

PROSECUTION v. DUSABIMANA

[Rwanda SUPREME COURT – RPAA0066/15/CS (Rugege, P.J., Kayitesi Z. and Kayitesi R., J.)
January 04, 2019]

Evidence Law – Admission of the offence – Admission is not an irrefutable proof to be considered in all circumstances in convicting the accused – The fact that the accused admitted the offence and later denies it, puts the onus on the Prosecution to produce other elements of evidence to support the statement of the guilty plea of the accused.

Facts: This case started at the Intermediate Court of Ngoma where the Prosecution accused Dusabimana for infanticide stating that together with Hategekimana, she killed her two years oldson called Sibomana, the accused pleaded not guilty arguing that she didn't kill her child, instead, he died natural death and that she possesses medical documents proving it, the court rendered the judgment and decided that the accused are guilty and sentenced each of them to life imprisonment.

The accused appealed to the High Court, chamber of Rwamagana, Dusabimana pleaded guilty requesting for pardon but that court did not consider her admission of the offence on ground that it found her admission incomplete because she contradicts herself that she took the child to the hospital and died on the way and on the other hand she states that she killed the child out of anger, consequently, the Court did not reduce the penalty.

Dusabimana again appealed before the Supreme Court arguing that she pleaded guilty and sought for pardon but the court refused to reduce the penalty of life imprisonment, she adds that in previous courts she pleaded guilty for the offence she did not commit because she was told that she will be immediately released if she admits it, but she did not kill her son, instead, he fell sick they took him to the hospital and died later, she adds that he was buried at his paternal grandfather's place and that he was the only child she gave birth to. She further explained that the contradiction in her statement was due to the fact that she had no advocate but there is no proof that she murdered her child.

After the court heard the grounds of appeal and the response of the Prosecution, the Court found that before adjudicating the case, it is necessary to conduct its own investigation with regard to the child she is accused to have killed, the court also ordered that Dusabimana be examined to determine whether she does not suffer from the neuro psychiatric illness, it also ordered the Prosecution to conduct further investigation to demonstrate the number of children the accused gave birth to, the place where the child was killed and where he was buried. The Court also found, it is necessary that the remains buried at the child's grandfather place be exhumed to make DNA test to determine the sex of the child buried in that grave and his/her relationship with Dusabimana.

With regard to the issue of mental illness, Ndera Neuro Psychiatric Hospital submitted its medical report demonstrating that she was mentally normal, whilst the DNA test which was conducted, revealed that the body which was examined was of a girl with no parental relationship to Dusabimana.

The hearing resumed and Dusabimana argued that since the DNA test revealed that the child alleged to be hers is not, implies that there is no ground to substantiate that she killed her own child, rather, the Prosecution should demonstrate other cause of the child's death.

The Prosecution contends that the fact Dusabimana Jeanette pleads not guilty in appeal while she admitted the offence before the previous courts, it should incriminate her and that Dusabimana and her counsel pleadings should not be considered because their statements contradict the elements of evidence contained in the case file. On the issue of locating the place where the body of Sibomana Samuel was buried, the Prosecution stated that it is unknown because the accused refused to reveal it.

Held: 1. Admission is not an irrefutable proof to be considered in all circumstances in convicting the accused, therefore the statements relied on by the previous courts are not sufficient to convict Dusabimana for the offence of infanticide because those statements do not clearly demonstrate the offence for which she admitted.

2. The fact that the accused admitted the offence and later denies it, puts the onus on the Prosecution to produce other elements of evidence to support the statement of the guilty plea of the accused.

3. The benefit of doubt is given in favour of the accused, therefore, the fact that the dead body which was examined has no parental relationship with the accused and differs from the one cited by the Prosecution on the basis of statements of witnesses and basing on the fact that the Prosecution failed to prove its case beyond reasonable doubt, the accused is acquitted.

**Appeal has merit;
Court fees 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 143.

Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, article 85 and 165.

