

RWANDA / JUDGMENT

Re MURANGWA (ADD)

RLR V.3-2024

COURT

Supreme Court

DECIDED

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RS/INCONST/SPEC 00001/2022/SC

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Re MURANGWA (ADD)

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Re MURANGWA (ADD) [Rwanda SUPREME COURT– RS/INCONST/SPEC 00001/2022/SC – (Mukamulisa, P.J., Cyanzayire, Hitiyaremye, Muhumuza na Karimunda J.) December 16, 2022] Constitution – Constitution – A petition seeking to confirm that various provisions of the law are contrary to the Constitution – The interests of the petitioner – In assessing the interests of the petitioner, the following elements must be considered; the presence of any one of them is sufficient for the Court to affirm that the petitioner has an interest. – If there is a law claimed to be contrary to the Constitution that pertains specifically to the petitioner or their category, thereby giving them personal interest in filing the petition – If the law claimed to be contrary to the Constitution pertains to citizens in general in a way that could affect their rights, this grants anyone who might be affected an interest in petitioning that it is contrary to the Constitution – If the petitioner is a lawyer acting in the interest of justice, they are allowed to file a petition to promote the law or the rights of those affected by that law even if they have no personal interest in the petition.. Facts: Murangwa filed a claim in the Supreme Court requesting that article 10, paragraph 3, a, b, and c and paragraphs 5, 7, and 8 of the Law n° 12/2017 of 07/04/2017

establishing the Rwanda Investigation Bureau and determining its mission, powers, organization and functioning and articles 38, 55, 56, 57, 60, 61 and 70 of the Law n° 027/2019 of 19/09/2019 relating to the criminal procedure are inconsistent with articles 13, 14, 23, 24, 29, 43 and 61 of the Constitution of the Republic of Rwanda of 2003 revised in 2015. He also requests that in case those articles are not repealed, the Court, in its discretion, would set a position that would not harm someone and in a way that does not interfere with the responsibilities of the security organs. He also requested the Court to order the Government and the investigation organs to stop presenting to the media organs the suspects and forcing them to talk to them and to order the managers of the media organs, social media including YouTube and any person, to completely delete from their archives the photos and pictures of the suspects they took. Before analyzing Murangwa's request, the issue of whether he has an interest, in this case, is first examined because he claims that he has the right to request that the articles inconsistent with the Constitution be repealed before being affected by them. He avers that petitioning against an unconstitutional article before it affects you is like getting vaccinated before you get sick, in case he notes that the impugned articles are detrimental to his fundamental rights provided by the Constitution, nothing can prevent him from petitioning against them and that it is not appropriate for the Court to consider the issue as non-existent, while the law was published in the Official Gazette and he is required to abide by it or not to do what it prohibits. The State Attorneys submit that the interest of petitioning is an important reason for the petition admissibility, it is not appropriate that anyone should be allowed to file a claim even if he/she has no interest because it can cause chaos and would interfere with the claims of those who have an interest. They further aver that Murangwa is only proving public interest instead of personal interest, in case his claim is admitted it would be confused with the one lodged in the public interest. Although it is appropriate for the Court to extend the power of those who file such petitions to protect the

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public interest, the set position bars those who file claims for unknown or impressive reasons and this allows to prevent the effects of unnecessary claims on the administration of fair justice. Held: The applicant has interest in the claims filed for repealing unconstitutional law, when, in particular, he/she or the category to which he/she belongs is concerned by that law, it concerns the people in general in a way that may affect their rights and the claimant is authorized lawyer for the sake of promoting the law or the rights of those who are concerned by the law. Petitioner has an interest in this case. The hearing of the case shall continue. Statutory and statutes referred to: The Constitution of the Republic of Rwanda of 2003 was revised in 2015, with articles 3, 13, 14, 23, 24, 29, 41, 43, and 61. Law n° 027/2019 of 19/09/2019 relating to the criminal procedure, articles 38, 55, 56, 57, 60, 61 and 70. Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 72. Law n° 12/2017 of 07/04/2017 establishing the Rwanda Investigation Bureau and determining its mission, powers, organization, and functioning, article 10. Cases referred to: Re Counsel Kabuye Ngendahayo, RS/ICONST/SPEC 00004/2021/SC decided by the Supreme Court on

