

Re. KABASINGA

[Rwanda SUPREME COURT – RS/INCONST/SPEC
00003/2019/SC (Rugege, P.J., Nyirinkwaya, Cyanzayire
Rukundakuvuga and Hitiyaremye, J.) December 04, 2019]

Constitution – Due process of law – Due process of law consists of a series of requirements to be followed in the course of the proceedings based on procedural due process and fair justice that prevents the enactment of laws or other irrational measures that infringe on rights of the population (substantive due process) – The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 29.

Constitution – Due process of law – Mandatory sentencing – The mandatory sentencing is contrary to the principle of due process of law because the convict cannot appeal the sentence because the appellate judge cannot change it because it is mandatory – In criminal cases, while sentencing the convict, the judge is obliged to consider how it was committed, the conduct and welfare of the offender, on the society in which it was committed and on the victim.

Constitution – Freedom and Independence of the judge – Mandatory sentencing – In exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority – The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the manner in which it was committed, and mitigating circumstances that would have reduced his sentence in case there are any – The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 151.

Fact: Kabasinga Florida petitioned the Supreme Court seeking to declare unconstitutional article 133, paragraph five of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general which provides that: "[...] If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances. It infringes on article 29 and 151 of the Constitution of the Republic of Rwanda because it violates the right to a fair trial and undermines the independence of the judge in sentencing.

She argues that if there is a provision of the law prohibiting the consideration of a mitigating circumstance, which benefits the defendant and have his sentence reduced, implies that he is deprived of the right to a fair trial because while sentencing, a Judge must take into account the mitigating circumstance if there is any because it is part of the right to fair justice is provided for in the Constitution. she explains that the context of the subsection of that article which relates to child defilement followed by cohabitation as husband and wife poses a problem because the penalty of life imprisonment that cannot be mitigated, some are given severe sentence than others while if the way the offence was committed is considered it wouldn't be the case.

Regarding the issue that the impugned article infringes on the provisions of article 151;5 of the Constitution which provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority, he states that when the legislature enacts a law which does not give the judge the independence and liberty to exercise reasonable judgment, it precludes him or her from rendering the right to a fair trial provided for in Article 29 of the

Constitution. Therefore, prays that article 133, paragraph five of the Penal Code, which prohibits a judge to base on mitigating circumstances to render fair justice, be declared null and void, because it violates the independence of the judge in his work, as he is only required to give a life sentence, which is contrary to article 151 of the Constitution.

The Government of Rwanda argues that article 133 of Law N° 68/2018 of 30/08/2018 determining offences and penalties, in general, does not violate the Constitution, that it does not infringe on the right to a fair trial and that it does not prejudice the independence of the judge because nothing indicates that people are deprived of the right to fair justice, that the allegations of the plaintiff are based on emotion. It further argues that article 29 of the Constitution demonstrates a person's rights which must be respected to get fair justice, but the petitioner does not demonstrate how the provisions of the impugned article violate any of those rights.

On the issue of that article being contrary to article 151 of the Constitution, it states that no State organ deprived the judge of his/her freedom and independence because in executing his duties he abides by the law and which law exists, therefore it finds that the mentioned article is not inconsistent with article 151 of the Constitution.

Held: 1. Due process of law consists of a series of requirements to be followed in the course of the proceedings based on procedural due process and fair justice that prevents the enactment of laws or other irrational measures that infringe on the rights of the population (substantive due process).

2. The mandatory sentencing is inconsistent with the principle of due process of law because the convict cannot appeal the sentence because the appellate judge cannot change it because it is mandatory.

3. In criminal cases, while sentencing the convict, the judge is obliged to consider how it was committed, the conduct and welfare of the offender, on the society in which it was committed and on the victim. Therefore, the fact that a judge is unable to examine and consider the mitigating circumstances when they are available, to reduce the sentence of a person convicted of child defilement followed by cohabitation as husband and wife, is inconsistent with the provisions of article 29 of the Constitution which provides that everyone has the right to a fair trial because the convict is given unproportional sentence.

