

RWANDA / JUDGMENT

PROSECUTION v. MUKASHEMA ET AL_231282_en

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PROSECUTION v. MUKASHEMA ET AL [Rwanda SUPREME COURT – RPA0176/11/CS (Mukamulisa, P.J., Munyangeri and Nyirandabaruta J.) October 16, 2015] Criminal Law – Guilty plea – Confession retraction – The trial court has the discretion to assess the sincerity of a confession made by the accused during the preliminary investigation, even when this confession was later retracted or altered in court. Criminal Law – Penalty reduction – Offence committed with cruelty – The commission of an offence with cruelty is a ground for the refusal to grant the benefit of penalty reduction. Criminal Procedure – Interrogation of the offender – The suspect who has information about the offence can be interrogated without being considered as a witness. Facts: Mukashema and Bihimana were prosecuted for having murdered Mukashema's husband named Sibomana Etienne. During her interrogation in the Judicial Police and Prosecution, Mukashema Janvière admitted to have killed her husband with complicity of Bihimana with whom they used to fornicate. She added that he was even involved in the killing to enable them to cohabit. However, when Mukashema appeared before the court, she changed her

pleading and stated that she killed her husband alone and called Bihimana for help to hide the corpse. As for Bihimana, he pleaded not guilty since the very first day of his arrest. The High Court, at Kigali, convicted the accused of complicity in assassination, and sentenced them to life imprisonment. Mukashema appealed against the judgment in the Supreme Court, stating that she was sentenced to the heavy penalty despite her guilty plea. She also stated that she changed pleadings before the court with regard to how the offence was committed; because it was the first time for her to appear before the court, but confirms what she stated before the Judicial Police and that she is ready to explain how the offence was committed. As for Bihimana, he pleaded not guilty since the very first day of his arrest. The prosecutor contends that the appeal of Mukashema lacks merit because she had raised the same ground of the guilty plea even in the previous courts, although she retracted later. Therefore, as she contradicts herself from what she had stated before, her guilty plea cannot be taken into consideration. With regard to Bihimana, he contends that his grounds of appeal lack merit because the High Court motivated the reason why it found him guilty and he failed to challenge it as he does not produce any new element at appeal level. Held: 1. The trial court has the discretion to assess the sincerity of a confession made by the accused during the preliminary investigation, even when this confession was later retracted or altered in court. Therefore, Mukashema does not deserve the benefit of penalty reduction, as the statements she made before courts are inaccurate, because they differ from those she made during the pre-trial phase especially that in her appeal submission, Mukashema explained that she considers the statements made before the Judicial Police given that she does not prove that she challenges them.

2. The commission of an offence with cruelty is a ground for the refusal to grant the benefit of penalty reduction, therefore considering the cruelty by which Mukashema committed the offence of killing her husband, and everything done to conceal the offence, the court finds that she does not deserve the benefit of penalty reduction.

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3. The suspect who has information about the offence can be interrogated without being considered as a witness. Therefore the allegations of Bihimana requesting the disregard of the statements made by Mukashema before the Judicial Police and prosecution lack merit, because she was not heard as witness rather as the offender who has information about the offence. Appeal lacks merit. Appealed judgment sustained. Court fees charged to the public treasury. Statutes and statutory instruments referred to: Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, article 86(2o). Decree Law N°21/77 of 18/08/1977 instituting the penal code, articles 82 and 83. No case referred to. Author cited: Michel Franchimont, Ann Jacobs na Adrien Masset, "Manuel de procédure pénale", Edition du Jeune Barreau de Liège, 1989, p.772.