18/02/2022. Re Byansi Samuel Baker, RS/INCONST/SPEC 00002/2021/SC decided by the Supreme Court on 24/12/2021. Re Byansi Samuel Baker, RS/INCONST/SPEC 00003/2021/SC decided by the Supreme Court on 10/12/2021. Re Mugisha Richard, RS/INCONST/SPEC 00002/2018/SC decided by the Supreme Court on 18/01/2019. Re Bisengimana Jerome, RS/INCONST/CIV 0001/11/CS decided by the Supreme Court on 30/11/2012, paragraph 7. Re Ingabire Umuhoza Victoire, RS/CONST/0002/12/CS decided by the Supreme Court on 18/10/2012. Re Ntawuburintimba Alivéra, RS/INCONST/002/10/CS decided by the Supreme Court on 27/04/2012, paragraph 5. Re Uwimana Jeannette, RS/INCONST/CIV 0002/09/CS decided by the Supreme Court on 18/06/2010, paragraph 5. Re Mutebwa Alfred, RS/INCONST/Pén.0001/07/CS decided by the Supreme Court on 11/01/2008. Ferreira Clive v Levin Allan and Others, CCT 5/95 of 06/12/1995. Rev. Christopher Mtikila v Attorney General [1994] TZHC 12. A.G. of Dendel State v A.G. of Nigeria (1983) ANLR 208. R (NFSE) v IRC [1982] AC 617. Abraham Ade Adesanya v President of the Federal Republic of Nigeria and The Hon Justice Ovie Whiskey (1981) All N.L.R 1.

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Klass and Others v Germany, Judgement of 6 September 1978, Series A, n° 28. Thorson v. Attorney General of Canada [1975] 1 SCR 138. Authors referred to: Blandine Rolland, “Procédure Civile,” in Panorama du Droit de Guillaume Bernard, Studyrama, 2005, p.5. Cédric Tahri, Procédure civile, Lexifac-Droit, Bréal, 2007, p.84.

Judgment

I. BACKGROUND OF THE CASE

On 15/01/2022, Murangwa Edward filed a claim in the Supreme Court requesting that article 10, paragraph 3, a, b, and c and paragraphs 5, 7, and 8 of the Law n° 12/2017 of 07/04/2017 establishing the Rwanda Investigation Bureau and determining its mission, powers, organization and functioning and articles 38, 55, 56, 57, 60, 61 and 70 of the Law n° 027/2019 of 19/09/2019 relating to the criminal procedure are inconsistent with articles 13, 14, 23, 24, 29, 43 and 61 of the Constitution of the Republic of Rwanda of 2003 revised in 2015. He also requests that in case those articles are not repealed, the Court, in its discretion, would set a position that would not harm someone and in a way that does not interfere with the responsibilities of the security organs.

Murangwa Edward also requested the Court to order the Government and the investigation organs to stop presenting to the media organs the suspects and forcing them to talk to them and to order the managers of the media organs, social media including YouTube, and any person, to completely delete from their archives the photos and pictures of the suspects they took.

In particular, Murangwa Edward advances that: -The fact that article 10 paragraphs 3, a, b, and c as well as paragraphs 5, 7, and 8 of the Law n° 12/2017 of 07/04/2017 establishing the Rwanda Investigation Bureau and determining its mission, powers, organization, and functioning,

provides for the reasons and circumstances in which the Rwanda Investigation Bureau can search a person or thing, enter a building or place without search warrant, or conduct search without search warrant, violates the constitutional rights. -The fact that articles 38, 55, 56, 57, 60, 61, and 70 of Law n° 027/2019 of 19/09/2019 relating to the criminal procedure are related to article 10, paragraph 3, a, b and c as well as paragraph 5, 7 and 8 of the Law n° 12/2017 of 07/04/2017 mentioned above, because all are related to the search of a person, place, house, office or any other place where it is suspected that there has been or is related to the commission of an offense and they also provide that search warrant is issued by the organ of the executive branch. However, article 43 of the Constitution provides that the Judiciary is the guardian of human rights and freedoms, which should issue search warrant. -The fact that articles 38, 55, 56, 57, 60, 61 and 70 of Law n° 027/2019 of 19/09/2019 relating to the criminal procedure provide for the interception of communication in investigations and prosecution, search, conducting body search or a body cavity search,