4. In exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority.

5. The judge is not independent, if during sentencing s/he is obliged to impose a mandatory sentence which is not proportional to the gravity of the crime, the manner in which it was committed, and mitigating circumstances that would have reduced his sentence in case there are any. Therefore, article 133 of paragraph five of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general which provides that: "[....] If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances is inconsistent with article 151 paragraph 5 of the Constitution which provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or

authority, as they are prohibited from relying on mitigating circumstances to impose proportional sentence.

Article 133, paragraph five of the Law N° 68/2018 of 30/08/2018 determining offences and penalties, in general, is inconsistent with article 29 and 151 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015.

That paragraph is without effect as provided by article 3 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015.

Statutes and statutory instruments referred to:

The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 29 and 61

Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, article 49, 58, 60 and 151

Organic Law N° 01/2012/OL of 02/05/2012 establishing the penal code, article 78 (repealed)

Law N° 09/2004 of 29/04/2004 relating to the code of ethics for the Judiciary, article 4 and 5

International Covenant on Civil and Political Rights, (ICCPR), article 14

Case referred to:

RP 00062/2019/TGI/HYE, Prosecution v Barakagwira Gilbert rendered by the Intermediate Court of Huye on 18/02/2019

RP00357/2018/TGI/NGOMA, Prosecution and Barimenya Venant rendered by the Intermediate Court of Ngoma on 14/06/2019

RP 00499/2018/TGI/MUS, Prosecution v Ntahorutaba Wellars
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Cases from foreign courts:

United States Supreme Court, Jurek v. Texas, 428 U.S. 262
(1976), July 2, 1976

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(1977), No. 76-5206, June 6, 1977.

Supreme Court of the United States, Lockett v. Ohio, 438 U.S.
586 (1978).

Supreme Court of Canada, R. v. Beaugard, [1987] LRC
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Supreme Court of Canada, R v Smith, [1987] 1 S.C.R. 1045

South Africa: Supreme Court of Appeal, S v Toms; S v Bruce
(139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802(A
D); [1990] 2 All SA 248 (A) (30 March 1990).

Supreme Court of the United States, Graham v. Florida, 560
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Supreme Court of India, Mithu v. State of Punjab [1983] 2 SCR
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The label of life imprisonment in Australia: A principled or
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Mandatory Sentencing & the Independence of the Judiciary, available at: <https://www.ruleoflaw.org.au/wp-content/uploads/2015/11/MandatorySentencing.pdf>, visited on November 30, 2019

Judgment

I. BACKGROUND OF THE CASE

[1] KABASINGA Florida petitioned the Supreme Court seeking to declare article 133 par.5 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general unconstitutional because it is inconsistent with article 29 and 151 of the Constitution of the Republic of Rwanda in so far as they infringe on the right to due process of law and the independence of the judge to determine penalties.

[2] Article 133 par.5 of the Law N°68/2018 of 30/08/2018 mentioned above states that “[...] If child defilement is followed by cohabitation as husband and wife, the penalty is life

imprisonment that cannot be mitigated by any circumstances. [...]”.

[3] The Government of Rwanda submits that article 133 of the Law N°68/2018 of 30/08/2018 determining offences and penalties, in general, is not unconstitutional, and does not infringe on the right to due process of law nor does it infringe on the independence of the judge.

[4] The hearing was heard in public tried by the Supreme Court on 06/11/2019, the petitioner was represented by Counsel Rwagitare Fred Fiston and Counsel Mugabonabandi Jean Maurice, whereas the Government of Rwanda represented by Counsel Batsinda Aline.

II. ANALYSIS OF LEGAL ISSUES

Whether paragraph five of article 133 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general, is inconsistent with article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[5] Kabasinga Florida and her counsels aver that article 133 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general contravenes article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 which provides that everyone has the right to due process of law. They further contend that the paragraph of article 133 which is inconsistent with the Constitution is the one that provides that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances.

[6] The petitioner and her counsel submit that when a case is adjudicated whereby the sentence was determined in consideration of the available mitigating circumstances, that also constitutes the due process of law which is guaranteed by the Constitution. Thus, in case there is a provision that obstructs the examination of mitigating circumstances which would have led to a reduced sentence for the defendant, the right to due process of law is deprived. They further argue that the construct of article 133, specifically the paragraph concerning "child defilement followed by cohabitation as husband and wife..." is unconstitutional given that the penalty of life imprisonment cannot be reduced and thus detrimental to some, when depending on the circumstances under which the crime was committed, leading to some being severely punished than others which would not have been the case in some instances.