Judgment

I. THE BRIEF BACKGROUND OF THE CASE [1] The prosecution has alleged against Mukashema Janvière and Bihimana Jean Baptiste for having connived in the murder of Sibomana Etienne, the husband of Mukashema Janvière. During her interrogation in the Judicial Police and Prosecution, Mukashema Janvière admitted to have killed her husband, by hitting him with the machete in the head three times. She also explained that Bihimana Jean Baptiste helped her to kill him by stabbing him and mutilating his eyes. After killing him, they threw away his corpse into Mukashema's abandoned toilet, before moving and throwing it in the forest in order to conceal evidence. She also mentioned that even before she used to have fornicated with Bihimana, and that he was even involved in the killing to enable them to cohabit. However, when Mukashema appeared before the court, she changed her statements and stated that she killed her husband alone and called Bihimana to help her to hide the corpse. As for Bihimana, he pleaded not guilty since the very first day of his arrest. [2] At the end of investigations, the Prosecution filed the case against Mukashema and Bihimana in the High Court, at Kigali, which convicted the accused of complicity in assassination, sentencing them to life imprisonment. [3] Mukashema Janvière appealed against the judgment in the Supreme Court, stating that she was sentenced to the heavy penalty despite her guilty plea. She also stated that she changed pleadings before the court with regard to how the offence was committed, because it was the first time for her to appear before the court, but confirms the statements made before the Judicial Police and that she is ready to explain how the offence was committed.

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[4] Bihimana states that the ground for his appeal relies on the fact that he was convicted of the offence he did not commit, therefore he intends the justice to be made. [5] The hearing was conducted in public on 7 September 2015, Mukashema Janvière being assisted by Counsel Rutagengwa Mukiga, Bihimana assisted by Counsel Rwimo Clotilde, while the Prosecution was represented by Mukunzi Faustin, the National Prosecutor. II. ANALYSIS OF LEGAL ISSUES

1. Whether the guilty plea made by Mukashema can be considered as a mitigating circumstance. [6] Mukashema states that her appeal grounds rely on the fact that she pleaded guilty and sought forgiveness but was sentenced to the heavy penalty that she could never serve. She added that another ground is that there are statements that she did not make clear because it was the first time for her to appear before the court that she intends to clarify. [7] She further states the commission of the offence was due to the fact that after having two kids with her husband, the latter abandoned her and cohabitated with his brother's wife, something that made her return to her parents till when her husband with Bihimana who was his friend came to get her back home. She adds that on the day the offence was committed, she went to the market with her husband to sell pigs and on their way back home; they passed to the pub, where she left her husband and went home to get food prepared. She adds that when the husband reached home, he insulted her and beat her,

asking her why the food was not yet served, and as she was drunk, she got nervous and hit him with machete. [8] She proceeds that at night, she went to call Bihimana so that he help her to burry or throw the corpse and he came, stabbed the deceased and removed his eyes before they threw the corpse into Mukashema's toilet. She added that a week later, they took the corpse from that place because it was near the public way and drugged it into the forest. She mentioned that they changed the place where the corpse was, so that none else could know what happened as it was the secret between them. She concludes requesting the penalty reduction, for her to look after her kids. [9] Counsel Rutagengwa Mukiga states that the offence of killing her husband that Mukashema admitted, happened accidentally, that they deserve the penalty but reduced due to the guilty plea following the provisions of article 35 of the Law relating to the code of criminal procedure and article 82 and 83 of the Penal Code that was into force when the offence was committed. He added that in determining her penalty, the court would consider that she has already served 10 years in jail. [10] The Prosecutor contends that the appeal lodged by Mukashema lacks merit because he had the same ground of the guilty plea even in the previous court, although when she was interrogated for the first time, she stated that she killed her husband with the help of Bihimana, and now, she is alleging to have called Bihimana for help after her husband had died, but indicating that when Bihimana arrived, he stabbed and removed the eyes of the deceased. [11] He finds that basing on article 82 of the penal code that was into force at the time the offence was committed, or article 35 of the Law relating to the code of criminal procedure,