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seizure and caveat of objects, authorization to search and visit any place where evidence may be found, the persons who have the power to issue search warrant and monitoring a suspect through technology, violates the human rights and freedoms provided by the Constitution. He provides the following explanations: •In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people's rights and freedoms, as well as public morals, public order and social welfare which generally characterize a democratic society as provided by article 41 of the Constitution, the reason why the protection of these rights must be performed by the Judiciary because it is the branch so entitled by the Constitution; •Human rights are inviolable, and the Constitution determines how they are protected, respected and the Government branch that has the responsibility to protect them, which means that, based on the provisions of its article 3 which provides that the Constitution is the supreme law of the country, any law, decision or act contrary to this Constitution is without effect; •In the event that the search warrant is issued or in the event of the search without warrant, conducting body search or a body cavity search, search of building, home and workplace, the principle of presumption of innocence of the suspect must be respected until the suspect is proven guilty by the final court decision as provided by the Constitution of the Republic of Rwanda and various international treaties that Rwanda ratified; •In the event that the search warrant, intercepting, monitoring, conducting body search or a body cavity search or other activities referred to in the articles of the law for which the repealing is sought, is issued by an organ not determined by the Constitution, it would mean that the activity and the underlying law are contrary to the article 23, paragraphs 2 and 3, the articles 43 and 61 of the Constitution, and therefore they are null and void. -The fact that the provisions of the article 10, paragraph 8 of the Law n° 12/2017 of 07/04/2017 mentioned above provide that any person can be ordered to provide information that can be helpful in the investigation and the suspect can be presented to the media organs for making statements that violate the provisions of the following

articles: •Article 29 of the Constitution of the Republic of Rwanda provides for the right to fair trial, especially the principle of presumption of innocence until proven guilty by competent court decision; •Articles 73 and 107 of the Law n° 027/2019 of 19/09/2019 relating to the criminal procedure provide for confidentiality during criminal investigation and who is responsible for the burden of proof in those cases. -Basing on the right to fair trial, the right to the privacy of the suspect, his/her family and his/her place of work and the responsibility of the organs responsible for preventing and fighting against offences, this instant Court should set a position that explains how words, reasonable grounds, tangible elements of evidence and serious elements of evidence, used in the article 10, paragraph 3, a, b and c as well as paragraphs 5, 7 and 8 of the Law n° 12/2017 of 07/04/2017 mentioned above should be understood with their limits, this is done in the interest of the law.

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The hearing was held in public on 18/10/2022, Murangwa Edward assisted by Counsel Rugemintwaza Jean Marie Vianney and Counsel Bahati Védaste, while the Government of Rwanda was represented by State Attorney Kabibi Spéciose and State Attorney Kayitesi Pétronille, and they first examined the issue raised by the Court of whether Murangwa Edward has interest in this case. II. ANALYSIS OF LEGAL ISSUE 1. Determine whether Murangwa Edward has interest in this case

Murangwa Edward and his lawyers submit that, as a person who is concerned by any law published in the Official Gazette, and is required to do what it orders or not to do what it prohibits, the impugned articles are detrimental to his interests because they provide for the procedures that apply during the search and for the organ that has the power to issue search warrant. They explain that those articles related to criminal prosecution concern everyone who is in Rwanda, including himself and his family, and they find that the provisions of those articles are contrary to the Constitution, especially in its article 43, the reason why he has the right to request for repealing unconstitutional articles before being affected by them.

They aver that petitioning against unconstitutional article before it affects you is like getting vaccinated before you get sick, in case he notes that the impugned articles are detrimental to his fundamental rights provided by the Constitution, nothing can prevent him from petitioning against them and it is not appropriate for the Court to consider the issue as non-existent, while the law was published in the Official Gazette. He submits that the rationale of his interest in this case is based on the article 72, paragraph one of the Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts¹. He states that in analyzing the article, this instant Court set a position in the case of Counsel Mugisha Richard², where it upheld that as regards the unconstitutionality cases, the party may request that the law be repealed in order to protect the public interest without proving the personal interest in it.

