

AKISANTI v TUYISHIMIRE

[Rwanda SUPREME COURT– RS/INJUST/RC 00021/2018/SC (Rugege, P.J., Cyanzayire and Rukundakuvuga, J) November 22, 2019

Evidence – Scientific evidence – The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available scientific evidence, so that it is not left to bank upon presumptions unless science has no answer to the facts in issue.

Family law – Paternity petition – DNA test – The results of the DNA test have significant weight and are trustworthy because it's scientific evidence.

Facts: Tuyishimire Yves filed a paternity suit in the Primary Court of Nyamirambo requesting the court to declared that the deceased is his biological father and therefore inherit his estate. According to the elements of evidence produced such as the baptism file, the certificate issued by FARG, and others, the Court declared the applicant a child of the late Gusenga.

After that case, Akisante, who claims to be a sibling of Gusenga, lodged a third party opposition against the ruling of the Court arguing that Tuyishimire was not born by Gusenga and challenges the evidence based upon by the court. After examining the grounds on which he bases to oppose the judgment, the Court found them without merit, therefore the opposed judgment was sustained. Akisanti was not satisfied with that ruling, thus he appealed to the Intermediate Court of Nyamirambo, which also found the appeal without merit.

AKISANTE was never contented with the rulings of those courts, thus took his matter to the Office of the Ombudsman requesting for the review of the case due to injustice. After scrutinizing the issue, the Office of the Ombudsman wrote to the President of the Supreme Court requesting that the case be reviewed because it was vitiated with injustice because the Court refused to conduct a DNA test between Nyirabarera and Akisanti himself whom they share same parents with the deceased. After examining the report, the President of the Supreme Court decided that the case be reviewed due to injustice.

At the hearing, after hearing the explanations on each side, the Supreme Court ruled that before the case was decided at the root it was necessary to first compare the DNA tests to the following: Rejoice with the Body of Prayer (buried in the Memorial) of the Mountain Genocide); The so-called relatives of the deceased in Rwanda are Akisanti, Nyirabarera, and the body of Prayer; The Prayers of Innocent have already been mentioned by Tuyishimire Yves.

After the oral submissions of the parties, the Supreme Court, in the interlocutory judgment, held that before ruling on the merit of the case, the DNA should be tested: Tuyishire Yves and the remains of Gusenga Innocent (raid to rest at Gisozi Memorial Center); those assumed to be the siblings of Gusenga Innocent living in Rwanda, who are Akisanti Ayubu, Nyirabarera Jacqueline and the remains of Gusenga Innocent; and the mentioned siblings of Gusenga Innocent with Tuyishimire Yves.

The DNA test was carried out at the Gisozi Memorial Center, the results were submitted to the Supreme Court and both parties were notified of the results, hence the hearing was resumed.

In the report submitted to the Court, the experts explained that, after conducting a test based on the saliva samples of those who were to be tested, as well as the bone removed from the remains of Gusenga Innocent, the results are the following:

Between Gusenga and Tuyishimire, the calculated probability of paternity is 99.999999999483 %, implying that there is no doubt about the fatherhood of late Gusenga Innocent and the child Tuyishimire Yves;

Between Gusenga Innocent and Akisanti Ayubu, the probability of being brothers is 2.3125452031 %, whereas for not being brothers it is 97.6874547968%;

Between Gusenga Innocent and Nyirabarera Jacqueline, the probability for the latter being the sister of Gusenga Innocent, meaning that they share the same parents, is 99.9999999927%, whereas the probability of not being biologically related is 0.0000000072 %;

Between Akisanti Ayubu and Tuyishimire Yves, the probability of the latter being a fraternal nephew of Akisanti Ayubu, meaning that the father of Tuyishimire Yves is a brother of Akisanti Ayubu, is 2.3125452031 %, that of not being biologically related is 97.6874547968 %;

Between Nyirabarera Jacqueline and Tuyishimire Yves, for the latter being the fraternal nephew of Nyirabarera Jacqueline, which means that the father of Tuyishimire Yves is the brother of Nyirabarera Jacqueline, the probability is 99.999999927 %, whereas for not being biologically related is 0.0000000072 %.

Before the beginning of the hearing, Akisanti prayed to the Court that the hearing is held in camera because his private life may be put in public which contravenes good morals, the other party argues that since the beginning of the hearing, he never requested that it should be conducted in camera, he finds the request groundless, after deliberating the Court found the raised issue without merit.