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Mukashema guilty plea cannot be considered since her statements in the court contradicts the one she made before, [12] He proceeds that the High Court, in paragraph 23 of the judgment, explained the reason why Mukashema's guilty plea was not taken into consideration, because it held that she intends to hide the role of Bihimana in the killing. He adds that the insult to Mukashema by late Sibomana could not be a reason to kill him, or stabbing and removing his eyes from his corpse. THE OPINION OF THE COURT [13] Article 82 of the Decree – Law N°21/77 of 18/08/1977 instituting the penal code that was into force at the time the offence charged to Mukashema was committed provides that the judge may consider the appropriateness of mitigating circumstances which preceded, accompanied or followed an offence. The decision to accept mitigating circumstances must be justified. As for article 83 of the same Law provides the way the penalty is reduced. [14] Analysis of the above mentioned articles proves that the judge in his discretion analyses whether there are mitigating circumstances for the accused. [15] As mentioned above, the appeal lodged by Mukashema solely intends the penalty reduction based on the ground that the previous court did not reduce her penalty despite her guilty plea in every instance of the courts. [16] The Court finds that the guilty plea of the accused can serve as a mitigating circumstance as the provisions mentioned in paragraph 13 provides is the one made accurately. [17] What have been mentioned above correspond with the opinions of the Law scholars including Michel Franchimont, Ann Jacobs na Adrien Masset, in their publication

“Manuel de procédure pénale”, Edition du Jeune Barreau de Liège, 1989, at page 772, where it is mentioned that in criminal cases, the trial court has the discretion to assess the sincerity of a confession made by the accused during the preliminary investigation, even when this confession was later retracted in court (L’appréciation de la sincérité d’un aveu en matière répressive relève du pouvoir souverain du juge du fond...Le juge de 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). [18] However, as the High Court explained, although Mukashema pretends to plead guilty and then requests the penalty reduction, the obvious is that when she was interviewed before the Judicial Police on 16 April 2005 and 19 April 2005, and in the prosecution on 25 April 2005, she revealed how Bihimana helped her to kill her husband, that she hit the deceased with the machete in the head while Bihimana stabbed him in the rib and mutilated his eyes and threw them into the toilette. She also stated that after that, they hide the corpse together, because they first hid it behind the house and then removed it and threw it in the forest. Furthermore, in her statements, Mukashema included that she used to fornicate with Bihimana and they intended to live together as husband and wife. [19] However, when she appeared before the High Court, Mukashema retracted and stated that she killed her husband alone, hitting him with the machete and that she went to call

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Bihimana so that he helps her to hide the corpse. She repeated such statements before this court. [20] With regards to the penalty reduction, in the appealed judgment, the High Court explained that Mukashema does not deserve it as she does not tell the truth rather she is trying to conceal the role of Bihimana in the killing. Therefore, even this court finds inaccurate the statements she made before courts because they differ from those she made during the pre-trial phase especially that in her appeal submission, Mukashema explained that the statements she considers are those made before the Judicial Police while she does not contest them. [21] Regarding the statements Mukashema made before this court in particular, it is not understandable the way Bihimana would have been called by Mukashema for help as a family friend but came after the death of Sibomana, and stabbed his corpse and removed his eyes that he threw into the toilet. Rather, it is obvious for the court that both of them killed Sibomana and hid the corpse that they even threw in the forest, in order to conceal evidence of the offence, as it has been explained by the High Court. [22] Considering the explanations above and the cruelty that followed the offence of killing one’s husband, and everything done to conceal evidence of the offence, the court finds that Mukashema does not deserve the benefit of penalty reduction, therefore, the penalty that was inflicted to her by the High Court must be sustained.

2. Whether Bihimana was innocently convicted and deserve to be acquitted. [23] Bihimana states that his appeal ground relies on the fact that the High Court convicted him of the offence he did not commit, without evidence proving that he really helped Mukashema to murder her husband. [24] Counsel Rwimo Clotilde states that Bihimana was convicted basing on the statements made by Mukashema who accuses him to have been her accomplice, while the court did not analyze whether the accusations of Mukashema have

merit because she requested the consideration of the statements she made before the court. [25] The counsel further states that before the Judicial Police, Mukashema declared that her husband succumbed to the blow of machete she hit him three times, and when she was before the Prosecution, she stated that she had Bihimana as accomplice. She argues that when it is confronted with the statements she made before the courts, it is proven that her statements before courts contradict those she made in the pre-trial phase. Therefore, she added, as the High Court explained, she contradicts herself; something that creates doubt which must be favorable to Bihimana pursuant to article 153 of the Law relating to the code of criminal procedure that was into force at the time the offence was committed. [26] She proceeds that the intimate relationship which Mukashema alleges to have been between her and Bihimana never existed since Bihimana denies it and Mukashema does not produce evidence thereto. She finds in addition that it is not clear the way Mukashema called Bihimana for help as a family friend around midi night therefore, pursuant to article 59 of the Law relating to the code of criminal procedure that was into force at the time the offence was committed, which states that the accused should not be heard as a witness; Bihimana should be acquitted due to lack of evidence from the Prosecution.