They submit that the fact that a person can request for repealing a law without having to prove that it has been applied to him/her, has been upheld by other courts including the European Court of Human Rights in the case of *Klass and others against Germany*³, and Constitutional Courts as evidenced by the case of *Ferreira v. Allan Levin et al.* rendered by the South African Constitutional Court⁴, the case *Rev. Christopher Mtikila v. The Attorney General* decided by the High Court of Tanzania⁵, the case *IRC v. National Federation of Self-Employed and Small*

1 It provides that the Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking declare unconstitutional a law if they have any interest 2 See Judgment RS/INCONST/SPEC 00002/2018/SC decided by Supreme Court on 18/01/2019. 3 See Judgment *Klass and Others v Germany*, Judgment of 6 September 1978, Series A, n° 28. 4 *Ferreira Clive v Levin Allan and Others*, CCT 5/95 of 06/12/1995. 5 *Rev. Christopher Mtikila v Attorney General* [1994] TZHC 12.

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*Businesses Ltd of England*⁶, the case *Thorson v. Attorney General of Canada*⁷, the case *Adesanya v. President of Nigeria & Another*⁸ and the case *A.G. of Dendel State v. A.G. of Nigeria*⁹.

Counsel Kabibi Spéciose and Counsel Kayitesi Pétronille, State Attorneys, submit that the interest of petitioning is an important reason for the petition admissibility. They explain that it is not appropriate that anyone should be allowed to file a claim even if he/she has no interest because it can cause chaos and it would interfere with the claims of those who have interest. They state that the legal scholar Blandine Rolland in her book entitled *Procédure civile*, asserts that the plaintiff must have a personal and strict interest at the time of filing a claim¹⁰, and Cédric Tahri, also in the book entitled *Procédure civile*, adds that if there is no interest, there should be no claim, and the interest must be reasonable instead of basing on the claimant's wish¹¹.

They sustain that the issue related to the personal interests have been clearly explained by this instant Court in the case of *Byansi Samuel Baker*¹², this instant Court set a position about the claimant's interests referred to in the article 72 of Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, is important reason for admissibility of unconstitutionality case, and these interests must be understood as personal and direct to prove that the articles for which the repealing is sought are detrimental to him. Regarding *Murangwa Edward*, they state that he is only proving public interest instead of indicating personal interest, if his claim is admitted it would be confused with the one filed in public interest litigation. They aver that although it is appropriate for the Court to extend the powers of those who file these claims in order to protect the public interest, the set position bars those who make them for unknown or impressing reasons and this allows to prevent the effects of unnecessary claims on the administration of fair justice

DETERMINATION OF THE COURT

Article 72, paragraph one of Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts provides that “The Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare unconstitutional a law if they have any interest”.

6 R (NFSE) v IRC [1982] AC 617. 7 Thorson v. Attorney General of Canada [1975] 1 SCR 138. 8 Abraham Ade Adesanya v President of the Federal Republic of Nigeria and The Hon Justice Ovie Whiskey (1981) All N.L.R 1. 9 A.G. of Dendel State v A.G. of Nigeria (1983) ANLR 208. 10 L'intérêt pour agir correspond à l'avantage que l'action est susceptible de procurer au plaideur. Cette condition est essentielle et traditionnelle, comme en témoigne la maxime: Pas d'intérêt, pas d'action. L'intérêt peut être pécuniaire (évaluable en argent), ou bien seulement moral. Il est donc patrimonial ou extrapatrimonial. Mais il doit en plus revêtir certaines caractéristiques. Il doit exister au jour de l'action (être né et actuel) et être légitime, personnel et direct. See Blandine Rolland, Procédure Civile, in Panorama du Droit de Guillaume Bernard, Studyrara, 2005, p.5. 11 “Le titulaire d'une action doit justifier d'une intention à agir, défini comme l'avantage moral ou matériel que l'action est susceptible de procurer au plaideur. La maxime: pas d'intérêt, pas d'action” reflète ce principe. En outre, il doit être né et actuel et pas seulement éventuel ou hypothétique”. See Cédric Tahri, Procédure civile, Lexifac-Droit, Bréal, 2007, p.84. 12 See Judgment RS/INCONST/Pén.0001/07/CS decided by the Supreme Court on 11/01/2008. See also Judgment RS/INCONST/SPEC 00003/2021/SC decided by the Supreme Court on 10/12/2021