The case proceeded in merit, both parties submitted their arguments on the results of the DNA test, Akisanti challenged the results on the basis that it was submitted without the signature of the administrator of the organ which issued it, that the statement contradicts itself therefore it is not trustworthy because what is written was dictated by Tuyishimire.

Tuyishimire, on the other hand, argues that Akisanti's claim that they do not accept the outcome of the test is a tactic to delay justice because they are the ones who requested it.

Tuyishimire requested various damages and in his defense, Plaintiff argues that the issues which were not examined in previous courts should not be submitted at this level because it's a new claim.

Held: The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left bank upon presumptions unless science has no answer to the facts in issue.

The results of the DNA test have significant weight and are trustworthy because it's a piece of scientific evidence.

**The claim for review of the case due to injustice have no merit;
Gusenga Innocent is the biological paternal parent of Tuyishimire.**

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 6 and 75

Law N° 32/2016 of 28/08/2016 governing persons and family, article 282

Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 76

Law N° 41/2016 of 15/10/2016 establishing the Rwanda Forensic Laboratory and determining its mission, organization and functioning, article 26, paragraph 6 and 7

Cases referred to:

Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576

Authors:

DR. HIMANSHU Pandey & Ms. ANHITA Tiwari, Evidential value of DNA, Bharati Law Review (online), Jan. – March 2017, p. 1 [seen the 18th Nov. 2019], published in the articles section of www.manupatra.com.

Judgment

I. BRIEF BACK GROUND OF THE CASE.

[1] Gusenga Innocent was killed in the Genocide against the Tutsi in 1994. In 2014, Tuyishimire Yves filed a paternity suit in the Primary Court of Nyamirambo requesting the court to declare that the deceased is his biological father and therefore inherit his estate. The claim was registered on RC 0669/14/TB/NYB and the judgment was pronounced on 08/10/2014. The Court held that Tuyishimire Yves is the son of Gusenga Innocent and that he has to be registered as his child. The court based its decision on the testimony of the witnesses, the baptism card, and on the document issued by FARG indicating that the father of Tuyishimire Yves is Gusenga Innocent.

[2] After the paternity suit was ruled in favour of Tuyishimire Yves, Akisante Ayubu opposed that judgment stating that the Court based on false information. He filed a claim on 17/03/2016, which was registered on RC0162/16/TB/NYB and adjudicated on 29/11/2016. The Court held that the claim filed by Akisante Ayubu has no merit, thus the opposed judgment is sustained. The Court, based on the fact that the witnesses Misago Pascal and Gakire Steven produced by Akisante Ayubu have no idea on the issue at hand because they averred that they only knew Gusenga Innocent from their workplace, they did not know his private life.

[3] Akisante Ayubu appealed that judgment before the Intermediate Court of Nyarugenge, it was registered on RCA 00010/2017/TGI/Nyge, and the judgment was rendered on 06/07/2017. The Court found his appeal without merit, sustained the appealed judgment RC 00162/16/TB/NYB rendered by Primary Court of Nyamirambo on 29/11/2016.

[4] After all those cases, Akisante Ayubu wrote to the Office of Ombudsman requesting to review the judgment RCA 00010/2017/TGI/NYGE because it is vitiated by injustice. The office of the Ombudsman after assessing the request of Akisante Ayubu, also wrote to the President of the Supreme Court requesting that the case RCA00010/2017/TGI/NYGE be reviewed because it

is vitiated by injustice. The Ombudsman motivated that the Intermediate Court refused to conduct a DNA test on Nyirabarera Jacqueline and Akisanti Ayubu, whom both share the same parents with Gusenga Innocent basing on the fact that, there was no DNA test conducted between them and Gusenga Innocent to determine whether they are biologically related or not. The Office of Ombudsman indicated that the rulings of the Intermediate Court are erroneous because it is inconsistent with the precedent of the Supreme Court, in the case RS/REV/INJUST/CIV 0005/15/CS, it rendered on 19/06/2015.