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[27] The prosecutor contends that the grounds of appeal of Bihimana lack merit because the High Court motivated its position of convicting him and he cannot challenge it as there is nothing new in his appeal. [28] He further states that the request made by the counsel for Bihimana that the statements made by Mukashema should be disregarded pursuant to article 59 of the Law relating to the code of criminal procedure that was into force at the time the offence was committed, lacks merit as well, because this provision was modified by article 57 of the current Law relating to the code of criminal procedure, especially that Mukashema was never heard as a witness as provided by the mentioned article. In addition, he requests the Court to rely on article 86 of the current Law relating to the code of criminal procedure when examining the relevance of evidence provided. [29] The prosecutor adds that although Bihimana denies to have been Mukashema's concubine, his statements contradicts with the statements Mukashema made before, while there are also testimonies testifying that Bihimana and Mukashema used to fornicate. Therefore, their declarations are to be taken into consideration pursuant to article 65 of the Law relating to evidence and its production, because they presented their knowledge of facts with regard to relationship between Bihimana and Mukashema. [30] He concludes by requesting the Court to analyze the statements Mukashema made before the Judicial Police and the Prosecution in confrontation with the testimonies, because they concur to prove that Bihimana was accomplice of Mukashema in the commission of the offence. THE OPINION OF THE COURT [31] Article 86, paragraph 2, of the Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure¹ provides that: "The court shall decide at its sole discretion on the veracity and admissibility of incriminating or exculpatory evidence". [32] Although in the appeal, Bihimana kept on denying the offence as he did in the High Court, based on

explanations as given above concerning Mukashema, the court finds without merit the appeal lodged by Bihimana, because Mukashema has explained at the very first time the way they killed her husband, and as above mentioned, she explained that she used to fornicate with Bihimana, and that they intended to cohabit. She also mentioned that the conflicts with her husband Sibomana was due to the fact that he had an affair with a lady named Mukandoli Athanasie, and that even Bihimana was in a bad relationship with Sibomana because he was in affair with Mukandoli Athanasie who used to be his concubine. [33] Furthermore, in her explanation, Mukashema stated that they were in the plot to kill Sibomana for approximately five months. [34] The analysis of explanations given by Mukashema as mentioned, the court finds that Mukashema and Bihimana plotted to kill Sibomana for longtime, and after killing him, they did their best to conceal evidence of the offence. Therefore, the court finds that there is no doubt on the role of Bihimana in the offence he was convicted of by the High Court. 1 Such provision corresponds to article 45 of the Law N°13/2004 of 17/5/2004 relating to the code of criminal procedure as amended to date, that was into force at the time the offence was committed.

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[35] Furthermore, The court finds without merit the allegations made by Bihimana's counsel relating to the disregard of the statements made by Mukashema before the Judicial Police and prosecution, basing on article 59 of the Law N° 13/2004 of 17/5/2004 relating to the code of criminal procedure that was into force at the time the offence was committed 2, because Mukashema was not heard as witness as provided for by that article, rather, as the suspect who has information about the offence especially that she pleaded guilty. III. THE DECISION OF THE COURT [36] Finds the appeal lodged by Mukashema Janvière and Bihimana Jean Baptiste without merit; [37] Upholds the judgment RPA0069/10/HC/KIG rendered by the High Court at Kigali on 16 June 2011; [38] Decides that the court fees be charged to the public treasury. 2 It provides "Persons against whom the prosecution has evidence to suspect that they were involved in the commission of an offence cannot be heard as witnesses".

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