Case referred to:

Prosecution v. Nyirahabimana, RPA0229/10/CS rendered on 19/09/2014 by Supreme Court.

Prosecution v. Ndungutse, RPA0042/14/CS rendered on 02/06/2017 by Supreme Court.

Authors cited:

Adrien Masset, Ann Jacobs & Michel Franchimont, Manuel de procedure pénale, Maison d'édition Larcier, 2009, P.1174.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started at the Intermediate Court of Ngoma whereby the Prosecution accused Dusabimana Jeannette together with Hategekimana Léonard of having killed her son called Sibomana Samuel who was 2 years old, so that they could cohabit.

[2] Dusabimana Jeannette pleaded not guilty stating that she didn't kill that child, instead, the death was succumbed to illness and that she possesses the supporting medical documents. The Intermediate Court of Ngoma rendered the judgment RP0678/13/TGI/NGOMA on 21/11/2013 deciding that Dusabimana Jeannette and Hategekimana Léonard are guilty of the offence which they are prosecuted for, hence It sentenced each of them to life imprisonment. Both appealed to the High Court, chamber of Rwamagana which rendered the judgment RPA0385/13/HC/RWG-RPA394/13/HC/RWG on 12/06/2014 deciding that their appeal lacks merit.

[3] In the examination of the grounds of Dusabimana Jeannette's appeal, where she stated that she appealed seeking for the pardon on the offence she committed, the Court found her admission not complete because even if she admits having committed the offence, she is not remorseful, rather she contradicts herself stating that she took the child to the hospital being accompanied by Hategekimana Léonard who held the child in his arms and when they reached the forest he told Dusabimana that the child has passed away while he was the one choking the child, on the other hand she stated that she murdered the child out of anger caused by her husband who took her family's estate, consequently, she collaborated with Hategekimana Léonard to kill that child.

[4] Dusabimana Jeannette appealed to the Supreme Court stating that she pleaded guilty seeking for pardon but the court did not reduce the penalty and upheld the sentence of life imprisonment, she adds that she discharged Hategekimana Léonard demonstrating that he was not involved in the commission of the offence but the court disregarded it, she further requests that Hategekimana Léonard be acquitted since the criminal liability is personal. Her appeal was recorded N^oRPAA0066/15/CS.

[5] The hearing of the case was held in public on 22/01/2018, Dusabimana Jeannette assisted by Counsel Ndayambaje Gilbert whereas the Prosecution represented by Munyaneza Nkwya Eric, the National Prosecutor. Dusabimana Jeannette begun her pleadings by disowning the contents of the document relating to the appeal which were brought before the Supreme Court arguing that she is not the one who prepared it because she was sick, she states that in lower courts she pleaded guilty for the offence she did not commit because she was told that she would be immediately released if she pleaded guilty, that she did not murder her son Sibomana Samuel, rather, he got sick and he was taken to the hospital and died, that he was buried at his paternal grandfather.

[6] After the Court heard Dusabimana Jeannette explaining her grounds of appeal and the Prosecution's response, the Court decided to conduct its own investigation on the child whom Dusabimana Jeannette is accused of murdering. Duringt the investigation conducted on 22/01/2018, witnesses Uwimana Beatrice, Ntirenganya Fabien and Harerimana Damascene testified that Tuyisenge and Dusabimana gave birth to two children, but they do not know whereabouts of the second child called Sibomana Samuel and that the child they know who deceased is Uwineza Aline and was buried at his paternal grandfather.

[7] During the hearing of 19/03/2018, the accused appeared before the court being assisted by a legal counsel and the Prosecution was represented as it was in the previous session. After the court examined how Dusabimana Jeannette explained the facts in comparison to her previous hearings, the Court ordered for supplementary inquiry, that the Prosecution takes Dusabimana Jeannette to the expert physicians to examine her, if she does not suffer from mental illness . The court also found it necessary that the Prosecution conducts supplementary investigation to determine whether Dusabimana Jeannette gave birth to two children (Uwineza Aline and Sibomana Samuel) or one and also the place where Sibomana Samuel was killed and buried. The court summoned Tuyisenge Emmanuel the husband of Dusabimana Jeannette in order to get some information from him, the court decided to resume the hearing on 25/06/2018.