[5] The office of the Ombudsman indicated that the pleadings of Tuyishimire Yves are similar to those of Umugire Alphonse in the case RS/REV/INJUST/RC 0005/15/CS, because they all stated that, it is impossible to conduct a DNA test between the relatives of the deceased and the child who seeks to be declared a child of the deceased, therefore deciding contrary to that precedent would be an error in law because, the decisions of the Supreme Court are binding to all other Courts as provided by article 47 paragraph 6 of the organic Law N^o 03/2012 OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court which was into force at the time of rendering that judgment.¹

[6] The President of the Supreme Court, based on the assessment made by the Ombudsman and on the report made by the inspectorate general of Courts, decided the case to be scheduled for review, it was registered on RS/INJUT/RC 00021/2018/SC, and the hearing of the case was scheduled on 14/05/2019.

[7] The hearing was held on 14/05/2019 in public, Akisanti Ayubu appeared in Court assisted by Counsel Muhayimana Isaie together with Abijuru Emmanuel, whereas Tuyishimiye Yves was also present assisted by Counsel Murindabigwi Mariam together with Counsel Muhiganwa Damas. The parties argued upon the evidence relied on by the previous Courts, also they argued upon the issue of whether is necessary to conduct a DNA test to determine if Tuyishimiye Yves is a child of Gusenga Innocent.

[8] After the oral submissions of the parties, the Supreme Court, in the interlocutory judgment, it held that before ruling on the merit of the case, A DNA test should be performed between :

Tuyishire Yves and the remains of Gusenga Innocent ;

Those who are said to be the siblings of Gusenga Innocent living in Rwanda, who are Akisanti Ayubu, Nyirabarera Jacqueline, and the remains of Gusenga Innocent ;

The aforementioned siblings of Gusenga Innocent and Tuyishimire Yves.

[9] On 03/06/2019, the Chief Registrar of the Court wrote to Rwanda Forensic Laboratory requesting it to perform the DNA test in order to enforce the decision of the Court. The DNA test was performed on 15/10/2019 at Kigali Genocide Memorial at Gisozi. On 06/11/2019, the results were given to the Supreme Court and both parties were notified of the results, the hearing resumed on 07/11/2019, in presence of all parties.

[10] Before the beginning of the hearing, Counsel Abijuru Emmanuel representing Akisanti Ayubu, based on article 70, paragraph 2 of the Law N^o 22/2018 of 29/04/2018 on civil, commercial,

¹ Judgments and decisions of the Supreme Court shall be binding on all other courts of the country.

labor and administrative procedure², prayed to the Court that hearing is held in camera because the private life of Akisanti Ayubu may be put in public which contravenes the good morals.

[11] Tuyishimire Yves and his counsels argued that since the beginning of the case, the hearing was held in public and none was at stake, also that it requires the consent of both parties for the hearing to be held in camera, thus they find that request without merit.

[12] The Court after deliberating on the request submitted by Counsel ABIJURU Emmanuel, it found that since this case started before the Primary Court and before the Intermediate Court, it was heard in public, and even Akisanti Ayubu does not indicate the inconvenience caused, also if the hearing is conducted in public, it will not cause any disorder, it found his request without merit, the hearing resumed in public, the parties made oral submissions on the report submitted by Rwanda Forensic Laboratory. One of the experts who performed the DNA test was also present during the hearing to provide explanations on that report.

[13] The hearing of the case was closed, the parties were notified of the pronouncement scheduled on 22/11/2019. The main issue under litigation in this case and which was examined by the Court is whether there is irrefutable evidence that proves that Tuyishimire Yves is a child of Gusenga Innocent.

II. ISSUES TO BE ANALYSED

A. Whether there is irrefutable evidence that proves that Tuyishimire Yves is a child of Gusenga Innocent.

[14] Counsel Muhayimana Isaie and Counsel Abijuru Emmanuel who represent Akisanti Ayubu state their client's grounds of injustice are the following :

Article 282 of the Law N° 32/2016 of 28/08/2016 governing persons and family provides for the procedure to determine the paternity of the child of supporting evidence. None of the provisions of that article was respected in deciding that Tuyishimire Yves is a biological child of Gusenga Innocent, including the DNA test.

Their client requested to conduct a DNA test which indicates without any confusion the paternity relationship, this was possible because there are some of the siblings of Gusenga Innocent are still alive, but the Court rejected it. However as decided by the Supreme Court in the case RS/REV/INJUST/CIV 0005/15/CS rendered on 19/6/2015, that test is possible and resolves the dispute irrevocably.

