

RWANDA / JUDGMENT

PROSECUTOR v. NDAGIJIMANA

RPAA 0149/12/CS

COURT

Supreme Court

DECIDED

15 July 2016

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Text

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THE PROSECUTION v. NDAGIJIMANA [Rwanda SUPREME COURT – RPAA 0149/12/CS (Mukanyundo, PJ, Rugabirwa and Nyirandabaruta, J.) July 15, 2016] Criminal Procedure – Guilty plea – Admission of offense before pre-judicial phase while the accused plead not guilty in the court – it is analysed by the judge who have the case in merit to in his/her discretion the value of the statement retracted by its author, taking into account the way the offence was committed and after corroborating it with other evidence in hands – Law n° 15/2004 of 12/06/2004 relating to evidence and its production, article 119. Criminal Law – Child defilement – any sexual relations with a child, whatever the means or methods used, are considered as rape – Law n° 27/2001 of 28/04/2001 relating to the right and protection of the child against the violence, article 33. Criminal Law – Penalty reduction – The judge may consider the appropriateness of mitigating circumstances which preceded, accompanied or followed an offence. – Decree-Law N°21/77 instituting the penal code, article 82 and 83. Facts: The accused was prosecuted for the child defilement committed against a five year old child The Intermediate Court of Rusizi convicted him and sentenced him to the life imprisonment with the fine of one hundred thousand (100.000 Frw). He appealed against the decision to the High Court, Rusizi chamber, which dismissed his

appeal. He lodged an appeal before the Supreme Court, stating that the court convicted him basing on the fact that he had admitted the offence in the Judicial Police, while it had found that he was tortured as he had presented, without considering the medical report discharging him nor conducting the investigation as he had requested. Prosecution states that there is no where that the Court declared that he was beaten and that the medical report is not the ultimate proof, as it is to be supported by other additional evidences. Held: 1. Statements the accused made during the pre- trial phase have to be taken into consideration, because it corresponds with the one made by victim's mother.

2. As the accused declared that he tried to insert his sex into the sex of the child and whe he found that it was impossible to be inserted he abandoned, it implies that he defiled the child as provided by the Law.
3. The fact that the accused is the first offender, and he committed the offence while he attends his teenagehood, the stage where the human thinking is fully governed by lust, this can serve as a mitigating circumstance, therefore, the sentence of life imprisonment is replaced of the sentence of 20 years imprisonment. Appeal lacks merit. Accused sentenced to twenty years (20) of prison. Court fees charged to the Public treasury.

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Statutes and statutory instruments referred to: Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 119 Law N° 27/2001 of 28/04/2001 relating to the rights and protection of the child against violence, Article 33. Law N° 21/2012 of 14/06/2012 Law relating to the civil, commercial, labour and administrative procedure, article 9 Decree-Law N°21/77 instituting the penal code, articles 82 and 83. Case Laws referred to: Judgment RPAA 0029/10/CS, MP c Ufitimana Fidèle and Ndagijimana Faustin, rendered on 8 July 2011, Judgment RPA 0041/06/CS, MP c Mukashema Anne Marie et al, rendered on 9 April 2010. Doctrine: Michel FRANCHIMONT, Ann JACOBS, Adrien MASSET, Manuel de procédure pénale, 4ème édition, Bruxelles, 2012, p1177

Judgment

I. THE BRIEF BACKGROUND OF THE CASE [1] The case started in the Intermediate Court of Rusizi, where the Prosecution was alleging against Ndagijimana Innocent, for the child defilement committed against a five year old child named Y.L. The Prosecution explains that he entered the child into his house and defied her and the kids who stayed outside revealed it after that the child came out crying. The court convicted him of the offence and sentenced him to the lif imprisonment with the fine of one hundred thousand (100.000 Frw). [2] Ndagijimana appealed against the decision to the High Court, Rusizi chamber, which dismissed his appeal [3] Ndagijimana Innocent lodged an appeal before the Supreme Court, stating that the court convicted him basing on the fact that he had admitted the offence in the Judicial Police, while it had found that he was tortured as he had presented, without considering the medical report discharging him nor conducting the investigation as he had requested. [4] The public hearing took place on 13 June 2016, Ndagijimana Innocent being assisted by Counsel Me Kavuyekure

Dieudonné, while the Prosecution was represented by Uwombonye Hirwa Sudi, the National prosecutor. II. ANALYSIS OF THE LEGAL ISSUE Weather there are evidence incriminating Ndagijimana Innocent