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The issue of the interests of the petitioner in the case seeking for repealing the unconstitutional articles has been examined by this instant Court in various cases. In the cases Mutebwa Alfred¹³, Uwimana Jeannette¹⁴, Ingabire Umuhoza Victoire¹⁵, Bisengimana Jérôme¹⁶, and Ntawuburintimba Alivera¹⁷, this instant Court found that each of them had an interest in filing a petition seeking to declare the law unconstitutional because they had claims pending in ordinary courts. The interests of the claimant in these cases were based on the fact that there was the claimant's case and requests such Court to stay the judgment pronouncement for allowing him to justify that the article on which the Court will rely is unconstitutional.

The issue of the interest of the party who does not have another case in the ordinary court or has not yet affected by the article for which he claims to be declared unconstitutional, was deeply examined in the case of Counsel Mugisha Richard¹⁸. From the paragraph 20 to 32 of that judgment, this instant Court explained that the appeal against the unconstitutionality of the law should be considered as a serious issue and resolved instead of being treated as a non-existent issue, the interests of the petitioner are based on the fact that he/she is requesting the Court to declare that there are articles that interfere with the constitutional rights or that make the purpose of the Constitution unachievable while it must be protected. The fact that the articles of the impugned law are into force entitles to the petitioner the interest of filing a claim requesting for repealing them without waiting their effects on him/her. In other words, in such claims, the

interests can be real or potential.

This instant Court also found that the interest must be understood in a broad sense due to the fact that the importance of the judgment on those issues exceeds the personal interests of the claimant as upheld in ordinary cases and reaches the public, and no one else can file a claim against those provisions challenged to be unconstitutional. This is why the Legislator provides that the judgments on the unconstitutionality are published in the Official Gazette to inform all citizens.

The Court finds that the issue of interest claimed for petitions seeking to declare a law unconstitutional should be viewed broadly was also reiterated in the case of Counsel Kabuye Ngendahayo¹⁹. In that case, this instant Court found that the provisions of the Law on the matrimonial regimes, donations and successions impugned to be unconstitutional concern everyone in Rwandan society because marriage, succession and property rights do not exclude anyone, which means that every Rwandan, including Kabuye Ngendahayo, can apply it or it can affect him. Therefore, the fact that he is among those who are concerned by the relevant law and

¹³ See Judgment RS/INCONST/Pén.0001/07/CS decided by the Supreme Court on 11/01/2008 ¹⁴ Regarding to the claim filed by Uwimana Jeannette, ... has interest to file that claim because she has a case in the High Court therefore finds that the alleged article should threaten her in her appeal. See Judgment RS/INCONST/CIV 0002/09/CS decided by the Supreme Court on 18/06/2010, paragraph 5 ¹⁵ Ingabire Umuhoza Victoire has the interest to file a claim intending to remove of the alleged provisions of laws because she has a criminal case in the High Court, she is accused of the crime of minimization of genocide and geneocide ideology. See Judgment RS/CONST/0002/12/CS decided by the Supreme Court on 18/10/2012 ¹⁶ Bisengimana wishes that the section of the alleged article be repealed so that Intermediate Court of Rusizi will render his appeal, and hears his case on merit so that he will find justice. See Judgment RS/INCONST/CIV 0001/11/CS decided by Supreme Court on 30/11/2012, paragraph 7. ¹⁷ See Judgment RS/INCONST/002/10/CS decided by the Supreme Court on 27/04/2012, paragraph 5. ¹⁸ See Judgment RS/INCONST/SPEC 00002/2018/SC decided by the Supreme Court on 18/01/2019. ¹⁹ See Interlocutory Judgment RS/INCONST/SPEC 00004/2021/SC decided by the Supreme Court on 18/02/2022.

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he can rely on it even if he has not been negatively affected will affect him, entitles to him the interests of lodging the claim against the articles that infringe upon his constitutional rights.