The intermediate Court did not put into consideration the contradictions in the testimony of the witnesses before the Primary Court, because they failed to prove that Tuyishimire Yves is a child of Gusenga Innocent :

A witness called Migambi Déogratias stated that he has no proof that the parents of Tuyishimire Yves are Gusenga Innocent and Nzitonda Médiatrice ; this is a

² However, if the court, upon its motion or application by both parties or any of them, believes that the hearing conducted in public may disrupt public order or good morals or if it is against people's right to privacy, it may decide that the hearing be conducted in camera and the explanation thereof is given.”

contradiction from the content of the copy of the judgment on page one, where the Court indicated that he affirmed that Tuyishimire is a child of Gusenga Innocent.

A witness called Nyiribambe Joselyne who stated that Nzitonda Médiatrice (the mother of Tuyishimire Yves) was her classmate, her testimony should not have been based on because she stated that the sister of Gusenga Innocent who used to work from the taxi park was the one who used to give Nzitonda Médiatrice money to look after the child whereas Gusenga Innocent was still alive;

Whether Tuyishimire Yves was born in 1992 or 1993 because he keeps on changing his date of birth, the testimony of Nyiribambe Joselyne is untrustable since she states that Nzitonda Médiatrice did not suspend her studies whereas it is impossible due to pregnancy, giving birth, and breastfeeding the baby; it should also be noted that during that time when a girl got pregnant without a husband she had to drop out of school.

The baptism card based on as evidence contains the following irregularities :

The falsification as regards to the mother's name, where it was written Béatrice and later changed it to Médiatrice;

The names of the parents which appear on the card, (Gusenga and Nzitonda) are not the ones that appear in the register of the children baptized in "Eglise Episcopale au Rwanda" from 11/03/1992 to 10/04/1993 ;

If the baptism card was not a forgery, the parent's names of the child Tuyishimire baptized on 24/12/1992, would be Rwabutogo Emmanuel and Nzitonda Béatrice as it's the case for other children baptized on that date of 24/12/1992 ;

Rwabutogo Emmanuel, who appears on baptism form as the godparent of the child, also appears in the register as the father of the child. This should be the truth as mentioned by the witness called Migambi Déogratias, whereby he testified that he has no proof that the father of Tuyishimire Yves is Gusenga Innocent.

Also, it is not understandable, how Gusenga Innocent who was catholic would baptize his child in an Anglican church.

The student identity card of "Ecole Technique Nyarurema" of 2012, which the previous Court qualified as FARG certificate, on which it based its rulings, it indicates that the owner of that card is Tuyishime Yves who is different from Tuyishimire Yves the claimant in this case. Akisanti Ayubu states also that the concerned card indicates that Tuyishime Yves was born on 25/05/1992 (that year is also falsified), whereas the baptism card on which the Court also relied on indicates that he was born on 14/05/1992 ;

The way Tuyishimire Yves keeps on changing his names, date, and year of birth as affirmed by NIDA, it is proof that he makes and uses the documents as he wants depending on the motive. They also state that his paternal parent who is registered in the civil registry, who also raised him since he was very young, is called Kanyamibwa, and does not refute it.

[15] Tuyishimire Yves and his counsel Adv. Murindabigwi Mariam and Adv. Muhiganwa Damas in responding to Akisanti Ayubu's grounds for injustice, state that :

The intermediate Court decided in its discretion because it motivated that Akisanti Ayubu requests for a DNA test between him and Tuyishimire Yves or between Tuyishimire Yves

and Nyirabarera Jacqueline, the sister to him and Gusenga Innocent, but he does not indicate whether there was a DNA test performed between him and Gusenga or between Gusenga and Nyirabarera, which indicated that Gusenga is biologically related with one of them ;

At the time of filing the claim, the DNA test was not provided by the Law of 27 October 1988 relating to book I of the Civil Code, the judge referred to various elements of evidence, including the baptism file which indicates that Gusenga registered that child as his own, and FARG certificate which indicates that is a child of Gusenga Innocent ;

The other party requested a DNA test between Tuyishimire Yves, Akisanti Ayubu, and Nyirabarera Jacqueline, whereas there is nothing that proves that they are brother and sister of Gusenga Innocent. Tuyishimire Yves and his counsel requested that the DNA test should be performed between him and the remains of Gusenga Innocent's which was laid to rest at the Genocide Memorial at Gisozi because some people know where he is buried also there is a video taken at his burial ceremony ;

As regards the testimonies of the witnesses, Akisanti Ayubu disregards the facts that, they corroborate with the written evidence produced before the Court, which includes the baptism card and the FARG certificate which indicates that his tuition is paid by the latter. With regards to witnesses produced by Akisanti Ayubu, they stated that they only knew Gusenga Innocent at the workplace, they are not aware of the birth of Tuyishimire Yves ;

With regards to the baptism card :

The written errors as regards the names are common and they were rectified by Anglican Church.