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- [5] Ndagijimana states that the court found him guilty by only basing on the fact that he admitted the offence before the Prosecution, while the court itself confirmed that he was beaten as he mentioned it during his defence, and that during his interview he accepted the crime due to the fact that he was seriously beaten, and that he showed the scars to the Court, yet the Court did not consider it, and that the Court remained silent on the decision of the health practitioner proving him innocent while the decision of the health practitioner was the ultimate evidence proving sexual violence, and that he requested that an investigation be conducted but his request was not valued, while during the investigation the mother of the child would have interviewed why she had gone to Police requesting that Ndagijimana be detained, and what had caused her to go and ask forgiveness to Ndagijimana's parents. [6] He continues stating that the fact that the mother of the child came to discharge him at the Police requesting that he should be released the defendant has no evidence on that except the fact that he read it through the case file in the Intermediate Court, and that it is the Police that included that statement in the file. However, if it is the Prosecutor who requested the mother to take the daughter to the hospital so as to find if the child was sexually violated, the health practitioner cannot prove it, there is no grounds on which to base approving that she was sexually violated. [7] Kavuyekure, the Counsel, assisting Ndagijimana, states that the grounds for the appeal of his client are based on two respective reasons; the first being the fact that the Court did not value the report of expert concludes that the health practitioner cannot approve or disapprove that the child was sexually violated. Furthermore, the second grounds is that the mother of the daughter stated that she was absent when her daughter was sexually violated, and that she took her to the hospital so as the health practitioner could approve that she was sexually violated, the fact due to which the content of the report of expert should be verified by the Court by basing on punishing the crime of which it was showed and of which there are evidences, since whenever the plaintiff fails to provide evidence of any act that was carried out on the sex of the child, the defendant is declared innocent; since there is no proof, and this can entail to term an act carried out by a child touching another child a sexual violence . [8] The representative of the Prosecution states that there is no where that the Court declared that he was beaten, rather the copy of the case file proved that he was not beaten, and that the later agrees with both Ndagijimana and his counsel that the report of expert is not the ultimate proof, this report of expert has to be supported by other additional evidences, and that in this case the report of expert is to be supported by the statements of the victim that the offender attempted to insert his sex into hers and then failed, and this corroborates with the provisions of the article number 33 of the Law n° 27/2001 of 28/04/2001 relating to the rights and protection of the child against violence. He further stated that the fact that the medical practitioner stated that s/he cannot

approve or disapprove that the child was sexually violated, should not serve the basis on which Ndagijimana should be declared innocent as he himself stated that he tried to insert his sex into the sex of the child and failed as the child was young enough. [9] He continues stating that Ndagijimana challenges himself, since he, on one side, states that he was beaten, and states, on the other side during Judges meeting, that they recorded what he did not state, when it is known that after preparing a statement sheet of the victim, the sheet is given to him/her for reading and approval by putting his/her signature on it, once he/she puts

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his/her signature on it, it means that he/she agrees with it. He states that his statement that he was beaten is one of the ways to get rid of the crime, rather he should prove the vice regarding the two previously tried cases. The view of the court [10] With regard to evidence in criminal cases, article 119 of the Law n° 15/2004 of 12/06/2004 relating to evidence and its production provides:« In criminal cases, evidence is based on all grounds, factual or legal provided that parties have been given a chance to be present for cross-examination», while article 65 of the same law states that “ Only the court can assesses the relevance, pertinence and admissibility or rejection of testimonial evidence.....». [11] Article 33 of the Law n° 27/2001 of 28/04/2001 relating to rights and protection of the child against violence provides “In this law, any sexual relations with a child, whatever the means or methods used, are considered as rape ". [12] The statements from the Judicial Police included in the case file prove that Ndagijimana Innocent accepted the crime and stated the way he committed it in these words: " I was drunkard, the child was at our home, and then her and I were into the house alone, then I laid down the mat and put her on it, and then laid on her, and then inserted my sex into hers though mine failed to enter hers, children outside knocked the door angrily and I let her go“. However, before the Court while he was defending the provisional imprisonment, stating that what he committed was due to the alcohol consumption; yet when he was defending the case at the first instance in the intermediate Court, in the High Court and before this Court, he denied the case stating that he accepted it due to the fact that he was severely beaten during the interview in the Judicial Police, and he added that the report of expert discharges him as it proves that the child was not defiled violated. [13] The case file also shows that in addition to the statements made by Ndagijimana, there are also some other statements that he stated throughout various justice instances through which his case has passed as in the Judicial Police he admitted the offence by explaining how he committed it, in the Judicial Police he stated that he was going to commit such a crime yet he recalled that it is a sin and then abandoned to commit it, before the Court when he was defending the provisional imprisonment he was stating that he committed it under influence of alcohol consumption, before both first instance Courts when he was defending himself by denying the case stating that he accepted the crime due to the fact that he was beaten in the Judicial Police, and that he has conflicts with the mother of the child, yet when he was before the Court he changed his prior statement and stated that the mother of the child wanted to request for his release and reconcile with his parents by asking them for forgiveness. [14] The Court finds that constant change of the

statements of Ndagijimana only targets to get rid of the crime, while there are evidences proving him guilty including his statements where he accepted the crime during the interview and his statements corroborate with those of witnesses namely Ntabudakeba Spéciose, Kayigi Juvénal and Nyirabusoro Pétronille accusing him of committing that crime, and they also corroborate with the statements provided by the mother of the child while she filed the case.

