

RWANDA / JUDGMENT

Re MURORUNKWERE

RS/INCONST/PÉN.0001/08/CS

COURT

Supreme Court

DECIDED

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Re MURORUNKWERE

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Text

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1 Re MURORUNKWERE [Rwanda SUPREME COURT – RS/Inconst/Pén.0001/08/CS (Rugege, P.J., Ruyenzi, Mutashya, Nyirinkwaya, Mukanyundo, Hatangimbabazi, Havugiyaremye, Kanyange na Mukamulisa, J.) 26 Nzeri 2008] Itegeko Nshinga – Amategeko anyuranyije n’Itegeko Nshinga – Ikirego kigamije gukuraho ingingo ya 354 y’Itegeko Teka N°21/77 ryo ku wa 18/08/1977 rishyiraho igitabo cy’amategeko ahana ibyaha mu Rwanda – Kuba ingingo ya 354 y’Itegeko Teka N°21/77 ryo ku wa 18/08/1977 rishyiraho igitabo cy’amategeko ahana ibyaha mu Rwanda iteganya ko umugore uzahamwa n’icyaha cy’ubusambanyi azahanwa ku buryo butandukanye n’uko umugabo uzahamwa n’icyo cyaha azahanwa, bigaragaza ko hari ivangura mu guhana rishingiye ku gitsina bityo ikaba inyuranyije n’irangashingiro ndetse n’ingingo ya 16 by’Itegeko Nshinga rya Repubulika y’u Rwanda ryo ku wa 04/06/2003 nk’uko ryahinduwe kandi ryujujwe kugeza ubu – Kuvanaho igika cya mbere cy’ingingo ya 354 yo mu gitabo cy’amategeko ahana ibyaha mu Rwanda, hakagumaho igika cya 2, nacyo kikongerwamo amagambo “cyangwa umugore” ayo magambo agakurikira ijamba umugabo riri muri icyo gika bizatuma iyo ingingo ya 354 itanyurana n’Itegeko Nshinga – Kongera amagambo mu ngingo ya 354 yo mu gitabo cy’amategeko ahana ibyaha mu Rwanda si ukurengera ahubwo ni ukuzuzanya kw’inzego za Leta mu rwego rwo

kwirinda ingaruka zishobora guturuka ku cyuho cyaterwa n'uko nta ngingo y'itegeko ihana icyaha cy'ubusambanyi – Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 4/6/2003 nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo ya 11, 16 n'ya 200 – Amasezerano Mpuzamahanga yerekeye guca burundu ivangura iryo ari ryo ryose rikorerwa abagore, yashyirwaho umukono mu nama rusange y'Umuryango w'Abibumbye, mu cyemezo 34/180 cyo mu Kuboza 1979, yemejwe n'u Rwanda binyuze mu Iteka rya Perezida N°431/12 ryo ku wa 10/11/1980, ingingo ya 2 – Itegeko Ngenga N°01/2004 ryo ku wa 29/01/2004 rigena imitunganyirize, imikorere n'ububasha by'Urukiko rw'Ikirenga nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo ya 89, iya 90 n'ya 93. Incamake y'ikirego: Urega amaze guhamywa n'icyaha cy'ubusambanyi n'Urukiko rw'Ibanze yajuririyemo urwo rubanza mu Rukiko Rwisumbuye maze aboneraho gutanga ikirego mu Rukiko rw'Ikirenga arusaba gukuraho ingingo ya 354 y'Itegeko Teka N°21/77 ryo ku wa 18/08/1977 rishyiraho igitabo cy'amategeko ahana ibyaha mu Rwanda ihanisha umugore ibihano bitandukanye n'ibihabwa umugabo mu gihe bose bahamwe n'icyaha kimwe cy'ubusambanyi kuko inyuranyije n'irangashingiro ndetse n'ingingo ya 16 by'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04/06/2003 nk'uko ryahinduwe kandi ryujijwe kugeza ubu. Incamake y'icyemezo: 1. Ingingo ya 354 y'Itegeko Teka N°21/77 ryo ku wa 18/08/1977 rishyiraho igitabo cy'amategeko ahana ibyaha mu Rwanda inyuranyije n'irangashingiro ndetse n'ingingo ya 16 by'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04/06/2003 nk'uko ryahinduwe kandi ryujijwe kugeza ubu.