Where it is written Rwabutogo it concerns another child who was baptized on the same day with Tuyishimire Yves

Being baptized in Anglican Church whereas Gusenga Innocent was a catholic, this was due to the fact that his mother was a member of the Anglican Church.

after the debate on the baptism card and the register of the baptized children produced before the Court by his opponent, Tuyishimire Yves was given the Christian certificate which testifies that he was baptized and is the son of Gusenga Innocent and Nzitonda;

With regards to the FARG certificate produced before the Court, which indicates that his tuition is paid by the latter and the student's card was produced separately. For the student's card containing some errors, it is not an issue because he has a diploma that indicates his name. Akisanti Ayubu filed a complaint before police for the forged document, his claim was transferred to the prosecution which found it groundless and dismissed it.

As regards the names, Tuyishimire Yves does not change names as it is alleged, but when his mother got married, he went to stay with his grandmother, and those two names were registered on him; then when he grew up he changed them, and remained with those given to him by his parents.

[16] After the Court held that Rwanda Forensic Laboratory performs a DNA test, and it was done and the report notified to parties, the Counsel for Akisanti Ayubu, contested it, thus they requested the Court to disregard it because it contained the following irregularities:

The first issue concerns those who performed it because of the way it was done you cannot recognize the authors of that report;

The report which was given to the Court contains the names of 3 people but nothing indicates that their work was approved by the Director-General of Rwanda Forensic Laboratory. There is no letter written by the Director General to the Supreme Court accompanying the requested report as provided by article 26 of the Law establishing Rwanda Forensic Laboratory especially in litera 6 and 7³, where it provided that the Director General is the spokesperson of the organ, this means that when the report is made by someone else or when is not its signatory, it is not valid;

When the report is submitted by an organ rather than the one requested to submit it, that implies that it was made by the incompetent person, thus, its contents cannot be based upon. With regards to the experts who came to explain to Court the content of that report, they have no comments because nothing proves that, they are Rwanda Forensic Laboratory employees, also if the Director General does not appear in Court or does not sign on the report, it should have been done by some sent by him with a letter accompanying the report.

The report would have been sent together with some other documents which would facilitate the reader to understand it easily because it contains many abbreviations and it was made in the professional terminology and the figures lack explanations to facilitate someone else who is not an expert in that field to understand them. They argue that the experts who made it should make it complete.

the authors of the report do not indicate how they got the figures and the software used, this is the reason why their report does not give guidance to the issues raised by the Court.

The report contradicts itself and that casts doubt on its contents and its truthfulness. This is emphasized by the fact that, on 06/11/2019, Rwanda Forensic Laboratory reported that, it has not yet performed a DNA test between either Gusenga Innocent and his siblings or between Tuyishimire Yves and the siblings of Gusenga Innocent, due to the fact that the software to be used was not yet available, it is thus not understandable how that software was immediately procured in the morning basing on the procedure for the public procurement ;

another reason to doubt that report is that the numbers it provides keep on changing, whereby the biological relationship between Gusenga Innocent and Tuyishimire Yves is different from the relationship in percentage between Gusenga Innocent and Nyirabarera Jacqueline. They state also that numbers do not match well, they state that they do not understand how the percentage reach 99,999% where Gusenga Innocent has 15/16 whereas Tuyishimire Yves has 13/16 somewhere else, Gusenga Innocent has 7/8, whereas Tuyishimire Yves has 6/11, also at line 14 Tuyishimire Yves has 8/11 whereas Gusenga Innocent has 13/14;

The experts indicated that the probability that Nyirabarera Jacqueline is related to Tuyishimire Yves 99.999999927 %, whereas the probability between Gusenga Innocent and Tuyishimire Yves is 99.999999999483 %, this may indicate that Tuyishimire Yves

³ The Director General of RFL has the following responsibilities:

6° to serve as the legal representative of RFL and give publicity to its activities;

7° to serve as the spokesperson of RFL.

is closely related to Nyirabarera than he is related to Gusenga Innocent. They state that if that is not a coincidence or an error, they are the lies, reason why they pray the Court to disregard this report, and another one contradicting it be performed abroad (*Contre expertise*);

The fact that the report emphasizes the allegations made by Tuyishimire Yves since the beginning of the case, that among the siblings of Gusenga Innocent some are half brothers and sisters, means that its authors wrote what they have been told by Tuyishimire Yves, to the extent that someone may assume that there has been impartiality or bribery, though they can not affirm or deny it.