In the interlocutory judgment of Byansi Samuel Baker decided on 10/12/2021²⁰ and the one which was decided on 24/12/2021²¹, this instant Court after recalling the position set in the case of Counsel Mugisha Richard, explained that as part of avoiding unnecessary claims that may hinder the functioning of the courts, the claimant has the obligation to prove the particularity of his personal interest that he/she is claiming for in the case. It found that Byansi Samuel Baker

had the particularity of being a journalist who claimed for repealing the articles of the law that prejudiced the freedom of the press, the freedom of expression and access to information. In the judgment decided on 24/12/2021, the Court found that the Law determining offences and penalties in general applies to everyone on the territory of Rwanda, including journalists, so its provisions should be repealed because they are contrary to the Constitution and they may be detrimental to him currently or in the future.

The Court also found that Byansi Samuel Baker, as a professional journalist, combined the public interest and the personal interest to file the claim as above described. Regarding the public interest, it was considered that the provisions of the Law determining offences and penalties in general, which concern the general public including him, may interfere with his rights. The personal interest is based on the fact that he is a professional journalist who promotes the development of freedom of the press and laws thereof instead of considering the effects of the impugned articles on him. The fact that he was a journalist entitled to him the particularity for which the Court decided that the articles impugned for being unconstitutional are among the laws that govern him in his profession, so it was not necessary to wait for their effect on him before being allowed to prove that they are inconsistent with the Constitution.

Basing on the aforementioned elucidations, the Court finds that in determining the interests of the claimant, the following factors should be considered, the existence of one of them is sufficient for the Court to declare that the claimant has interest: -If there is a law impugned to be unconstitutional which concerns the claimant or the category to which he/she belongs in particular so that he/she has a personal interest to file a claim. An example is the Law governing journalists, medical doctors, teachers, and others; -If the law challenged to be unconstitutional concerns the population in general so that it may affect their rights, such fact entitles to any person who may be affected the interests of challenging it for being unconstitutional; -If the claimant is a lawyer, the latter is allowed in the interest of justice, to file a claim in order to promote the law or the rights of those who are concerned by that law even if he/she has no personal interest in the claim.

Regarding this instant case, the Court finds that Murangwa Edward states that the legal provisions that he challenges are related to certain activities of investigation, search, interception of objects or control of communication, the procedure in which they are conducted is detrimental

20 See Judgment RS/INCONST/SPEC 00003/2021/SC decided by the Supreme Court on 10/12/2021.

21 See Judgment RS/INCONST/SPEC 00002/2021/SC decided by the Supreme Court on 24/12/2021.

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to the fundamental rights provided by the Constitution including the respect of the human dignity and value and not interfering with his personal life, family, home privacy or messages shared with others. He also adds that these articles confer the excessive powers to the

Investigation and the Prosecution because it is provided that a search can be conducted without the issuance of search warrant, but due to the fact that it can be issued by the Prosecution, he finds that such fact interferes with the Judiciary's duty to protect the human rights and freedoms provided by article 43 of the Constitution.

Basing on the aforementioned elucidations and the provisions of the paragraph 17 (2), the Court finds that the impugned articles concern everyone as it is the case for the article 10, paragraph 3, a, b and c as well as paragraphs 5, 7 and 8 of Law n° 12/2017 of 07/04/2017 establishing the Rwanda Investigation Bureau and determining its mission, powers, organisation and functioning and articles 38, 55, 56, 57, 60, 61 and 70 of Law n° 027/2019 of 19/09/2019 relating to the criminal procedure, at that time such fact entitles to the claimant as one of the concerned persons the interest to file a claim before being personally affected.

The Court therefore finds that Murangwa Edward, as one of the persons concerned by the articles of the Law establishing the Rwanda Investigation Bureau and determining its mission, powers, organisation and functioning as well as those of the Law relating to the criminal procedure, he has the interest to request to the Court to declare unconstitutional some of articles of those laws. III. DECISION OF THE COURT

Holds that Murangwa Edward has the interest to file a claim seeking to declare the law unconstitutional in this case;

Holds that the hearing of this case will continue on the date which will be notified to the parties by the Registry of the Court.

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