2. Icyakora, kvanaho igika cya mbere cy'ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda, hakagumaho igika cya 2, nacyo kikongerwamo amagambo “cyangwa umugore” ayo magambo agakurikira ijamba umugabo riri muri icyo gika bizatuma iyo ingingo ya 354 itanyurana n'Itegeko Nshinga rya Repubulika y'u Rwanda. Uru Rukiko kandi rusanga

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2 amagambo yongerewe mu ngingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda bitaba ari ukurengera ahubwo byaba ari ukuzuzanya kw'inzego za Leta mu rwego rwo kwirinda ingaruka zishobora guturuka ku cyuho cyaterwa n'uko nta ngingo y'itegeko ihana icyaha cy'ubusambanyi. Ikirego gifite ishingiro. Amagarama aherereye ku isanduku ya Leta. Amategeko yashingiweho: Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 4/6/2003 nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo ya 11, 16 n'ya 200. Amasezerano Mpuzamahanga yerekeye guca burundu ivangura iryo ari ryo ryose rikorerwa abagore, yashyirwaho umukono mu nama rusange y'Umuryango w'Abibumbye, mu cyemezo 34/180 cyo mu Kuboza 1979, yemejwe n'u Rwanda binyuze mu Iteka rya Perezida N°431/12 ryo ku wa 10/11/1980, ingingo ya 2. Itegeko Ngenga N°01/2004 ryo ku wa 29/01/2004 rigena imitunganyirize, imikorere n'ububasha by'Urukiko rw'Ikirenga nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo ya 89 iya 90 n'ya 93. Imanza zifashishijwe: Schachter v Canada (1992) 2 S.C.R 679, P21. <http://CSC.Lexum.Umontreal.ca>. S v Manamela 2000 (3) SA1 (CC) National Coalition of Gay and Lesbian Equality v Minister of Home Affairs 2000(2) SA 1 (CC) para. 75. M v H (1999) 2 SCR, para. 139 Inyandiko z'ababanga zifashishijwe: Iain Currie and Johan de Waal, The new Constitution and

Administrative Law, Vol.I, Cape Town, JUTA, 2001, pp. 290-293. Urubanza I. IMITERERE Y'URUBANZA [1] Murorunkwere Spéciose akurikiranyweho icyaha cy'ubusambanyi, giteganywa kandi kigahanishwa ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda. Umugabo wa Murorunkwere Spéciose witwa Sehene JMV yatanze ikirego mu bugenzacyaha arega umugore we icyaha cy'ubusambanyi akorana na Nisengwe Fred. Urwego rw'ubugenzacyaha rwakoze iperereza, rirangiye dosiye ishyikirizwa ubushinjacyaha. [2] Ku wa 23/04/2007, Umushinjacyaha wo ku Rwego rw'Ibanze rwa Kagarama yandikiye Perezida w'Urukiko rw'Ibanze rwa Kagarama, amwoherereza dosiye ubushinjacyaha buregamo Murorunkwere Spéciose na Nisengwe Fred. Icyo kirego cyahawe N°RP0066/TB/Kma. Sehene JMV yuririye kuri icyo kirego cy'inshinjabyaha atanga ikirego cy'indishyi.

