

RWANDA / JUDGMENT

UBUSHINJACYAHA v. BAZIGA

RPAA 0163/12/CS

COURT

Supreme Court

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UBUSHINJACYAHA v. BAZIGA

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Text

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UBUSHINJACYAHA v. BAZIGA [Rwanda URUKIKO RW'IKIRENGA – RPAA 0163/12/CS (Nyirinkwaya, Kayitesi na Mukandamage, J.) 22/7/2016] Amategeko agenga imiburanishirize y'imanza nshinjabyaha – Ubuhamya butanzwe n'umwana – Bugira agaciro iyo bushyigikiwe n'ibindi bimenyetso – Itegeko - Teka n° 21/77 ryo kuwa 18/08/1977 rishyiraho Igitabo cy'amategeko ahana, ingingo ya 70. Amategeko Mpanabyaha – Gusambanya umwana – Kwanduza uwasambanyijwe agakoko gatera SIDA – Ntawafata kuba uwo yasambanyije ataranduye agakoko gatera SIDA kandi we agafite, kuko ukoranye imibonano mpuzabitsina n'utaranduye adahita byanze bikunze ayimwanduza Incamake y'ikibazo: Uregwa yakurikiranywe mu Rukiko Rwisumbuye rwa Muhanga Ku cyaha cyo gusambanya umwana w'imyaka itatu n'amezi arindwi, igihe yari agiye iwe, akamuha inzoga, nyuma amukuramo ikariso, amukorakora ku gitsina. Urukiko rwamuhamije icyaha, rumuhanisha cy'igifungo cy'imyaka makumyabiri (20) n'ihazabu y'amafaranga 100.000. Yajuriye mu Rukiko Rukuru, Urugereko rwa Nyanza asaba guhanagurwaho icyaha, akagirwa umwere kuko muganga wasuzumye Uwingeneye Joselyne atigeze agaragaza ko igitsina cye cyinjiye mu gitsina cy'umwana nuko nta masohoro yasanze mu gitsina cy'umwana, ko kandi nta bwandu bwa SIDA yamusanganye nyamara we ayirwaye. Urukiko rwaciye urubanza ko

ubujurire bwe budafite ishingiro, rugumishaho urubanza rwajuririwe. Yajuriye Urukiko rw'Ikirenga, avuga ko Urukiko Rukuru rwirengagije ibimenyetso yarugaragariye bimushinjura bijyanye no kuba yari afitanye ibibazo na Nishimwe Vèrene nyina w'umwana, kuba Muganga wasuzumye umwana atarigeze agaragaza ko igitsina cye cyinjiye mu gitsina cy'umwana cyangwa ngo asangemo amasohoro, kuba mu iperereza ryakozwe n'Urukiko Rwisumbuye rwa Muhanga abaturage babajijwe bose baremeje ko nta ngeso y'ubusambanyi bamuziho, no kuba rutaritaye ku cyemezo cya muganga cyemeza ko afite uburwayi bwa SIDA mu gihe basanze umwana ari muzima. Ubushinjacyaha buvuga ko Urukiko rwasobanuye ko ntacyo Baziga yapfaga na nyina w'umwana kuko yivugiye ubwe ko uwo mwana yagendaga iwe, bivuze ko nyina atari kumwemerera kuhagenderera bafitanye ibibazo, akaba nta n'ikimenyetso yigeze abitangira. Incamake y'icyemezo:1. Ubuhamya butanzwe n'umwana, bugira agaciro bushyigikiwe n'ibindi bimenyetso.

2. Uregwa ntiyakwireguza ko uwo yasambanyije atanduye agakoko gatera SIDA kandi we agafite, kuko ukoranye imibonano mpuzabitsina n'utaranduye adahita byanze bikunze ayimwanduza nk'uko ubushakashatsi bwakozwe ku bwandu bwa SIDA bwagiye bubigaragaza Ubujurire nta shingiro. Urubanza rwajuririwe rugumyeho. Amagarama aherereye ku isanduku ya Leta. Amategeko yashingiweho:

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Itegeko n° 13/2004 ryo ku wa 17/05/2004 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 60 Itegeko n° 27/2001 ryo ku wa 28/04/2001 ryerekeye uburenganzira bw'umwana n'uburyo bwo kumurinda ihohoterwa, ingingo ya 33. Nta manza zifashishijwe: Inyandiko z'abahanga: [Http:// www.catie.ca/en/pif/summer](http://www.catie.ca/en/pif/summer) Urubanza I.IMITERERE Y'URUBANZA [1] Mu Rukiko Rwisumbuye rwa Muhanga, Baziga Hassan yarezwe kuba ku wa 16/04/2010 yarasambanyije umwana w'imyaka itatu n'amezi arindwi, U.J, igihe yari agiye iwe, akamuha inzoga, nyuma amukuramo ikariso, amukorakora ku gitsina. Urukiko rwemeje ko ahamwa n'icyaha cyo gusambanya umwana w'imyaka ine y'amavuko, rumuhanisha cy'igifungo cy'imyaka makumyabiri (20) n'ihazabu y'amafaranga 100.000. [2] Baziga Hassan yajuriye mu Rukiko Rukuru, Urugereko rwa Nyanza asaba guhanagurwaho icyaha, akagirwa umwere kuko muganga wasuzumye U.J atigeze agaragaza ko igitsina cye cyinjiye mu gitsina cy'umwana nuko nta masohoro yasanze mu gitsina cy'umwana, ko kandi nta bwandu bwa SIDA yamusanganye nyamara we ayirwaye. Urukiko rwaciye urubanza ku wa 27/04/2012, rwemeza ko ubujurire bwa Baziga Hassan budafite ishingiro, ko urubanza rwajuririwe rudahindutse. [3] Baziga Hassan yajuriye Urukiko rw'Ikirenga ku wa 03/05/2011, avuga ko Urukiko Rukuru rwirengagije ibimenyetso yarugaragariye bimushinjura bijyanye no kuba yari afitanye ibibazo na Nishimwe Vèrene nyina w'umwana, kuba Muganga wasuzumye umwana atarigeze agaragaza ko igitsina cye cyinjiye mu gitsina cy'umwana cyangwa ngo asangemo amasohoro, kuba mu iperereza ryakozwe n'Urukiko Rwisumbuye rwa Muhanga abaturage babajijwe bose baremeje ko nta ngeso y'ubusambanyi bamuziho, no kuba rutaritaye ku cyemezo cya muganga cyemeza ko afite uburwayi bwa SIDA mu gihe basanze umwana ari muzima. [4] Urubanza rwaburanishijwe mu ruhame ku wa 06/06/2016, Baziga Hassan yunganiwe na Me Furaha Amida, naho Ubushinjacyaha

buhagarariwe na Higaniro Hermogène, Umushinjacyaha ku Rwego rw'Igihugu. ISESENGURA RY'IBIBAZO BIGIZE URUBANZA Kumenya niba hari ibimenyetso bidashidikanywaho bihamya Baziga Hassan icyaha akurikiranyweho. [5] Baziga Hassan avuga ko Muganga wasuzumye Uwingeneye atigeze agaragaza ko igitsina cye cyinjiye mu cy'umwana cyangwa ngo asangemo amasohoro, ko kandi yavuze ko