[7] They give an example of a person who may be convicted of defiling a child of the age bracket of 14 to 18 years, and the convict is above 50 years of age, such a person may be given a reduced sentence of up to 25 years of imprisonment. Yet a person of 19 years of age convicted of child defilement followed by cohabitation as husband and wife is sentenced to a penalty of life imprisonment which cannot be mitigated. They find this inconsistent with article 29 of the Constitution of Rwanda, consequently, they pray that article 133 which provides that be repealed.

[8] State Attorney Batsinda Aline representing the government of Rwanda argues that the provision of article 133 of the determining offences and penalties in general is not inconsistent with the Constitution because it does not obstruct

the right to due process of law, and that the petitioner's submissions are based on sentiments

[9] She further submits that article 29 of the Constitution of the Republic of Rwanda lays down the rights vested in a person, which must be respected so as to access due process of law, nevertheless, the petitioner does not prove how article 133 of the law determining offences and penalties in general infringes on some of those rights. She does not demonstrate whether the impugned article infringes on the rights provided under article 29 which are the right to be informed of the nature and cause of charges, the right to defence and legal representation, the right to be presumed innocent until proved guilty by a competent Court, the right to appear before a competent Court, the right not to be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute an offence under national or international law at the time it was committed.

[10] She concludes by submitting that the Legislator was attentive of the matters regarding the right to due process of law, that article 133 does not in any way contravene article 29 of the Constitution, that on the contrary, that both articles are harmonious based on the provisions of paragraph 4 of article 29 where it provides that offences and their penalties are determined by law, it is in her view that based on the petitioner's arguments, she finds that the petitioner is confusing the social majority age with the legal majority age. She concludes by praying to this Court to declare that article 133 is not inconsistent with article 29 of the Constitution.

DETERMINATION OF THE COURT

[11] Article 29 of the Constitution of the Republic of Rwanda states that “Everyone has the right to due process of law, [...]”. The same article furthermore numerates some of what constitutes this right.

[12] Article 29 of the Constitution provides some of the elements constituting the right to due process of law. As viewed through the construct of that article, it is obvious that all elements that constitute the right to due process of law were not listed. The legislator used the term “includes”. This implies that apart from those elements listed in article 29, other elements constitute the right to due process of law.

[13] The due process of law is defined in different ways, there is procedural due process: a course of formal proceedings (such as legal proceedings) carried out regularly and in accordance with established rules and principles¹. There is also substantive due process: protection against the enactment of arbitrary and unreasonable legislation or other measures that would violate peoples'rights.²

[14] The remaining issue before this court is whether the court considering the mitigating circumstances and to give an appropriate penalty are among the elements that constitute the right to due process of law. On this issue, the court finds that in criminal matters, the right to due process of law starts with the investigation phase, proceeds to the prosecution phase, to the trial and sentencing for the offences provided by criminal laws.

¹ Definition of due process, available at; <https://dictionary.findlaw.com/legal-terms/d.html> accessed on 2nd December 2019

² John N. Ferdico. Criminal Procedure for the Criminal Justice Professional. Thomson, Wadsworth 9th Edition, P.22

This implies that even the examination of the mitigating circumstances and sentencing is in the trial phase, and they should also respect the principles that constitute the right to due process of law on those aspects.

[15] Article 49 paragraph one of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general provides the grounds upon which a judge bases to give a sentence. That article provides that a judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence. [...]". The Court finds that the provisions of this article form the ground upon which a judge determines a penalty, and acting contrary to it, tantamounts to acting contrary to the right to due process of law in the determination of the penalty.