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3 II. IMIGENDEKERE Y'URUBANZA MU RUKIKO RW'IBANZE [3] Perezida w'Urukiko rw'Ibanze rwa Kagarama yashyizeho itegeko rigena umunsi w'Iburanisha wo ku wa 05/06/2007, kuri uwo munsi urubanza ntirwaburanishijwe rwimuriwe ku wa 03/07/2007, uwo munsi ugeze urubanza ruburanishirizwa mu muhezo, isomwa ryarwo rishyirwa ku wa 13/07/2007, uwo munsi isomwa ntiriyabaye kuko umucamanza yagize indi mirimo itunguranye ryimurirwa ku wa 24/07/2007. [4] Murorunkwere Spéciose na Nisengwe Fred baburanye bahakana icyaha, uhagarariye ubushinjacyaha atanga ibimenyetso bishingiye ku nyandiko mvugo z'abaregwa zo mu bugenzacyaha aho bemeye icyaha, Murorunkwere Spéciose yatse umugabo we imbabazi naho Nisengwe Fred akaba yarasobanuye uburyo yasambanaga na Murorunkwere Spéciose, hakiyongeraho ubutumwa bwo kuri telefone Nisengwe Fred yoherereje Murorunkwere spéciose. [5] Sehene JMV watanze ikirego cy'indishyi yasabye ko yahabwa indishyi zingana na 1000.000FRW, 500.000FRW y'ikurikiranarubanza, agasubizwa na 1.500.000Frw Murorunkwere yasahuriye kwa Nisengwe Fred. Abaregwa bavuze ko nta ndishyi bagomba gutanga kuko nta cyaha bakoze, Nisengwe Fred ahakana ko atigeze abona 1500.000FRw yaba yarahawe na Murorunkwere Spéciose. [6] Mu guca urubanza, Urukiko rw'Ibanze rwa Kagarama rwemeye kwakira no gusuma ikirego rwashyikirijwe n'Ubushinjacyaha, rugisuzumye rusanga gifite ishingiro, ruhanisha Murorunkwere Spéciose na Nisengwe Fred igifungo cy'amezi abiri buri wese. Urukiko kandi rwemeye kwakira ikirego cy'indishyi rwashyikirijwe na Sehene JMV rugisuzumye rusanga gifite ishingiro, rutegeka Murorunkwere Spéciose gufatanya na Nisengwe Fred guha Sehene JMV indishyi zingana na 250.000FRW. [7] Murorunkwere Spéciose na Nisengwe Fred ntabwo bishimiye icyemezo cy'Urukiko, bahise bajuririra urubanza mu Rukiko Rwisumbuye rwa Nyarugenge, ikirego cyandikwa kuri RPA 0137/07/TGI/Nya. III. URUBANZA MU RUKIKO RW'IKIRENGA [8] Ku wa 22/04/2008, Me Gumisiriza Hilary mu izina rya Murorunkwere Spéciose yatanze ikirego mu Rukiko rw'Ikirenga gisaba gukuraho ingingo ya 354 y'Itegeko Teka N°21/77 ryo ku wa 18/8/1977 kuko inyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, ikirego cyandikwa kuri N°RS/INCONST/PEN 0001/08/CS. [9] Perezida w'Urukiko rw'Ikirenga yashyizeho itegeko rigena umunsi w'Iburanisha wo ku wa 14/8/2008. Intumwa nkuru ya Leta yamenyesheje urubanza, Murorunkwere Spéciose na Nisengwe Fred bamenyeshwa urwo rubanza. Umunsi w'Iburanisha ugeze, urubanza rwaburanishirijwe mu ruhame, Leta ihagarariye n'intumwa yayo

Me Rubango Epimaque, Murorunkwere Spéciose ahagarariwe na Me Kazungu Jean Bosco afatanije na Me Gumisiriza Hilary.