[8] On 20/06/2018, Ndera Neuro Psychiatric Hospital submitted the report on examination conducted on Dusabimana Jeannette from 17/05/2018 to 20/06/2018, which demonstrated that she was mentally normal. The only sign noticed was the depression because sometimes she cries saying that she has headache, but the physician explains that this may have been caused by the conditions she lived in before and after incarceration, the report concluded that she has no sign of neuro psychiatric illness.

[9] On 25/06/2018, both parties appeared before court and expressed their opinions on outcome of the investigation as well as on the medical report. Among the issues assigned to the Prosecution was to determine whether Dusabimana Jeannette gave birth to two children (Uwineza Aline and Sibomana Samuel) or one. The Prosecution produced photos of the grave where it states that Uwineza Aline is buried, that the place where Sibomana Samuel was buried or thrown is unknown because the accused refused to reveal it.

[10] Dusabimana Jeannette stated that Sibomana Samuel was buried in that grave, that he was the only child she gave birth and that before she cohabited with Tuyisenge Emmanuel, the latter had a daughter who is still alive.

[11] The court found that before rendering the judgment, it is necessary that the body buried at the child's grandfather be exhumated to have DNA test conducted in order to find out the sex of the child buried in that grave and the relationship with Dusabimana Jeannette, the Court again summoned Tuyisenge Emmanuel in order to get some information from him. The DNA test was conducted by Dr Christa Augustin who works at UKE Institute of legal medicine, Hamburg, Germany, which indicated that the body which was examined was of a female with no parental relationship to Dusabimana nor Tuyisenge .

[12] The hearing was resumed in public on 03/12/2018, the accused appeared before court being assisted and the Prosecution was represented by Rudatinya Nyangezi Gaspard, whereas Tuyisenge defaulted to appear though he was legally summoned, the parties were given opportunity to react on the DNA test report.

II. ANALYSIS OF LEGAL ISSUES

Whether there are incriminating elements of evidence to prove that Dusabimana Jeannette murdered her child Sibomana Samuel.

[13] Dusabimana Jeannette states that in previous courts she was convicted for the offence she did not commit because she did not kill her child, rather she took him to the hospital accompanied by Tuyisenge Emmanuel (the child's father) and the child succumbed to sickness thereafter. She states that she confessed in judicial police and admitted in lower courts because she was told that she would be released immediately once she confesses and that she is not the one who wrote the letter of appeal when she appealed to the Supreme Court because she was sick.

[14] She states that the child she is accused of killing, did not die in 2013 as indicated in the case file, rather, he died in 2011 and buried at his grandfather place in Nyabageni village, Kabazungu cell, Musanze sector, northern province, she adds that he was buried in presence of his father and neighbors, among these, she remembers Ntiringanya Fabien, Harerimana Damascene, Ntawiha and Uwimana Nirere.

[15] When she was asked about the statements of those whom she mentioned that they escorted her to the hospital whereas they denied having known about the death of Sibomana Samuel and that he is not recorded in appropriate registers, she replied that the physician who treated him may have forgotten to record in that book, while the fact that those who were interrogated have refuted her statement, she explained that she does not know the reason behind that because what happened was in the broad daylight.

[16] With regard to outcome of the supplementary investigation, Dusabimana Jeannette again affirmed that she and Tuyisenge Emmanuel gave birth to one child called Sibomana Samuel, that before she cohabited with Tuyisenge Emmanuel, the latter had another child who is still alive, she believes that this is the reason why they are those who stated that she had two children, the child she had with Tuyisenge died at 3 years old and buried at his grandfather's place, and by the time they moved to Kirehe, the child was already dead.