[17] Tuyishimiye Yves and his counsels responded to the claimant's critics about that report as follows :

Akisanti Ayubu and his counsel challenging the results of the test is just a tactic to delay justice because they are the ones who requested it,

It is not understandable how the counsels are trying to challenge the work of experts while they don't have any skills in that field, the arguments for the counsel of Akisanti Ayubu should not be considered ; also if they fail to understand some of the contents of the report, the expert will explain to them because that is the reason why the expert was summoned to give explanations.

Basing on article 93 of the Law governing evidence and its production, they find that the report was made in accordance with the law because it does not provide that the report should be signed by the Director General of the institution which made it.

With regards to the way the report was made, they find that it does not have any problem because every issue raised by the Court, was tackled by the experts and a conclusion was made upon it.

Stating that the experts did the report in favour of Tuyishimire Yves and that they were biased, is uncalled for because an advocate cannot just make an allegation before the court without substantiating it with, therefore, they must withdraw that statement ;

Requesting to conduct another test abroad, would be seen as not having trust in the Rwandan justice system ;

They conclude by stating that, it is surprising that Akisanti Ayubu who requested for DNA test, is also the one who requests that it should be nullified.

[18] One of the experts who conducted the DNA test who appeared before the Court, representing the DNA department in Rwanda Forensic Laboratory, demonstrated how the test was conducted, he even explained what the counsel for Akisanti Ayubu had not understood. He indicated that the probability parentage between Gusenga Innocent and Tuyishimire Yves(99.999999999483 %) is high than that between Nyirabarera Jacqueline and Tuyishimire Yves(99.999999927 %), this is indicated by figures "9" it contains. He explained that a child normally has 50 % of his mother's chromosomes and 50% of his father's. he explained also that, there was no procurement bid to be advertized, rather the renewal of the license.

DETERMINATION OF THE COURT

[19] The major irregularity indicated as the ground of review the case RCA00010/2017/TGI/NGYE due to injustice, is that the Intermediate Court of Nyarugenge, decided that Gusenga Innocent is the father of Tuyishimire Yves without performing the DNA test which was requested by Akisanti Ayubu.

[20] Article 76 of Law N° 15/2004 of 12/06/2004 relating to evidence and its production provides that evidence by experts is that which is intended to give to the court, explanations based on expertise as well as conclusion which is beyond the ordinary knowledge of a judge in his or her duties, depending on the underlying special expertise. Whereas article 282 of the Law N°32/2016 of 28/08/2016 governing persons and family provides that DNA test or other scientific evidence is one of the grounds for a paternity petition to be admissible⁴

[21] In other words, these articles indicate that a judge may use experts who have particular expertise to guide him/her on the issue at hand, particularly he/she can use the DNA test to rule on a paternity petition. This was the position of the Supreme Court of India in the case *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*, (2014)2 SCC 576, whereby it held that "The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left bank upon presumptions unless science has no answer to the facts in issue".

[22] In this case, the Court requested Rwanda Forensic Laboratory as a government institution that has the expertise to perform a DNA test as it is to determine whether Gusenga Innocent is the father of Tuyishimire Yves. In the report submitted to the Court, the experts of Rwanda Forensic Laboratory explained that after performing the test from saliva samples of the persons who had to be tested, and also from the bone extracted from the remains of Gusenga Innocent, the results were as follows:

Between Gusenga Innocent and Tuyishimire Yves, The calculated probability of paternity is 99.999999999483 %. From a forensic point of view there is no doubt about the fatherhood of late Gusenga Innocent and the child Tuyishimire Yves ;

Between Gusenga Innocent and Akisanti Ayubu, the probability of being brothers is 2.3125452031 %, whereas for not being brothers it is 97.6874547968% ;