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4 [10] Nyuma yo kumva raporo y'umucamanza wateguye urubanza, Me Gumisiriza Hilary yahawe ijambo ngo asobanure mu magambo arambuye ikirego yashyikirije Urukiko mu izina rya Murorunkwere Spéciose, avuga ko uwo yunganira yaburanye urubanza mu Rukiko rw'Ibanze rwa Kagarama, akaba yarahanwe hashingiwe ku ngingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda, kandi iyo ngingo ikaba inyuranye n'Itegeko Nshinga rya Repubulika y'u Rwanda. [11] Me Gumisiriza Hilary yavuze ko ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda inyuranye n'Itegeko Nshinga rya Repubulika y'u Rwanda mu irangashingiro ryaryo. Inyuranye kandi naryo mu ngingo yaryo ya 16 kuko iteganya ko umugabo n'umugore bangana imbere y'amategeko. Yakomeje avuga ko ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda ihana umugabo n'umugore ku buryo butandukanye kandi baba bakoze icyaha kimwe. Nk'uko bikubiye muri iyi ngingo, umugore ntabwo yigeze ahabwa amahirwe yo gutanga ihazabu mu gihe umugabo ashobora gutanga ihazabu. Abakoze icyaha kimwe bakaba bagomba guhanwa kimwe. [12] Me Gumisiriza Hilary yakomeje ijambo avuga ko mu irangashingiro ry'Itegeko Nshinga rya Repubulika y'u Rwanda mu gace ka 6, abanyarwanda bivugira ko biyemeje kubaka Leta igendera ku mategeko. Mu gace ka 9 bavuga ko biyemeje gukurikiza amahame y'uburenganzira bwa muntu nk'uko ateganywa mu itangazo mpuzamahanga ry'uburenganzira bwa muntu ryo ku wa 10/12/1948, Murorunkwere Spéciose abonye ko inyungu ze zirimo kubangamirwa yahisemo kuregera Urukiko rw'Ikirenga kuko aramutse ahamwe n'icyaha mu Rukiko Rwisumbuye rwa Nyarugenge, yahanwa hifashijwe ingingo inyuranye n'Itegeko Nshinga. Me Gumisiriza Hilary yavuze ko umucamanza w'Urukiko rw'Ibanze rwa Kagarama yacishirije ahanisha umugabo n'umugore igihano kimwe, asaza asaba ko urukiko rwakoresha ubushishozi rukavanaho ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda. [13] Me Kazungu Jean Bosco yahawe ijambo avuga ko ingingo ya 185 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryashyizeho ihame ry'uburinganire ishyiraho n'urwego rw'abari n'abategarugori ruzagenzura ko ubwo burunganire bwubahirizwa. Yavuze ko ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda itubahiriza iryo hame. Yakomeje avuga ko ingingo ya 2 n'ya 15 z'amasezerano mpuzamahanga avanaho ivangura iryo ari ryo ryose rikorerwa abagore. Muri ayo masezerano hateganijwemo ko ibihugu byayasinye bizubahiriza ihame ry'uburinganire, hakiyongeraho ingingo ya 190 y'Itegeko Nshinga. [14] Me Gumisiriza Hilary yabajijwe niba ashaka ko ingingo yose ivaho cyangwa ashaka ko havaho agace kayo kamwe kareba umugore cyangwa agace kareba umugabo, yashubije ko ingingo yose yavaho. Inteko Ishingamategeko nayo ikaba yahita itora itegeko vuba rihana umugabo n'umugore mu buryo bumwe, ku buryo hatabaho icyuho, kubera ko havuyeho ingingo yose hasigara icyuho mu guhana abakoze icyaha cy'ubusambanyi. [15] Ku kibazo cyabajijwe n'Urukiko, Me Kazungu Jean Bosco nawe yagize icyo akivugaho. Yashubije ko ingingo ya 93 y'itegeko rigena imikorere, n'ububasha by'Urukiko rw'Ikirenga iteganya ko urukiko rusuzuma ikirego mu mbibi z'icyaregewe, ariko kuko inzego zuzuzanya urukiko rukaba rwatanga ingingo yaba igenderwaho

mu gihe hagitegerejwe ko itegeko rishyiraho igitabo gishya cy'amategeko mpanabyaha rijyaho. Icyo gihe hagumaho igihano kireba umugabo kuko aricyo gito kikaba cyareba n'umugore. Urukiko rwavuga ko igika cya 2 cy'ingingo ya 354