[16] Article 133 of the law N° 68/2018 provides for life imprisonment for a person convicted of child defilement if it was followed by cohabitation as husband and wife. That article does not allow that penalty to be mitigated. This contradicts the fact that a judge determines the penalty based on the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence as provided under article 49 mentioned in the preceding paragraph. Based on the construct of article 133, par.5 which relates to a person convicted of the crime of child defilement followed by cohabitation as husband and wife, it seems that the discretion of a judge over the convict of such a crime is limited only to convicting that person of that offence, and thus has no discretion

or powers to consider the factors taken into account by a judge in determining a penalty, since the life imprisonment penalty provided by the article is mandatory. This is contrary to what is provided under article 49 which provides for the factors taken into account by a judge in determining a penalty.

[17] The mandatory sentence that is also contrary to the principle of fair trial provided under article 14 (5) of the International Covenant on Civil and Political Rights,³ (ICCPR), which states that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal and according to the law" Regarding the mandatory penalty provided for a given offence, a person convicted of such an offence cannot appeal against the penalty handed since the appellate judge cannot change it given that it is mandatory. The same is emphasised by the United Nations Special Rapporteur on the Independence of the Judiciary where he stated that : ...[...] the right of appeal contained in Article 14(5) : [...] is negated when the trial judge imposes the prescribed minimum sentence since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards"⁴ . in a similar manner, a person convicted of the crime of child offence followed by cohabitation as husband and wife benefit nothing from

³ International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. Ratified by Rwanda on 12/02/1975 (See decree law No 8/75 of 12/02/1975, Official gazette n° 5 of 01/03/1975).

⁴ Dato' Param Kumaraswamy 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) Australian Journal of Human Rights at <http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#Heading140>.

appealing against the penalty of life imprisonment given that that punishment is mandatory and as such is inconsistent with article 14 (5) mentioned in this paragraph.

[18] Article 49 par.2 of this law provides for the possibility of the concurrence of both aggravating and mitigating circumstances in the same case and it goes further to demonstrate how such circumstances are considered in deciding a case in the following way: In the event of the concurrence of grounds for judgment, the judge must consider the following while imposing a penalty: 1° aggravating circumstances; 2° mitigating circumstances. The fact that the law allows a judge to consider both aggravating and mitigating circumstances at the same time, the Court finds that is an element that constitutes due process of law. The fact that the law construes cohabitation as husband and wife as an aggravating circumstance and it prohibits a judge to base on mitigating circumstances available to reduce penalties, is inconsistent with the principle of the right to due process of law as far as sentencing is concerned.

[19] The provisions of article 49 that a judge considers both aggravating and mitigating circumstances simultaneously is a principle acceptable even in other jurisdictions and to that effect, any law which is inconsistent with it has to be repealed. A case in point is the case of *Jurek v. Texas* that was tried by the Supreme Court of the United States of America based on other cases it had decided and it held that in sentencing, mitigating circumstances should be considered, and therefore any law providing otherwise contravenes the Constitution. The court held that : "But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing

determination that we today have held in *Woodson v. North Carolina*, [428 U.S.] at 303-305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts v. Louisiana* [428 U.S. 325 (1976)]. A jury must be allowed to consider based on all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. "Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."⁵

[20] Article 58 of the Law N°68/2018 du 30/08/2018 determining offences and penalties in general provides that: "the judge assesses whether mitigating circumstances decided by a judge are admissible. The reasons for the acceptance of mitigating circumstances must be stated in the judgment. Article 59 lays down some of the mitigating circumstances that may be considered by a judge. The provisions of these articles are based on the obligation vested in a judge in criminal matters of giving a penalty based on the circumstances surrounding the commission of the crime, on the offender's prior record and personal situation, on the family upon which the offence was perpetrated and the victim of the crime. These, also constitute the right to due process of law and any law or one of its articles providing otherwise is deemed inconsistent with the Constitution. As held by the Supreme Court of the United States of America in the case of *Roberts v. Louisiana*, that a judge should consider mitigating circumstances relevant to the

⁵ U 6 United States Supreme Court, *ROBERTS v. LOUISIANA* (1977), No. 76-5206, June 6, 1977. United States Supreme Court, *Jurek v. Texas*, 428 U.S. 262 (1976), July 2, 1976

offender or the offence, and any law hampering the consideration thereof, is construed contradictory to the Constitution. The court pronounced itself in these words: "As we emphasized [...], the capital sentencing decision must allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the [Louisiana] statute does not allow for consideration of particularized mitigating factors, it is unconstitutional⁶".