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- [15] With regards to the value of the admission of offence during pre - judicial phase while he pleaded not guilty in the court, the court finds that the same issue was resolved in the case law rendered by this court¹, the fact that the accused changes his version before courts is not enough to reject the statements made during the pre-trial phase while he/she does not prove that he/she admitted it being under the high pressure that he/she could not escape; but it is up to the judge who have the case in merit to analyse in his/her discretion the value of the statement retracted by its author, taking into account the way the offence was committed and after corroborating it with other evidence in hands. This opinion is confirmed by Law scholars in criminal procedure, namely Michel FRANCHIMONT, Anne JACOBS et al, where they state “As to the probative force of the confession, the trial judge sovereignly assesses the sincerity of an admission made by the defendant during the preliminary investigation, even when that confession was subsequently retracted in court.²
- [16] The Court finds that statements that Ndagijimana provided in Judicial Police organs have to be valued since they corroborate with those provided by the mother of the child who filed the case against him as he himself heard it from the children who caught him sexually violating that child, this entails that denying, before the Court, the statements he provided during interview, is uniquely one of ways to get rid of the crime or trying his fate. In addition, it is not understandable how a person being beaten, though there are no evidence to prove that he was beaten, his statements corroborate with those provided by both witnesses during interview and the mother of the child who lodged the case in explaining committing a crime circumstances if he ensures that no crime was committed. [17] With regard to the appeal ground of Ndagijimana to the effect that the High Court omitted to conduct investigation so that the victim’s mother be asked the reason why she fled him from the police station and went to ask for pardon to his parents, the court finds that there is no document in the case file to prove it. Therefore, pursuant to article 9 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, the ground lacks merit because he does not prove what he states. With regard to his statements that there are conflicts between him and the victim’s mother, the court finds that it is contradictory with the one he states above that she tried to flee him from the police station, because it is not understandable how she could do it despite disagreement between them. Therefore, the change of the statements only targets to get rid of the crime. [18] Furthermore, with regard to the pleading of Ndagijimana that the medical report does not incriminate him because it does not prove that the child was defiled, the court finds that his analysis does not meet the content of the report, because the Doctor states that the hymen is

present but not intact (Hymen présent mais non intact), thus it does not discharge Ndagijimana as he alleges, but rather, the report confirms his personal statements that he tried to insert his sex into the child's but in vain, the reason why the doctor discovered that the hymen was not intact 1 Judgment RPAA 0029/10/CS, MP c Ufitimana Fidèle and Ndagijimana Faustin, rendered on 8 July 2011, the judgment RPA 0041/06/CS, MP c Mukashema Anne Marie et al, rendered on 9 April 2010. 2 Michel Franchimont, Ann Jacobs, Adrien Masset, Manuel de procédure pénale, 4ème édition, Bruxelles, 2012, p.1177: «Quant à la force probante de l'aveu, le juge du fond apprécie souverainement la sincérité d'un aveu fait par le prévenu au cours de l'instruction préparatoire, même quand cet aveu a été ultérieurement rétracté devant le tribunal. L'aveu en matière répressive peut toujours être rétracté par son auteur, le principe de l'intime conviction laissant le juge libre d'apprécier la valeur de la rétractation comme la portée de l'aveu lui-même».

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though it was present. Therefore, pursuant to article 119 and 65 of the Law n° 15/2004 of 12/06/2004, mentioned above, there is no doubt that the offence was committed. [19] The Court finds that the fact that Ndagijimana accepted the crime during the interview stating that he tried to insert his sex into the sex of the child and whe he found that it was impossible to be inserted he abandoned, it is clearly understandable that he defiled the child as provided by article 33 of the Law n° 27/2001 of 28/04/2001, stated above, hence he is found guilty of the crime he is accused as there are tangible evidence accusing him as previously explained. [20] However, the Court finds that, the fact that Ndagijimana Innocent is the first offender, and he committed the offence while he attends his teenagehood, the stage where the human thinking is fully governed by lust, this can serve as a mitigating circumstance, pursuant to article 82 of the penal code that was into force at the time of the offence, and article 83 of the same penal code, the sentence of life imprisonment and the fine amounting to RFR 100,000 inflicted by the previous Courts is changed to the sentence of 20 years imprisonment. III. THE DECISION OF THE COURT [21] Dismiss the appeal lodged by Ndagijimana Innocent. [22] Sentences Ndagijimana Innocent to twenty (20) years imprisonment. [23] Decides that the judgment RPA 0295/08/HC/RSZ rendered on 04 April 2012, by the High Court, Rusizi chamber, changes only with regard to the penalty. [24] Orders that the court fees be charged to the public treasury because the accused is in jail.

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