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5 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda aricyo kizakoreshwa mu guhana umugabo n'umugore. Ingingo ya 6 y'itegeko rigena imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ikaba yakwitabwaho cyane cyane aho ivuga ko umucamanza ashobora gushyiraho itegeko iyo ntarindi tegeko rihari ryakwifashishwa mu rubanza. [16] Me Rubango Epimague, Intumwa ya Leta, yahawe ijambo ngo agire icyo avuga ku kirego cyatanzwe na Murorunkwere Spéciose avuga ko icyifuzo cyo guhindura iriya ngingo cyamaze kwitabwaho, kuko mu mushinga w'itegeko rishyiraho igitabo cy'urwunge rw'amategeko mpanabyaha, hateganijwe ko umugabo n'umugore bakoze icyaha cy'ubusambanyi bazajya bahanwa kimwe. Yakomeje asaba ko Urukiko mu gufata icyemezo rutavanaho ingingo yose kuko byatera icyuho mu mategeko ahana ibyaha. [17] Me Rubango Epimague yakomeje ijambo avuga ko mu guca urubanza, Urukiko rwazagumishaho agace ka 2 karebana n'uko umugabo ahanwa, ako gace kakaba ariko kashyirahwa mu guhana umugore, kuko icyo uwatanze ikirego anenga ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda ni uko ihana umugore kurusha uko ihana umugabo. Ikifuzwa ni uko umugore ahanwa kimwe n'umugabo. Yakomeje avuga ko igika cya mbere cy'ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda kiramutse kivuyeho cyonyine ntihagire ikivugwa uko umugore azahanwa, haba habaye ivangura mu guhana, kuko icyo gihe umugore wakora icyaha cy'ubusambanyi atahanwa. Yasabye ko mu rwego rw'ubwuzuzanye bw'inzego, Urukiko rwazaca urubanza rukuraho igika cya mbere ariko rukanavuga ko igika cya kabiri kireba umugabo n'umugore. [18] Me Rubango Epimague yabajijwe niba Urukiko ruramutse rwemeje ko igika cya kabiri cy'ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda cyaba aricyo cyakoreshwa mu guhana umugore n'umugabo, bitatuma amagambo agize iriya ngingo ahinduka n'icyo iyo ngingo yari igamije kigahinduka, bikaba byaba ari ukurengera k'ubucamanza aho kuba kuzuzanya kw'inzego. Yashubije ko Urukiko rutavanaho ingingo yose kuko byatera icyuho mu mategeko mpanabyaha. Igika cya mbere nacyo kiramutse kivuyeho ntihagire ikigisimbura ntabwo byaba aribyo. Yasabye ko Urukiko rwazifashisha amasezerano mpuzamahanga kugirango hafatwe ingamba ziboneye nk'uko biri mu nshingano n'ububasha bwarwo. Urukiko rwanashyiraho itegeko nk'uko biteganywa mu ngingo ya 6 y'Itegeko N°18/2004 rigena imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi nk'uko ryahinduwe kandi ryujijwe kugeza ubu. Iyo ngingo iteganywa ko "abacamanza baca imanza bashingiye ku ngingo z'amategeko zirebana n'ikirego baregwe cyangwa iyo nta tegeko rijyanye n'ikiburanwa bagashingira ku mategeko basanga bashyiraho mu gihe baba bashinzwe kuyashyiraho, bifashishije ibyemezo byagiye bifatwa n'inkiko, umuco, amahame rusange agenga amategeko n'inyandiko z'abahanga mu mategeko". IV. UKO URUKIKO RW'IKIRENGA RUBIBONA