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yasanze udusebe ku gitsina cy'umwana ariko yemeza ko nta bwandu bw'agakoko gatera SIDA afite mu gihe we akamaranye igihe, ko byumvikana ko iyo amusambanya yari kumwanduza SIDA. [6] Avuga kandi ko n'ubwo arwaye Sida atazi aho yayikuye kuko nta ngeso y'ubusambanyi yigeze agira, ko ibyo Ubushinjacyaha buvuga ko yasambanyije umwana akoresheje urutoki ataribyo ahubwo asanga ari nyina waba yarabimukoreye kugira ngo amugerekeho icyaha, ko kandi mu iperereza ryakozwe n'Urukiko, ibyo umwana yavuze ko yamukoreye yabibwiwe na nyina. [7] Akomeza avuga ko Nishimwe Vèrene yamuhimbiye icyaha kubera amasambu yaguze na sebwewe witwa Ngendahayo Stanislas, ko kandi Nishimwe yamusabye kenshi ko basambana, ashaka ko amucyura arabyanga kuko yari aziko arwaye SIDA ariko we agatekereza ko abikora kubera kumwanga, bituma amwanga cyane anamubwira ko ntacyo azimarira, agomba gusubira iwabo, ko bitumvikana ukuntu umwana yasambanyijwe ku wa 12/06/2010 Nishimwe ntamurege yaba mu baturanyi yaba mu Buyobozi bw'Ibanze, ahubwo akajyana umwana kwa muganga ku wa 19/04/2010. [8] Me Furaha Amida umwunganira avuga ko Baziga Hassan yagaragarije Inkiko zibanza ko yari afitanye ikibazo cy'amasambu na Nishimwe no kuba yarashakaga ko amucyura ariko ntirwabiha agaciro, ko kandi no mu ibazwa ry'umwana yagaragaje ko ibyo yavuze yabibwiwe na nyina n'ubwo Umucamanza yavuze ko imvugo y'umwana atariyo yashingiweho gusa, ahubwo hashingiwe no ku bindi bimenyetso nyamara imvugo y'umwana ariyo yabaye nyirabayazana mu guhamya Baziga icyaha. [9] Avuga kandi ko mu nyandiko mvugo ya Nishimwe, yavuze ko umwana yamubwiye ko Baziga yamukoze ku gitsina ntiyabyitaho, bikaba bitumvikana ukuntu umubyeyi yamenya ko umwana yasambanyijwe akabyihorera, akamujyana kwa muganga nyuma y'iminsi itatu, ko na muganga byamugoye kwemeza ko umwana yasambanyijwe, ahubwo akavuga ko ashobora kuba yarasambanyijwe ashingiye ko yasanze umwana afite udusebe duto, ari naho Baziga ahera avuga ko iyo aba ariwe wamusambanyije yari kumwanduza SIDA, naho kuba nta karangabusugi afite nta cyemeza ko gutakaza ubusugi kwe byatewe no gusambanywa, ko rero ubuhamya bw'umwana ufite imyaka ine y'amavuko n'iyi raporo ya muganga bitashingirwaho ngo Urukiko rumuhamye icyaha aregwa, asaza asaba ko yagirwa umwere. [10] Uhagarariye Ubushinjacyaha avuga ko Urukiko rwasobanuye ko ntacyo Baziga yapfaga na nyina w'Uwingeneye Joselyne kuko yivugiyemo ubwe ko uwo mwana yagendaga iwe, bivuze ko nyina atari kumwemerera kuhagenderera bafitanye ibibazo, akaba nta n'ikimenyetso yigeze abitangira. [11] Akomeza avuga ko raporo ya Muganga igaragaza ko yasanze umwana afite udusebe duto mu myanya ndangagitsina kandi yatakaje ubusugi, ko Urukiko rwasobanuye ko nta masohoro yari kugaragara kuko Baziga Hassan yakoresheje urutoki, ko kandi atari buri gihe uwanduye agakoko gatera SIDA yanduza uwo bagiranye imibonano mpuzabitsina. [12] Avuga kandi ko Urukiko rumuhamya icyaha rutashingiye ku mvugo y'umwana wahohotewe gusa, ko ahubwo yari

ishyigikiwe n'ibindi bimenyetso nk'uko bigaragara mu rubanza rujuririrwa mu gace ka 2 na 4. Naho ku bijyanye no kuba uregwa nta ngeso y'ubusambanyi yari asanzwe afite mbere y'uko akurikiranwaho icyaha, ko Urukiko rwasobanuye ko iyo mpamvu itashingirwaho ngo ahanagurweho icyo cyaha kuko ubusambanyi budakorerwa ahagaragara cyane cyane ko n'umutangabuhamya wabajijwe