Between Gusenga Innocent and Nyirabarera Jacqueline, the probability for the latter being the sister of Gusenga Innocent, meaning that they share the same parents, is 99.9999999927%, whereas the probability of not being biologically related is 0.0000000072 % ;

Between Akisanti Ayubu and Tuyishimire Yves, the probability of the latter being a fraternal nephew of Akisanti Ayubu, meaning that the father of Tuyishimire Yves is a brother of Akisanti Ayubu, is 2.3125452031 %, that of not being biologically related is 97.6874547968 %;

⁴ Even though this Law came into force after this case was already filed, it can be relied on pursuant to the first paragraph of article 330, which provides that All cases pending before courts at the time of commencement of this Law are tried in accordance with this Law, but with no retrospective effect over acts thereto related already accomplished.

Between Nyirabarera Jacqueline and Tuyishimire Yves, for the latter being the fraternal nephew of Nyirabarera Jacqueline, which means that the father of Tuyishimire Yves is the brother of Nyirabarera Jacqueline, the probability is 99.999999927 %, whereas for not being biologically related is 0.000000072 %.

[23] The Court based on the explanations of the experts as demonstrated in the previous paragraph finds that there is no doubt that Tuyishimire Yves is a child of the late Gusenga Innocent and he is a fraternal nephew of Nyirabarera Jacqueline, but he is not biologically related to Akisanti Ayubu. The results produced by the DNA test are highly valuable and trustworthy because it is scientific evidence that is reliable. The experts state that the DNA of a person is composed of chromosomes from both parents, this emphasizes the fact that the DNA test is reliable in determining the biological relationship between parents and their descendants⁵. This corroborates with the explanations provided by experts of Rwanda Forensic Laboratory during the hearing.

[24] The Court finds that it is no longer necessary to examine the elements of evidence relied on by the Intermediate Court Nyarugenge which were challenged by Akisanti Ayubu, those elements of evidence comprise mainly of ; testimonies of the witnesses, baptism card issued by the Anglican Church of Rwanda and the card for the student paid by FARG because the results produced by DNA test are trustworthy. The Court finds also that Tuyishimire Yves being registered on Kanyamibwa (the husband of his mother) in the civil registry, changes nothing on the truth established by the DNA test.

[25] The arguments of the counsel for Akisanti Ayubu, that the report made by the expert is null and void because nothing proves that the task they did was approved by the administration of Rwanda Forensic Laboratory, which should also be the one to submit it to the Court, this Court finds it without merit because the test was conducted by experts designated by that institution based on their expertise and knowledge after swearing as provided by article 93 of the evidence Law No15/2004 of 12/06/2004 relating to evidence and its production, they prepared the report which they submitted to the Court registry as provided by article 95 of the aforementioned Law.

[26] The Court finds that article 26, litera 6 and 7 of the Law No 41/2016 of 15/10/2016 establishing the Rwanda Forensic Laboratory and determining its mission, organization and functioning, referred to by the counsel for Akisanti Ayubu, does not provide that the Director General has to write to the Court when submitting the experts' report to the Court after he has approved. That article rather in litera 6 and 7, provides that the Director General serves as the legal representative of RFL and gives publicity to its activities, and he serves also as its spokesperson.

[27] Furthermore, the counsels for Akisanti Ayubu challenge the report of the expert that it contains many abbreviations and figures which don't have explanations also lacks merit because, despite that the experts summarized the report to the extent that it can be understood by an ordinary person with no knowledge of DNA test, they also took enough time to explain it before the Court,

⁵ « DNA is made up of one half of our biological mother's DNA and one half of our biological father's DNA. 50 % of our DNA is passed down to our biological children. It is this that ensures DNA is unique and allows for accurate testing of parentage and direct descendants through a DNA paternity test"; DR. HIMANSHU Pandey & Ms. ANHITATiwari, Evidential value of DNA, Bharati Law Review(online), Jan. – March , 2017, p. 1[seen the 18th Nov. 2019], published in articles section of www.manupatra.com

they even answered all questions about what the parties to the case wanted to know. About the concern raised by the counsel for the plaintiff, that RFL first sent a report indicating that the software to be used was not yet available, and the next morning it sent another report containing the results got from that software whereas the public procurement usually takes a long time, the experts explained that what was needed is the renewal of the license, not the advertisement of the bid, and this can be done in a short time. The court also finds this ground with no merit.