- a) Iyakirwa ry'ikirego [19] Ingingo ya 89 y'Itegeko Ngenga n° 01/2004 ryo kuwa 29/01/2004 rigena imitunganyirize, imikorere n'ububasha by'Urukiko rw'Ikirenga nkuko ryahinduwe kandi ryujujwe kugeza ubu, iteganya ko "Urukiko rw'Ikirenga arirwo ruburanisha ibirego

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6 byerekeranye no gusaba gukuraho itegeko-ngenga, itegeko, itegeko-teka, cyangwa itegeko ryemerera kwemeza amasezerano mpuzamahanga, haba kubikuraho byose cyangwa se zimwe mu ngingo zabyo zinyuranyije n'Itegeko Nshinga". Nk'uko byavuzwe, Urukiko rw'Ikirenga rwashyikirijwe ikirego kigamije gusaba gukuraho ingingo y'itegeko kuko inyuranyije n'Itegeko Nshinga, ingingo imaze kuvugwa ikaba yarubahirijwe, bityo ikirego cyatanze kikaba kiri mu bubasha bw'Urukiko rw'Ikirenga. [20] Ingingo ya 89, igika cya 2 y'Itegeko Ngenga n° 01/2004 ryo kuwa 29/01/2004 rigena imitunganyirize, imikorere n'ububasha by'Urukiko rw'Ikirenga nkuko ryahinduwe kandi ryujujwe kugeza ubu iteganya ko Urukiko ruregerwa n'umuntu wese cyangwa ikigo n'amashyirahamwe bifite ubuzima gatozi iyo babifitemo inyungu. Iyi ngingo nayo yarubahirijwe kuko ikirego cyatanze n'umuntu ku giti cye kandi ufite inyungu mu rubanza, kuko yahanishijwe igihano giteganywa mu ngingo asaba ko yakurwaho. [21] Ingingo ya 90 y'Itegeko Ngenga rimaze kuvugwa iteganya ko "ikirego gisaba gukuraho itegeko ngenga, itegeko, itegeko teka cyangwa itegeko ryemerera kwemeza amasezerano mpuzamahanga kigomba kuba gifite itariki n'umukono w'ugitanze. Kigaragaza kandi ikiregerwa kimwe n'ingingo urega asabisha kvanaho itegeko ngenga, itegeko, itegeko-teka cyangwa itegeko ryemerera kwemeza amasezerano mpuzamahanga. Urega agomba kandi gushyira ku mugereka w'ikirego cye, kopi y'itegeko ngenga, y'itegeko, y'itegeko teka cyangwa y'amasezerano mpuzamahanga anenga, n'imigereka yabyo iyo biyifite". Iyi ngingo ikaba yarubahirijwe kuko ikirego kiriho itariki kandi cyasinywe n'uwagitanze, kikaba cyerekana ikiregerwa n'impamvu zishingirwaho. Murorunkwere Spéciose akaba yatanze kandi ku mugereka w'ikirego, itegeko ririmo ingingo asabira kvanwaho ariyo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda.

- b) Isesengura ry'ikirego [22] Ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda iteganya ko "umugore uzahamwa n'icyaha cy'ubusambanyi azahanishwa igifungo kuva ku kwezi kumwe kugeza ku mwaka umwe. Umugabo uzahamwa n'icyaha cy'ubusambanyi azahanishwa igifungo kuva ku kwezi kumwe kugeza ku mezi atandatu n'ihazabu y'amafaranga igihumbi cyangwa kimwe gusa muri ibyo bihano". Muri iyi ngingo icyaha kivugwamo ni kimwe aricyo cy'ubusambanyi, ibihano kuri icyo cyaha bikaba bitandukanye. Nk'uko bigaragara, ibihano byateganirijwe umugore uhamwe n'icyaha cy'ubusambanyi bitandukanye n'ibihano byateganyirijwe umugabo uhamwe n'icyo cyaha. [23] Ku byerekeranye n'igihano cy'igifungo, umushingamategeko yateganiye ko igihano ntarengwa gito ari ukwezi kumwe haba ku mugabo no ku mugore, naho ku byerekeranye n'igihano kinini, umugore yahanishwa igifungo kugeza ku mwaka umwe, naho umugabo akaba yahanishwa igifungo cy'amezi atandatu. Bikagaragara ko hari itandukaniro hagati y'igihano kinini cy'igifungo kigenewe umugore n'ikigenewe umugabo. [24] Itandukaniro riri hagati y'igihano cyateganirijwe umugore n'icyateganirijwe umugabo bahamwa n'icyaha cy'ubusambanyi rigaragarira nanone kubirebana n'ihazabu. Muri iyo ngingo biteganijwe ko,

