to prevent.

[9] Counsel Mugabo Fidèle states, the fact that the testimony made was the statement of the child and the medical report does not reveal an act of the offence against the child, the High Court should have asked the Prosecution to produce other irrefutable elements of evidence because there is no incriminating evidence against Ndikubwayo Emmanuel, hence, they prays to the Supreme Court to base on article 87 and article 165 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure and acquit Ndikubwayo Emmanuel because of doubt.

[10] Ndikubwayo Emmanuel and his counsel Mugabo state that the High Court relied on the findings of the Intermediate Court and emphasized them instead of ordering the Prosecution to produce other elements of evidence beyond any doubt basing on article 85 of the law relating to the code of criminal procedure because the affidavit of the child's father demonstrates that Ndikubwayo Emmanuel heard him coming, he covered himself with a bed cover and then when the child's father touched his private organ, he found it in state of erection. They asserted, the fact that the medical report discharges him and the fact that he was not examined, there is no any irrevocable incriminating evidence against him, thus, the court should disregard the evidence of the Prosecution, instead, the court should base on article 87 of the law relating to the code of criminal procedure and finds that there is no irrefutable incriminating evidence produced by the Prosecution against Ndikubwayo Emmanuel and consequently acquits him.

[11] The Prosecution argues that Ndikubwayo Emmanuel's grounds of appeal are groundless, that there is no statement of the child either in the case file or in the rulings of the judgment rendered by the High Court, that the statement of the child was not relied on, rather, the court based on the fact that Gasirikare caught Ndikubwayo Emmanuel red-handed defiling his child, this collaborates with what the child told him and the confession of Ndikubwayo Emmanuel.

[12] With regard to the medical report, the Prosecution argues that the report does not indicate that the child had the infection caused by the defilement, that even in his conclusion he found U.A. with no any sexually transmitted diseases, the Prosecution further explained that the medical report demonstrates that Ndikubwayo Emmanuel did not penetrate his genital organs into that of the child, this corroborates with his confession that he defiled her using her external genital organs, this is also why it was found that her hymen was still intact.

[13] With regard to Ndikubwayo Emmanuel's statement that the medical report should not be considered because it contradicts itself, it stated that considering how the offence was committed, it was not possible that the physician could notice that the child was defiled as Ndikubwayo Emmanuel admitted in his interrogation that he defiled her by using her external genital organs and ejaculated outside in order to avoid injuring the child, this proves that he committed the offence in concealing evidence, he willingly revealed this because he was asked if his confession is extracted under duress but he replied that was not under forced constraint.

[14] The Prosecution states that the physician treated the child with medicines in order to prevent harmful consequences.

[15] It prays for not taking into account the statement of Ndikubwayo Emmanuel and his counsel that there are no incriminating evidence produced by the Prosecution, because considering the way the offence was committed, how Gasirikare Gaspard caught Ndikubwayo Emmanuel red-handed in defiling his child and the fact that Ndikubwayo Emmanuel confessed immediately before him, to the village authorities as well as in judicial police. In addition, he does not prove that he had conflict with his employer before he was detained so that it can be serve as discharging evidence especially that in his interrogation he stated that he does not know the reason they falsely accused him.

[16] The prosecution argues that the elements of evidence based on in court's ruling which include Ndikubwayo Emmanuel's confession, the statement of Gasirikare Gaspard who caught him sleeping with the child, the medical report proving that the child was defiled without penetration, it finds that this report does not discharge him because it indicated the child's health conditions, this corroborates with the Prosecution's arguments in proving its case and it also concurs with the provisions of article 190 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code.¹ It also states that a medical test of Ndikubwayo Emmanuel could not help in the administration of the justice because the report demonstrated nothing to him as well as to U.A.

[17] It concluded stating that after reading the affidavit of the child's father whereby he indicated that the offence did not cause harmful consequences to his child and he requested to

¹This article provides that child defilement means any sexual intercourse or any sexual act with a child regardless of the form or means used.

release him, it finds that nothing should prevent him from being imprisoned however basing on article 40 of the penal code which states that fixed-term imprisonment is not less than one (1) day and not more than twenty-five (25) years, it prays that in case the court finds it otherwise, it can reduce the penalty and sentence him to 25 years of imprisonment, because the offence did not cause harmful consequences to the child.

THE VIEW OF THE COURT

[18] Article 4 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that a court decides a case before it in accordance with the rules of evidence applicable to the nature of the case. Article 65 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence[...] while article 119 of the Law N°15/2004 of 12/06/2004 mentioned provides that the courts rule on the validity of the prosecution or defence evidence.

[19] The documents of the case file demonstrate that Ndikubwayo Emmanuel was accused of defilement of the child U.A. of eight(8) years old, the Prosecution's evidence include Ndikubwayo Emmanuel's confession that he defiled the child using her external parts to avoid injuring her, and that U.A. told her father that Ndikubwayo Emmanuel poured on her warm fluid and that Gasirikare Gaspard (parent) in his interrogation he stated that he caught him sleeping with his child and when he touched his genital organ, he found that he had penile erection, and Ndikubwayo instantly apologized stating that he had not yet done it, except yesterday. Before this Court, the Prosecution states that the medical report indicates that the child was not injured, it links this with how Ndikubwayo Emmanuel explained the commission of the offence during his confession in interrogation.