[17] Her Counsel Ndayambaje Gilbert states that the reason Dusabimana Jeannette was contradicting herself in her pleadings was because she had no advocate, but there is no proof that the child was murdered by her mother and that in addition, those who were interrogated in investigation did not assist the court, but they all stated that the cause of the child's death is unknown.

[18] Counsel Ndayambaje Gilbert states that DNA test carried out, shows that there is no parental relationship between the dead body examined and Dusabimana and Tuyisenge as well, that the fact that DNA proves that the child alleged to be theirs is not, it should be questioned the basis to affirm that Dusabimana murdered her child whilst nothing proves the place in which he died, rather it is obvious that they gave birth to child who dies later due to natural cause, if it is not considered as such, the Prosecution should prove other cause of the death. He concludes by requesting that his client be acquitted pursuant to article 165 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure because of benefit of doubt.

[19] The Prosecution states that Dusabimana Jeannette made false declaration in stating that she went together with the child's father to the hospital and that the child died in hospital because in judicial police Tuyisenge Emmanuel explained that he asked Dusabimana where the

child was but she kept quiet and later she told him that he had died, this proves that the father was not present at the moment of the child's death.

[20] It further states that even if Dusabimana Jeannette disowns her document of appeal but its contents include the fact that she explained how the child cried, hence she was depressed and choked him, threw the body in sand quarry, thus the statements found in that document demonstrate that they cannot be written by someone else especially that in that appeal she discharges Hategekimana Léonard.

[21] The Prosecution further states that the fact that Dusabimana Jeanette pleads not guilty in appeal while she admitted the offence before the previous courts, this incriminates her basing on article 104 of the evidence law and that Dusabimana Jeannette and her counsel pleadings should not be considered because their statements contradict the elements of evidence found in the case file and they are sufficient.

[22] It also states that the outcome of the investigation reveals the truth of the facts because all witnesses stated that the child they know is Aline who was buried at the place of Dusabimana Jeannette's father in law, and their common declaration was that Dusabimana's second child was of two years old, and that child is different from the one called Sibomana treated at the health center of Bisate on 25/05/2011. It concludes stating that the document written by Dusabimana Jeannette herself when lodging appeal, it is the one which contains her truth even if she argues that it was written by someone else.

[23] With regard to the issue of determining the time and the place where Sibomana Samuel was murdered, the Prosecution states that it was not possible because all those with information stated that they got it from Dusabimana, but they indicated that the child died either in Kirehe or Musanze. It adds that with regard to whether Dusabimana Jeannette is not the one who prepared her submissions of appeal because she was sick, witness Nyirabarima Florida (she is among those who prepare court submissions to other prisoners in prison of Ngoma) who is detained in prison of Ngoma was interrogated, explained that she prepared Dusabimana's court submissions when she was not sick and that they discussed about the case, that she demonstrated to her the negative effect of concealing the truth and in the course of preparing that court submissions, Dusabimana was remorseful for wrongly accusing Hategekimana Léonard.

[24] The Prosecution contends that DNA test indicated that the child who was buried was a girl, and it is a proof that the accused murdered her son called Sibomana Samuel which is different from what the accused declares that he died and buried at his grandfather's place, therefore this element of evidence corroborates with other elements of evidence produced before, and it shows that the child was not buried at his grandfather's place.

THE VIEW OF THE COURT

[25] Dusabimana Jeannette was accused of infanticide which is provided by article 143 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which states that a person who kills his/her biological or adopted child shall commit infanticide. Infanticide shall be punishable by life imprisonment.

[26] Article 85 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that the burden of proof shall be on the Public Prosecution or, in case of a claim for damages or private prosecution, on the victim of an offence or his/her rightful beneficiaries. The case file demonstrates that Dusabimana Jeannette was found guilty of infanticide by previous courts basing on the fact that she might have admitted the offence.