umugabo uzahamwa n'icyaha cy'ubusambanyi ashobora guhanishwa ihazabu y'amafaranga igihumbi hejuru y'igihano cy'igifungo. Ku birebana n'igihano cyateganirijwe

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7 umugore, nta hazabu yigeze iteganywa. Umushingamategeko yanagennye ko umugabo ashobora guhanishwa igihano cy'igifungo cyangwa agahanishwa ihazabu gusa. Naho ku mugore iyo ahamwe n'icyaha cy'ubusambanyi, ahanishwa igihano cy'igifungo gusa nta guhitamo kumuhanisha igihano cy'igifungo cyangwa ihazabu nk'uko bimeze ku mugabo. Ibi bikaba bigaragaza ubusumbane imbere y'amategeko n'ivangura bishingiye ku gitsina. Nk'uko biteganywa mu ngingo ya 16 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 4/6/2003 nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ubusumbane n'ivangura birabujijwe. Iyo ngingo ivuga iti "abantu bose barangana imbere y'amategeko. Itegeko ribarengera ku buryo bumwe nta vangura iryo ariryo ryose". [25] Ingingo ya 11 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya mu gace kayo ka 2 ko "ivangura iryo ariryo ryose rishingiye nko ku bwoko, ku muryango, ku nzu, ku gisekuru, ku ibara ry'umubiri, ku gitsina, ku karere, ku byiciro by'ubukungu, ku idini cyangwa ukwemera, ku bitekerezaho, ku mutungo, ku itandukaniro ry'umuco, ku rurimi, ku bukungu, ku bumuga bw'umubiri cyangwa ubwo mu mutwe no ku rindi vangura iryo ariryo ryose, rirabujijwe kandi rihanwa n'amategeko". Nk'uko bigaragaraga muri iyi ngingo ivangura rishingiye ku gitsina rirabujijwe. [26] Amasezerano mpuzamahanga nayo abuza ko habaho ivangura rishingiye ku gitsina. Amasezerano mpuzamahanga yashyirweho kurwanya ivangura iryo ari ryo ryose rikorerwa abagore yo ku wa 18/12/1979, yemejwe n'u Rwanda binyuze mu iteka rya Perezida², mu ngingo yayo ya 2(C) hateganijwemo ko ibihugu byasinye aya masezerano bigomba kurwanya ivangura iryo ari ryo ryose rikorerwa abagore, bishyiraho uburyo bukwiye, mu gihe kigufi politiki ivanaho ivangura rikorerwa abagore, buri gihugu kiyemeje gushyiraho uburyo bumwe bwo kurengera uburenganzira bw'abagore nk'uko ubw'abagabo bumeze no kwizeza kurinda abagore ivangura iryo ari ryo ryose binyuze mu nkiko zibifitiye ububasha n'izindi nzego za Leta³. Kuba rero harateganijwe ko abagabo bafite uburenganzira bumwe n'abagore, guhana umugabo ku buryo butandukanye n'uko umugore ahanwa, binyuranije n'ibyateganijwe muri aya masezerano. [27] Mu gace ka (g) k'ingingo yavuzwe mu gika kibanziriza iki, hateganijwe ko buri gihugu cyasinye amasezerano kizavanaho ingingo zo mu mategeko mpanabyaha yacyo zigaragamo ivangura rikorerwa abagore (abroger toutes les dispositions pénales qui constituent une discrimination à l'égard des femmes/ to repeal all national penal provisions which constitute discrimination against women). Kuba mu mategeko mpanabyaha y'u Rwanda hagaragamo ingingo iteganya ko umugore uzahamwa n'icyaha cy'ubusambanyi azahanwa ku buryo butandukanye n'uko umugabo uzahamwa n'icyo cyaha azahanwa, bigaragaza ko hari ivangura mu guhana rishingiye ku gitsina. Iyi akaba ari indi mpamvu ituma ingingo ya 354 yo mu gitabo