[21] The Law N°68/2018 of 30/08/2018 determining offences and penalties in general qualifies different acts as child defilement if it is committed on a child under eighteen (18) years of age. The penalty thereof ranges between twenty (20) to twenty five years of imprisonment. If child defilement is followed by cohabitation as husband and wife, it is construed to be an aggravating circumstance, and thus the penalty is life imprisonment that cannot be mitigated by any circumstances since the law prohibits it such mitigation. On the contrary, the law does not consider child defilement that was done for a long period as an aggravating circumstance as long as it does not result in cohabitation as husband and wife. This also is not conceivable.

[22] In consideration of what could be based on as mitigating circumstances, the Court finds that there are reasonable grounds that may lead to a convict of child defilement followed by cohabitation as husband and wife to be given a lesser sentence than a person convicted of the same crime without cohabiting as husband and wife. It is inconceivable how a person convicted of

⁶ United States Supreme Court, ROBERTS v. LOUISIANA (1977), No. 76-5206, June 6, 1977.

defiling a child he is much older than in age, committed it forcefully hence damaging her, maybe given a reduced sentence based on mitigating circumstances, yet a person of 19 years old who cohabited with a 17 years old victim of the same offence as husband and wife on their mutual consent, with a possibility that they two might be having children together, mutually cohabiting with the intent of establishing a family, is sentenced to life imprisonment that cannot be mitigated. Some times, some cohabit as the only convenient way to survive, like in the event where both or one of them is an orphan without any other support.

[23] This is not just a possibility, but rather, these were the rulings in some decided cases. For instance, the judgment RP 00062/2019/TGI/HYE that was rendered on 18/02/2019 by the Intermediate Court of Huye, whereby the Prosecution accused Barakagwira Gilbert of 19 years of age of the offence of defiling a child of 16 years old and impregnated her, and they mutually decided to cohabit as husband and wife, nevertheless, the girl's parents went and brought her back after spending there one night. In that particular case, the accused pleaded guilty and revealed that he is in a relationship with the impregnated girl, in the same way, the girl confessed that she was in love with the person who impregnated her and that they consented to cohabit after impregnating her. The court convicted Barakagwira Gilbert of the offence of child defilement and sentenced him to life imprisonment as provided by the law, given that after defiling her, they cohabited as husband and wife for one day as the defendant admitted. The defendant in that particular case is 19 years old, and as per the Rwandan laws, he also lacks the capacity to contract a civil marriage.

[24] In another judgment rendered by the Intermediate Court of Ngoma, Barimenya Venant 66 years old, who knew he was HIV positive, was found guilty of defiling two girls one 10 years and the other 5 years of age respectively. He was sentenced to life imprisonment. Whereas in the judgment RP 00499/2018/TGI/MUS that was decided by Musanze Intermediate court, Ntahorutaba Wellars between 18-19 years old, was convicted of defiling a 16 years old girl following their mutual consent to do so, he impregnated her and they subsequently cohabited as husband and wife. The Prosecution had prayed to the Court to sentence the defendant to 20 years of imprisonment, but the Court, based on article 133 par.5, sentenced him to life imprisonment. It is obvious the circumstance surrounding the commission of the crime between these people is different and the effects on the victims are also different. Had it not been for the mandatory penalty, the judge might have sentenced them to different penalties considering each and everyone's distinctive circumstances. One would wonder whether justice was served in both Barakagwira Gilbert and Ntahorutaba Wellars case

[25] The nature of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general specifically on the issue relating to punishing those convicted of child defilement, it seems that it intended to severely punish offenders of such offence given its effects. The Court undoubtedly concurs that child defilement is both unacceptable and should be punishable. However, punishing such an offence does not preclude the right to due process of law which the accused has, which includes being given a mitigated penalty in case there are mitigating circumstances.