[27] The case file also demonstrates that when Dusabimana Jeannette was interrogated in judicial police on 06/08/2013 (identification mark 17-20), she denied the offence, she explained that her child died from stomach illness and that she took him for treatment. On 12/08/2013 before the Prosecution, Dusabimana Jeannette contradicted her statement and confessed the offence and stated that the child was strangled by Hategekimana when the latter brought her to the traditional healer. She again changed her statement before the Intermediate Court of Ngoma whereby she pleaded not guilty of the infanticide saying that she didn't kill her child, that he died from illness. Dusabimana Jeannette again changed her statement before the High Court whereby she pleaded guilty stating that together with Hategekimana Léonard murdered her child and buried him in the forest and before the Supreme Court, she pleaded not guilty.

[28] The confession of Dusabimana before the Prosecution is formulated as follows I confess the offence I am accused of. "It was on 22/06/2013 around 3pm, when we were in Musanze the child fell sick, Hategekimana took me to the traditional healer, at that moment, Hategekimana was the one carrying the child and on our way he told me that the child has passed away. I believe that he might have strangled him and concealed it [...]" in addition to this statement of Dusabimana before the Prosecution, there is also her statement before judicial police (identification page 7) where she stated "I seek pardon for concealing the offence of killing our child and failed to reveal the truth[...]." Despite pleading not guilty before the Intermediate Court, that Court relied on those statements to convict her.

[29] The other declaration in which Dusabimana confessed the offence was before the High Court. She stated "I admit the offence and ask for pardon because I pleaded not guilty before. I conspired for murdering my child. He told me that he does not want that child and he took and choked him[...]. I am requesting for reducing the penalty [...]. As it is obvious in paragraph 9 of the judgment RPA0385&394/13/HC/RWG rendered by the High Court, Dusabimana's declaration was considered as an element of incriminating evidence, however, that court found that she failed to explain clearly how she committed the offence.

[30] The statements relied on by the previous court to convict Dusabimana Jeannette for the infanticide, this Court finds them to be not sufficient for convicting her because in judicial police and before the Prosecution, those statements do not clearly demonstrate the offence which Dusabimana confessed since she stated herself that she suspects that her child was killed by Hategekimana. Pursuant to the provisions of article 85 of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, the burden of proof is on the Public Prosecution to prove the offence Dusabimana is prosecuted for. The Prosecution should have based on those statements for which it relies her confession, to get the corroborating evidence. It is not convincing how she informed the judicial police the place where the child's dead body was dumped and it failed to take her there to show that place whereas the corpse is considered as one of the elements of the offence.

[31] Admission of the offence is one of the elements of evidence which can be relied on by the court to convict the accused for having committed offence. However, Admission is not an irrefutable proof to be considered in all circumstances in convicting the accused. The legal scholars Adrien Masset, Ann Jacobs and Michel Franchimont in their book *Manuel de procédure pénale* state that admission of the offence is element of evidence like others, which can also not be considered because it can be a weak proof, (*l'aveu n'est plus qu'un élément parmi d'autres de la conviction du juge, dont il faut d'ailleurs se méfier, car il peut être une preuve fragile*).¹

[32] With regard to this case, at the beginning Dusabimana denied that she committed the offence, later she confessed but in an unclear manner. The Court finds that basing on the statements of her confession as an incriminating evidence and disregard her statement denying the commission of the offence has to be corroborated with other elements of evidence especially in this case where the accused is illiterate², who can consent to any thing suggested by others without prior analysis to know the effects of her statement.

[33] The fact that the admission of offence alone is not sufficient to prove the accused guilty of the offence in absence of other corroborating evidence was also decided so in the case between the Prosecution and Nyirahabimana Esperance, RPA0229/10/CS rendered on 19/09/2014 by the Supreme Court, and also in the case between the Prosecution and Ndungutse Deo, RPA0042/14/CS rendered on 02/06/2017. In both cases the court held that the fact that the accused admitted the offence and denied it later, puts the onus on the Prosecution to produce other elements of evidence to support the statement of the guilty plea of the accused.