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yavuze ko atamushinja cyangwa ngo amushinjure, asaba Urukiko kwemeza ko ubujurire bwa Baziga nta shingiro bufite, hakagumaho imikirize y'urubanza rwajuririwe. UKO URUKIKO RUBIBONA [13] Ingingo ya 33 y'Itegeko n° 27/2001 ryo ku wa 28/04/2001 ryerekeye uburenganzira bw'umwana n'uburyo bwo kumurinda ihohoterwa yakurikizwaga icyaha gikorwa iteganyaga ko " Ku bw'iri tegeko, imibonano yose mpuzabitsina cyangwa ishingiyeye ku bitsina ikorewe umwana uko yaba ikozwe kose, n'icyaba gikoreshejwe cyose, ni icyaha cyo gusambanya umwana." [14] Mu ibazwa rya Baziga Hassan mu Bugenzacyaha, n'ubwo yahakanye icyaha avuga ko atigeze aha Uwingeneye Joselyne inzoga cyangwa ngo amukuremo ikariso, ariko yemera ko ku wa 16/04/2010 yageze iwe mu rugo kandi ko yari yahishije inzoga. [15] Dosiye y'urubanza igaragaza kandi ko nyina w'umwana Nishimwe Vèrene ubwo yatangaga ikirego mu Bugenzacyaha yavuze, ko ku wa 16/04/2010 Uwingeneye Joselyne yagiye kwa Baziga Hassan nta wundi muntu uhari, avuyeyo amubwira ko Baziga yamuhaye inzoga, ko arangije yamukuyemo ikariso amukorakora ku gitsina, ntiyabyitaho bukeye umwana yongeye kubivuga, amubaza icyo yakoresheje umwana amwereka ko yakoresheje urutoki ku gapipi, ahita amujyana kwa muganga basanga yarasambanyijwe, anavuga ko aturanye na Baziga kandi ntacyo bapfa nta n'icyo bapfana. (Cote ya 3 na 4). [16] Iyi mvugo ya Nishimwe Vèrene ihura n'iy'umutangabuhamya Mukagatabazi Josephine wemeza ko yagiye mu rugo kwa nyina wa Uwingeneye ku wa 17/04/2010, akamubwira ngo naze yumve ibyo uwo mwana arimo kuvuga, umwana ababwira ko Baziga yamukuyemo ikariso amukorakora ku gitsina, kandi ko ku wa 16/04/2010, Baziga koko yari yahishije inzoga nuko yari abanye neza na Nishimwe kuko uwo mwana yahoraga iwe ahasanga abandi bana (Cote ya 7 na 8). Na none ubuhamya bwa Mukagatabazi bugaragaza ko Baziga yahohoteye umwana, hakaba nta mpamvu Nishimwe yari kumuhimbira icyaha kandi bari abaturanyi babanye neza. [17] Ubu buhamya kandi bushyigikiwe n'icyemezo cya Muganga Masinda Maurice wasuzumye umwana ku wa 19/04/2010, uvuga ko yasanze afite udusebe duto ku gitsina, ko yatakaje akarangabusugi (petites plaies traumatiques des petites lèvres et de la muqueuse vaginale, l'hymen est absent), kandi ko afite indwara yo mu myanya ndangagitsina, bituma akeka ko yasambanyijwe (Infection uro – génitale sur viol probable), anamwandikira imiti agomba gufata. [18] Urukiko rusanga ubuhamya bumaze gutangwa bushyigikiwe n'icyemezo cya muganga ndetse n'imvugo y'umwana ubwe ari ibimenyetso bihagije bihamya Baziga icyaha cyo gusambanya umwana w'imyaka ine nk'uko n'Urukiko Rukuru Urugereko rwa Nyanza rwabibonye; naho ibyo Baziga yireguza ko muganga atagaragaje ko igitsina cye cyinjiye mu gitsina cy'umwana nta shingiro bifite kuko icyaha cyo gusambanya umwana kitabaho iyo hakoreshejwe igitsina gusa ahubwo icyaba cyakoreshejwe cyose ku gitsina cy'umwana nk'uko ingingo ya 33 y'Itegeko n° 27/2001 yavuzwe haruguru ibiteganyaga, bivuze ko no gukorakora ku gitsina cy'umwana hakoreshejwe intoki nabyo bigize

icyaha cyo gusambanya umwana.