[26] In general, the fact that a judge cannot examine and base on mitigating circumstances if there any, to sentence the convict of child defilement followed by cohabitation as husband and wife to a mitigated penalty, the Court finds it inconsistent with the provisions of article 29 of the Constitution, which provides that everyone has the right to due process of law because it subjects a convict of such a crime to a disproportionate sentence. A provision of the law that provides such should be repealed as it was held in the case *Lockett v. Ohio* "A statute that prevents the sentencer in capital cases from giving independent mitigating weight to aspects of the defendant's character and record and the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed despite factors that may call for a less severe penalty, and, when the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"⁷. Even though this case was about the death penalty which is not provided for in the Rwandan laws but its contents can be applied to life imprisonment which is the heaviest penalty in Rwanda.

[27] It should also be noted that even scholars have divided opinions on the sentence of life imprisonment, as some argue that "mandatory sentence of life imprisonment arguably undermines several established common law and internationally recognised sentencing principles, including proportionality, equality before the law and respect for human dignity."⁸

⁷ Supreme Court of the United States, *Lockett v. Ohio*, 438 U.S. 586 (1978)

⁸ The label of life imprisonment in Australia: A principled or Populist approach to an ultimate sentence. John L Andeson. P. 748 available at <http://www.austlii.edu.au/au/journals/UNSWLJ/2012/30.html>, accessed on 27

[28] Pursuant to the motivations in the preceding paragraphs, the Court finds that the provisions of article 133 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general which provides that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances, inconsistent with one of the principles that constitute the right to due process of law, which states that a judge determines a penalty putting into consideration the gravity of the offence, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence. Therefore, it is inconsistent with article 29 of the Constitution.

Whether paragraph 5 of article 133 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with article 151 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[29] Kabasinga Florida and her counsel state that article 133 of the law mentioned hereinabove is inconsistent with article 151 50 of the Constitution which provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority. They furthermore submit that a judge should execute his/her duties in accordance with the laws, without government or private institutions prejudicing his/her independence, be it the legislature.

[30] They furthermore argue that when the legislature enacts a law that confines a judge to the degree that he/she is deprived of the discretion to exercise equity, it for that matter dispossess him/her of the independence of serving due process of law that is guaranteed under article 29 of the Constitution. They conclude by submitting that article 133, par 4o of the law determining offences and penalties in general, which prohibits a judge from rendering due process of law based on mitigating circumstances should be repealed because it encroaches on the independence of the judge since he/she is obliged to impose the sentence of life imprisonment only, which is inconsistent with article 151 of the Constitution.

[31] The State attorney, Batsinda Aline contends that article 151 of the Constitution lays down principles governing the judicial system, nonetheless, the petitioner does not point out exactly which principle(s) which article 133 infringes on, and he does not explain how the impugned article violates the principle that justice is rendered in the name of the people and nobody may be a judge in his or her cause, court proceedings are conducted in public unless or the proceedings are held in camera in circumstances provided for by law; every judgment must indicate its basis, be written in its entirety, and delivered in public together with the grounds and the decision taken; respect of the Court rulings by all and that which states that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority.

[32] She further submits that considering the explanations of the petitioner, she finds that the petitioner demonstrated her point of view on the severity of the penalties provided by the

law determining offences and penalties in general in its article 133. She contends that no organ encroached on the liberty and independence of a judge since he/she executes his/her duties in accordance with the law and which law is in place. She finds that article 133 is not inconsistent with article 151 of the Constitution.

DETERMINATION OF THE COURT

[33] Article 61 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 states that Branches of Government are the following [...] the Legislature, the Executive, and the Judiciary. The three branches are separate and independent from each other [...] the independence of the judiciary derives from this article which stipulates the three branches of the government (the Legislature, the Executive, and the Judiciary) are separate and independent (Separation of powers).

[34] Article 151, 5o of the Constitution of the Republic of Rwanda of 2003 revised in 2015 states that «[...] in exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority ». whereas article 4 and 5 of the Law N° 09/2004 of 29/04/2004 relating to the code of ethics for the Judiciary provides that: a judge shall be independent in the exercise of his or her judicial functions. A judge shall independently examine matters before him/her and take decisions without any external pressure. In cases before him, a judge shall guard against any attempt to influence his or her decisions other than those made through the ordinary procedure provided for by the law. A judge is bound to decide cases in accordance with the law. The articles cited in this paragraph establish the principle of independence of a judge

in exercising his/her judicial functions and they go further to demonstrate what constitutes that independence which includes not being influenced by any power or authority, independently examine matters before him/her, desist from anything which might influence him/her to make illegal decisions and to follow the laws relating to the case in hand.