[20] The medical report of 08/04/2014 indicates that U.A. the alleged victim was examined by Dr. Jules Mukeshimana, he found no signs of defilement on her genital organs, be it internal and external parts and that the hymen was still intact.

[21] The court finds that the Intermediate Court convicted Ndikubwayo Emmanuel basing on his confession before the village authorities who made a report, he also confessed it before the judicial police, that he pleaded not guilty before the court stating that he was flogged by by *inkeragutabara* but he failed to prove it, that because of that contradiction, in his conviction, the judge is entitled to analyse the statement of the accused. The High Court in sustaining the rulings of the previous court held that Ndikubwayo Emmanuel apart from his confession, he also explained the commission of the offence, and that when his statements are considered together with those of the child that he defiled her twice, pouring to her some warm fluids, then it ruled that his confession proves the truth despite pleading not guilty before the court, especially that he failed to prove that his confession was extracted under duress.

[22] In his pleadings before this Court, Ndikubwayo Emmanuel still pleads not guilty, stating that the Prosecution did not produce concrete incriminating evidence because even his confession based on by previous courts, was extracted by being flogged by *Inkeragutabara*.

[23] The Court also finds that in his pleadings, Ndikubwayo Emmanuel argues that the child's father falsely accused him with intention not paying his two months wage.

[24] Analysis of the elements of evidence relied on by previous courts to convict Ndikubwayo Emmanuel, it indicates that even though he confessed and explained the commission of the offence before the judicial police, but the fact that he pleaded not guilty before court and the medical report does not demonstrate any sign of sexual violence to the child's genital organs and Gasirikare, the child's father in his interrogation, stated that his child was not injured, moreover, he said that the justice organs can release Ndikubwayo Emmanuel but he unfortunately said that due to a lot of expenses he incurred to this case , he will not pay the money he owes him, the Court finds that the sympathy of Gasirikare Gaspard for Ndikubwayo Emmanuel are baffling, rather, the fact that he stated that he has not yet paid him supports the pleadings of Ndikubwayo Emmanuel that Gasirikare falsely accused him with intention of not paying him.

[25] Even if the confession is one of the elements of evidence which can be based on by the court to convict the accused, especially that for long time it had been considered as the darling evidence among others by some jurists, the Law scholar Jean Larguier in his book titled *la procédure pénale*¹² states that its trust has gradually been lost because it has been noticed that people confessed while not guilty with the intention of concealing an offender in his/her family, to be famous, to save his/her life in case of torture, penitentiary comfort compared to your living conditions, etc. for that, the fact that the accused has admitted the offence, it is not conclusive evidence to hold that the truth has been found because as motivated in given circumstances, the confession is one of the elements of evidence which have value when corroborated with other elements of evidence.

[26] Even if Ndikubwayo Emmanuel confessed the offence before local authorities and in the judicial police, but this time he denies having defiled that child, the Courts finds that there is confusion in the commission of that offence because the statement of the child's father on what he pretends to have seen and on what he was told by his child, nothing proves to the Court beyond reasonable doubt that the offence was committed so that the court may rely on it to hold that Ndikubwayo Emmanuel defiled U.A, in addition, the medical report does not indicate any wounds on the child's genital organ caused by Ndikubwayo Emmanuel's genital organ to prove that he used to defile her. This is also what was demonstrated by law scholars whereby they state that the judge cannot convict a person, without concrete evidence which were also subject to defense during the hearing, those elements of evidence have to be assessed by the discretion of the judge.³

[27] The fact that the Prosecution failed to produce irrefutable elements of evidence in relation to the commission of the offence beyond any reasonable doubt that Ndikubwayo Emmanuel

² Jean Larguier, *La procédure pénale, 5ème édition mise à jour : 4ème trimestre 1981*, p.45. : " L'aveu longtemps considéré comme " reine des preuves " - et sollicité le cas échéant par la torture-, l'aveu suscite aujourd'hui plus de défiance. Mille et mille, disait Montaigne, se sont chargés de fausses confessions : on peut avouer par vanité--, heureux de voir ainsi sa photographie dans le journal--, par crainte à l'égard du vrai coupable, par amour de l'être cher qui a commis l'infraction, voire par amour du confort pénitentiaire".

³ Henri-D-Bosly & Damien Vandermeersch, *Droit de la Procédure Pénale, 2ème édition, 2001*, p.929 : « Le juge ne peut déclarer un prévenu coupable que s'il a acquis l'intime conviction de sa culpabilité au-delà de tout doute raisonnable sur la base d'éléments de preuve qui lui ont été régulièrement produits et soumis à la contradiction et qu'il apprécie souverainement ».

defiled U.A. and basing on the statements of Gasirikare Gaspard which do not demonstrate that U.A. was actually defiled, especially that the medical report indicates no signs of sexual violence, the Court finds that there is a doubt whether Ndikubwayo Emmanuel committed the offence for which he was convicted by the previous courts, hence he has to be acquitted pursuant to article 165 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure which provides that the benefit of doubt shall be given in favour of the accused. If the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving beyond reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal.

III. THE DECISION OF THE COURT

[28] Finds Ndikubwayo Emmanuel's appeal with merit.

[29] Holds that Ndikubwayo Emmanuel is not guilty of the offence for which he is prosecuted because of doubt, hence he has to be released.

[30] Decides that the judgment RPA0454/14/HC/KIG rendered on 03/03/2015 by the High Court is reversed.

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