[28] The court finds that in general the irregularities raised by the counsels for the plaintiff seeking to declare the report null and void, have no connection with the consistence or substance of the report made by the expert. The Court finds that despite that their statements being baseless, they can not even render the report of the experts void, also their request that another test should be performed abroad, lacks merit.

[29] The court finds then that, Basing on all the motivations given above, the Court finds that there is enough evidence to prove that Tuyishimire Yves is a child of Gusenga Innocent.

B. Whether damages should be awarded in this case.

i. Damages requested by Tuyishimire Yves

[30] Tuyishimire Yves states that Akisanti Ayubu frivolously dragged him into a lawsuit whereas he knew that he is the son of Gusenga Innocent, because of this, he has to pay him damages calculated as follows :

Moral damages equal to 10,000,000 Frw for denying him whereas he knows the truth, he defamed him calling him a liar whereas he should be the one, who should have looked after him, also for having suspended his job because he was in jail due to these court cases.

Damages equivalent to 6,000,000Frw which includes :

1,000,000Frw paid to the Counsel at the Primary Court level ;

1,000,000Frw he paid to the counsel at the Intermediate court level;

500, 000Frw he paid while the file was still in police and 500,000Frw he paid to the Prosecution ;

2,000,000Frw he paid at the Supreme Court ;

493,020 Frw he paid for DNA test ;

[31] Akisanti Ayubu and his counsel state that, the claims which were not mentioned in the pre-trial meeting and not included in the court submissions should not be examined, because it will be a new claim. They state that the damages requested by Tuyishimire Yves for the proceedings before the previous courts and before the prosecution has no merit because they can not be heard before this Court.

Damages requested by Akisanti Ayubu

[32] Akisanti Ayubu requests the Court to award him damages for being dragged in unnecessary lawsuits, which are calculated as follows :

3,000,000Frw for being dragged in the unnecessary lawsuit ;

2,500,000 Frw for counsel fees for three court instances where this case was heard ;
1,000,000Frw for procedural fees.

DETERMINATION OF THE COURT

The damages requested by Tuyishimire Yves

[33] Article 6, paragraph one of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that the subject matter of the claim is determined by parties' respective arguments. Arguments are laid down in the document instituting proceedings and in the defense submissions and are confirmed during the pretrial conference, where applicable.

[34] The motive of the provisions of this article is to prevent parties to the case unexpectedly during the hearing bring up claims to the other part and the Court which they did not submit before. This is also in the same spirit (meme logique) as the provision of article 75, paragraph one of the aforementioned law ; the intention was to grant the rights to defence (Droit de defence). That article 75, paragraph one provides that “In general, no documents, submission, brief or pleading notes may be deposited with the court after the pretrial conference”.

[35] The case file indicates that Tuyishimire Yves did not request, damages before the previous courts, either in defence submission submitted before the court or during the pre-trial conference ; rather he requested them in the hearing of 07/11/2019. The Court finds it contrary to the provisions of article 6, paragraph one of the Law N° 22/2018 of 29/04/2018 aforementioned.

[36] Based on the motivation and the provisions given above, the Court finds the claim of the moral damages and civil damages comprising of the money spent by Tuyishimire Yves in the case which was before the Judicial police and in the Prosecution, can not be admitted. The Court finds that he should be awarded procedural and counsel fee in its discretion because what he is asking for is excessive and can not prove it. The Court awards him 793,020Frw for procedural fees which include 300,000Frw spent on transport and 493,020Frw he paid for the DNA test and 1,500,000Frw for counsel fee for the three instances. All amounting to 2,293,020Frw.

The damages requested by Akisanti Ayubu

[37] The Court finds that the damages requested by Akisanti Ayubu can not be awarded because he has lost the case.

III. DECISION OF THE COURT

[38] Decides that the claim filed by Akisanti Ayubu requesting to review the judgment N° RCA 00010/2017/TGI/NYGE, rendered by Nyarugenge intermediate Court 06/07/2017 due to injustice, has no merit;

[39] Decides that the ruling of the judgment N° RCA 00010/2017/TGI/NYGE rendered by Nyarugenge intermediate Court on 06/07/2017, is sustained ;

[40] Decides that Tuyishimire Yves is was born by Gusenga Innocent ;

[41] Orders Akisanti Ayubu to pay to Tuyishimire Yves 2,293,020Frw of procedural and counsel fee.