[35] The principle of the independence of the judge in exercising judicial functions goes hand in hand with the principle of the independence of the judiciary. In the case of *R. v. Beauregard*, on the issue of the independence of the judiciary, the Supreme Court of Canada held that " the core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider—be it Government, pressure group, individual or even another judge — should interfere, or attempt to interfere, with how a judge conducts a case and makes a decision"⁹. Any obstacle obstructing a judge to decide a case with complete liberty would automatically contravene the principle of the independence of the judiciary. As regards to the case at hand, the issue is whether the provisions of the law that a penalty cannot be mitigated by any circumstances would be infringing on the independence of the judiciary.

[36] Article 133 provides for a mandatory sentence; it prohibits a judge to impose a penalty based on his/her discretion and in the assessment of the mitigating circumstances he/she noticed. This deprives a judge of the independence to determine a penalty based on the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the

⁹ Supreme Court of Canada, *R. v. Beauregard*, [1987] LRC (Const.)

commission of the offence, the offender's behaviour and its effects on the victim and the Rwandan society in general. On the same issue, in the case of *S v. Toms; S v. Bruce*, the Supreme Court of South Africa held that "the first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. That courts should, as far as possible, have unfettered discretion in relation to the sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person"¹⁰.

[37] As it was held by the Supreme Court of the United States of America in the case of *Graham v. Florida*¹¹ that: "the judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question". This Court finds that in case a judge

¹⁰ South Africa: Supreme Court of Appeal, *S v Toms; S v Bruce* (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802 (AD); [1990] 2 All SA 248 (A) (30 March 1990)

¹¹ 11Supreme Court of the United States, *Graham v. Florida*, 560 U.S. 48 (2010), "holding that a life imprisonment without parole sentence on a juvenile offender convicted of armed burglary with assault, and attempted robbery, was offensive to the Eighth Amendment. [The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion]

has no other option other than imposing a mandatory sentence, and is prohibited from imposing a penalty that is proportionate to the offence, this deprives the judge of liberty and independence to render judgment putting into consideration the severity of the penalty in relation to the offence.

[38] In India, in the case of *Mithu v. State of Punjab*, the Supreme Court repealed article 303 of the penal code which provided for a mandatory penalty on the basis that it infringes on the independence of a judge of imposing a sentence in consideration of diverse circumstances surrounding the case. That Court held that “a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair”¹² No one would advance that there is independence of a judge of imposing penalties when he/she is obliged to only impose a mandatory sentence that is unproportionate to the severity of the offence, the circumstances surrounding the commission of the crime, and the mitigating circumstances that would have led to a reduced sentence if there are any.

[39] Basing on the motivations in the preceding paragraphs, the provisions of article 133 of the Law N° 68/2018 of 30/08/2018 which states that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances are inconsistent with article 151,5o of the Constitution which provides that in exercising their judicial functions, judges at all

¹² Supreme Court of India, *Mithu v. State of Punjab* [1983] 2 SCR 690

times do it in independence, given that they are prohibited to consider extenuating circumstances in inflicting a fair penalty.

[40] The Court notes that there are other articles that also provides for mandatory penalties, however, the court can not pronounce itself on those provisions given that they were not petitioned before this Court. The Government should examine them so that they conform with this judgment.

[41] In the course of examining this petition, the Court found out that there is another issue in sentencing which concerns the range between the minimum and maximum penalty, which the Court finds it necessary to give its opinion upon it as it is in the same line with the issue on which it was moved.

The issue concerning the penalties provided by the Law N°68/2018 of 30/08/2018 determining offences and penalties in general in case there are mitigating circumstances.

[42] Article 60 of the Law N°68/2018 du 30/08/2018 determining offences and penalties in general states that if there are mitigating circumstances, penalties may be reduced as follows : 1° subject to the provisions of Article 107 life imprisonment may be reduced but it cannot be less than twenty-five (25) years ; 2° a fixed-term imprisonment or a fine may be reduced but it cannot be less than the minimum sentence provided for the offence committed.