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[19] Ku birebana n'uko umwana yavuze ko ibyo yashinje Baziga ari ibyo yabwiwe na nyina, n'ubwo mu iperereza ryakozwe n'Urukiko Rwisumbuye rwa Muhanga ku wa 29/10/2010, U. J yavuze ko ari nyina wamubwiye kuzajya avuga ko ari Baziga, Urukiko rurasanga bitafatwa nk'ikimenyetso gishinjura Baziga cyane cyane ko mu mvugo ze, n'ubwo yari muto cyane, zigaragaramo ukuri nk'aho yabajijwe niba hari umuntu wamubabaje agasubiza ko ari muganga - ku gapipi ke, ahandi abazwa icyo yari arwaye asubiza ko ari Baziga ndetse n'aho yavuze ko Baziga yamukoze ku gapipi n'intoki kuko yari amwibye umutobe, imyiregurire ya Baziga ikaba nta shingiro, bityo iyo ngingo y'ubujurire nta shingiro ifite. [20] Ku bijyanye n'uko Urukiko rutagombaga gushingira ku mvugo y'umwana rumuhamya icyaha, Urukiko rurasanga nk'uko biteganywa n'ingingo 1 ya 60 y'Itegeko n° 13/2004 ryo ku wa 17/05/2004 ryavuzwe haruguru, imvugo y'umwana U.J atariyo gusa Urukiko Rukuru rwashingiyeho ruhamya Baziga icyaha cyo gusambanya umwana, ahubwo imvugo ye yari ishyigikiwe n'ibindi bimenyetso bigizwe n'imvugo y'umutangabuhamya Mukagabatabazi Josephine n'icyemezo cya muganga wasuzumye umwana cyemeza ko yasambanyijwe. [21] Ku birebana n'uko umwana wahohotewe nta gakoko gatera Sida bamusanganye kandi uregwa akamaranye igihe, Urukiko rurasanga atari ikimenyetso simusiga gihamya ko Baziga atasambanyije U. J harebwe uburyo icyaha cyakozwe, kuko yakoresheje urutoki, uretse ko n'uwanduye agakoko gatera SIDA ukoranye imibonano mpuzabitsina n'utaranduye adahita byanze bikunze ayimwanduza nk'uko ubushakashatsi bwakozwe ku bwandu bwa SIDA bwagiye bubigaragaza.2 [22] Naho ku birebana nuko nta ngeso y'ubusambanyi Baziga yari asanganywe, Urukiko rurasanga atari ikimenyetso rwashingiraho rwemeza ko Baziga atakoze icyaha ashinjwa nk'uko Urukiko rwabyemeje mu rubanza rujuririrwa kuko mu iperereza ryakozwe n'Urukiko Rwisumbuye rwa Muhanga, abatangabuhamya babajijwe barimo Nyirakimonyo Anastasie, Nyirakimonyo Floride, Hategekimana Sylvanie na Iryivuze Naason (cote 40- 46) bese bavuze ko Baziga ari umuturanyi mwiza, ntaho bavuze ko batamuziho ingeso y'ubusambanyi, byongeye kandi imyitwarire y'umuntu ikaba atariyo Urukiko rushingiraho ruhamya uregwa icyaha ahubwo rushingira ku bimenyetso bifatika. [23] Ku bijyanye nuko Baziga avuga ko yari afitanye ikibazo cy'amasambu na Nishimwe Vèrene, Urukiko rurasanga nabyo nta shingiro bifite nk'Uko Urukiko rwabisobanuye kuko hasuzumwa ifunga n'ifungurwa ry'agateganyo Baziga we ubwe yivugiye ko Uwingeneye Joselyne yagenderaga iwe, byumvikanisha ko bari abaturanyi babanye neza nk'uko n'ubuhamya bwavuzwe haruguru bubyemeza. [24] Hashingiwe ku mategeko n'ibisobanuro byavuzwe haruguru, Urukiko rusanga ubujurire bwa Baziga Hassan nta shingiro bufite. 1 Ingingo ya 60 y'Itegeko n 13/2004 ryo ku wa 17/05/2004 ryerekeye imiburanishirize y'imanza 0 z'inshinjabyaha ryakurikizwaga yateganyaga ko ".....abana batagejeje ku myaka cumi n'ibiri (12) nabo barumvwa ariko icyemezo cy'Urukiko ntigishobora gushingirwa kuri ubwo buhamya bwonyine. Muri ibyo bihe, ubuhamya bw'umwana bugomba gushyigikirwa n'ibindi bimenyetso 2 [Http:// www.catie.ca/en/pif/summer 2012](http://www.catie.ca/en/pif/summer%202012) (A meta- analysis of 10

studies exploring the risk of transmission through vaginal sex was published in 2009 it estimated the risk of HIV transmission through receptive vaginal sex (receiving the penis in vaginal) to be 0.08% (equivalent to 1 transmission per 1.250 exposures). A meta-analysis of three studies exploring the risk from insertive vaginal sex (inserting the penis into vagina) was estimated to be 0.04%(equivalent to 1 transmission per 2.500 exposures).

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ICYEMEZO CY'URUKIKO [25] Rwemeje ko ubujurire bwa Baziga Hassan nta shingiro bufite. [26] Rwemeje ko imikirize y`urubanza RPA 0009/11/HC/NYA, RPA 0043/11/HC/NYA na RPA 0074/11/HC/NYA zaciwe n'Urukiko Rukuru, Urugereko rwa Nyanza ku wa 27/04/2012 igumyeho. [27] Rutegetse ko amagarama y'uru rubanza aherera ku isanduku ya Leta.

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