[34] Before the Supreme Court, Dusabimana Jeannette stated that Sibomana Samuel died due to illness and buried in his grandfather's land. The Prosecution and those who were interrogated during the investigation stated that the child buried at the place mentioned by Dusabimana Jeannette is her other child called Uwineza Aline whom she gave birth together with Tuyisenge. To prove that the child who was buried at the place indicated by Dusabimana Jeannette is her daughter as invoked by the Prosecution, it should have been a proof that it is not Sibomana Samuel (a boy child) buried there.

[35] DNA test which was conducted demonstrated that the dead body examined was of the girl with no parental relationship to Dusabimana and Tuyisenge as well the test proved that he is not the father. The court finds that there is doubt on the body which was examined because though the test demonstrated that the body was of the girl, but she is not Dusabimana's child as previously stated by the Prosecution.

[36] It is the Prosecution which sought for the DNA test of the dead body whom it stated to be Uwineza Aline's body who was buried at her grandfather Gakaramu's place who jointly filed a complaint with his son Tuyisenge Emmanuel accusing Dusabimana to have murdered Sibomana. The Test of the dead body which was sought by the Prosecution without Dusabimana to be involved because she is imprisoned. What raises a doubt is that the dead body which was

¹ Adrien Masset, Ann Jacobs, Michel Franchimont in their, *Manuel de procédure pénale*, Maison d'édition Larcier, 2009, p.1174

² Dusamana Jeannette stated that she is illiterate on 06/08/2013 in judicial police and before the Prosecution on 12/08/2013 when she was being interrogated.

examined differs from the one invoked by the Prosecution basing on the statements of the child's grandfather Gakaramu as well as those of witnesses of the Prosecution who testified that it is a girl child called Uwineza Aline, daughter of Dusabimana who was buried at her grandfather's place instead of being Sibomana Samuel. The child's grandfather who showed the grave, he should not confuse the location of his grandchild (Uwineza Aline)'s grave. This raises the doubt on the truthfulness of Gakaramu's statements and other witnesses.

[37] The court finds that the nature of the case file also raises doubt, because it does not explain the facts especially the death of Sibomana Samuel, its cause and the place where he was buried in order to get further information and to remove doubt, the Supreme Court legally summoned Tuyisenge Emmanuel, the father of Sibomana Samuel twice but he refused to appear with no reason whilst he is the one who filed a complaint. It is therefore questionable whether he was right in his statement before judicial police or he intends to conceal the truth.

[38] Pursuant to the provisions of article 85 of the Law N°30/2013 of 24/5/2013 mentioned above, the burden of proof is upon the Public Prosecution to prove that the accused committed the offence. Also in the present case, the Prosecution had to produce the elements of evidence proving beyond any reasonable doubt that Dusabimana killed her son Sibomana, how and where she killed him, and other relevant evidence. In this case, the court finds that it was insufficiently done, the Prosecution solely relied on the accused's statements which are also not sufficient as motivated above.

[39] Article 165 of the law mentioned in the above paragraph 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. The court finds that in light of analysis of the provisions of articles mentioned above, there is serious doubt, thus Dusabimana Jeannette has to be acquitted for the offence of infanticide because the Prosecution has failed to prove beyond reasonable doubt that she committed that offence.

III. THE DECISION OF THE COURT

[40] Decides that the appeal lodged by Dusabimana Jeannette has merit;

[41] Decides that Dusabimana Jeannette is acquitted of infanticide because of doubt;

[42] Overtunes the rulings of the judgment RPA0385&394/13/HC rendered on 12/06/2014 by the High Court, chamber of Rwamagana.;

[43] Orders the release of Dusabimana Jeannette with immediate effect after pronouncement of the case;

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