[43] Before comming into force of the Law cited in the preceeding paragraph, the Organic Law N° 01/2012/OL of 02/05/2012 establishing the penal code which was in force by then in its article 78 provided on the modality in which

penalties are reduced in case of mitigating circumstances as follows: If there are mitigating circumstances, the reduction of penalties shall be as follows: 1° life imprisonment or life imprisonment with special provisions is replaced by a penalty of imprisonment of not less than ten (10) years; 2° a penalty of imprisonment of ten (10) years to twenty five (25) years may be reduced up to a term of imprisonment of five (5) years; 3° a penalty of imprisonment of more than five (5) years, but less than ten (10) years may be reduced up to a 4° a penalty of imprisonment of six (6) months to five (5) years may be reduced up to a term of imprisonment of two (2) months; 5° a penalty of imprisonment of less than six (6) months may be suspended.”

[44] Law N° 68/2018 establishes that if there are mitigating circumstances, a penalty may be reduced but shall not be less than the minimum penalty provided by the law. Whereas Organic Law N° 01/2012/OL of 02/05/2012 provided that if there are mitigating circumstances, a penalty can be reduced to less than the minimum penalty in the modality provided under article 78 mentioned in the preceding paragraph. In comparison with those two laws, for many offences the minimum penalty did not change and for some offences the minimum penalty was raised. This makes it impossible for the convict to be sentenced to an appropriate mitigated sentence even if there are mitigating circumstances and in some instances is given the same penalty as the one with no mitigating circumstance.

[45] Given the fact that the legislator decided that if there is a mitigating circumstance, the penalties may be reduced but shall not be less than the minimum penalty provided for the offence committed. It is the opinion of this Court that it would be reasonable if the range between the minimum and the maximum

penalty is large, putting more emphasis on reducing the minimum penalty. This would enable the provisions of article 49 par.1 of the Law N° 68/2018 of 30/08/2018 which provides that a judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence to be correctly applied. Basing on the mitigating circumstances and impose minimum penalty provided for an offense which itself is heavy, does not benefit the defendant nor does it serve justice in general.

[46] Research has established that when the law provides for the penalties that a judge cannot reduce, he/she may choose to acquit the suspect because the judge finds that the circumstances surrounding the defendant's commission of the crime and his/her behaviors in general are disproportionate with the severity of the penalty likely to be imposed¹³. In such a case, the purpose of the law is not realized.

[47] Generally, the enacting and imposition of the penalty should be based on its purpose and objective. In that case, there is a denunciation of the offender, deterrence, rehabilitation and protection of the public through incarcerating the offender. As held by the Supreme Court of Canada in the case of R v Smith¹⁴ that: "[T]he court must first consider the gravity of the offence, the personal characteristics of the offender and the particular

¹³ Mandatory Sentencing & the Independence of the Judiciary, available at: <https://www.ruleoflaw.org.au/wp-content/uploads/2015/11/MandatorySentencing.pdf>, visited on November 30, 2019.

¹⁴ Supreme Court of Canada, R v Smith, [1987] 1 S.C.R. 1045

circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves". Likewise, the penal provisions in Rwanda ought to provide for penalties with a large range between minimum and maximum penalty which permits a judge to determine a sentence in consideration of its purposed as mentioned hereinabove.

[48] Given the above, the Court finds it an urgent matter to adopt a punitive policy that is based on thorough research that harmonizes international sentencing principles with special issues in the Rwandan society and also a judge be accorded the liberty of imposing a sentence in consideration of the severity of the offence, its effects, the reasons that occasioned the commission of the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence.

III. DECISION OF THE COURT

[49] The Court holds that the petition filed by Kabasinga Florida has merit ;

[50] Declares that article 133 particularly paragraph five of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general, which states that : “if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances” is inconsistent with article 29 and 151 of the Constitution of the Republic of Rwanda of 2003 revised in 2015. That paragraph is therefore without effect as provided for by article 3 of the Constitution ;

[51] Orders that this judgment is published in the Official Gazette of the Government.