1 Amasezerano Mpuzamahanga yerekeye guca burundu ivangura iryo ari ryo ryose rikorerwa abagore. Hemejwe ko yashyirwaho umukono mu nama rusange y'Umuryango w'Abibumbye, mu cyemezo 34/180 cyo mu Kuboza 1979 2 Iteka rya Perezida N°431/12 ryo ku wa 10/11/1980 (igazeti ya Leta N°4 yo ku wa 15/02/1981) 3 Ingingo ya 2 y'ayo masezerano ivuga iti « States Parties

condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of elimination discrimination against women and, to this end, undertake :(C) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination ».

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8 cy'amategeko ahana ibyaha mu Rwanda iteganya ibihano bitandukanye hagati y'umugabo n'umugore bahamwa n'icyaha kimwe cy'ubusambanyi, igomba guhindurwa. [28] Nk'uko byasobanuwe hejuru, ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda inyuranye n'Itegeko Nshinga. Urukiko rw'Ikirenga rugomba gusuzuma uburyo bunoze bwo gukemura iki kibazo kugirango ubusumbane n'ivangura bigaragara muri iyo ngingo bivanweho. Iyo ngingo isabirwa kuvaho ikubiyemo ibice bibiri. Igice cya mbere kirebana n'ibihano byateganirijwe umugore uzahamwa n'icyaha cy'ubusambanyi, naho igice cya kabiri giteganya uko umugabo uzahamwa n'icyaha cy'ubusambanyi azahanwa. Ingingo ya 93 y'itegeko ngenga N°01/2004 ryo ku wa 29/01/2004 rigena imitunganyirize, imikorere, n'ububasha by'Urukiko rw'Ikirenga nk'uko ryahinduwe kandi ryujijwe kugeza ubu iteganya ko iyo Urukiko rusanze ikirego gifite ishingiro, ruvanaho iryo tegeko, haba igice cyaryo cyangwa ryose, bitewe n'uko urega arinenga. Mu gutanga ikirego, Me Gumisiriza Hilary uhagarariye Murorunkwere Spéciose asaba ko ingingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda yavaho. Me Rubango Epimague uhagarariye Leta yemera ko iyo ngingo ivangura ariko agasaba ko Urukiko rwavanaho agace kayo ka mbere, rukavuga ko agace ka kabiri kareba umugabo, kareba n'umugore wahamwe n'icyaha cy'ubusambanyi, ibi bikaba byatuma hatabaho icyuho mu guhana icyaha cy'ubusambanyi igihe itegeko rishya ritarajyaho. [29] Nk'uko bigaragara, urebye buri gika cy'ingingo ya 354 ukwacyo (in isolation) nta kibazo giteye. Ingingo ya 354 inyuranya n'Itegeko Nshinga rya Repubulika y'u Rwanda iyo habayeho guhuza, ugasomera hamwe ibika byombi bigize iyo ngingo. Ariko kandi igika kimwe kiramutse kivuyeho icyaha cy'ubusambanyi hari abatagihanirwa. Icyo gihe n'ikindi gika cyaba gisigaye nacyo cyaba kinyuranye n'Itegeko Nshinga, mu gihe haba habayeho guhana abagabo gusa, abagore ntibahanwe, cyangwa habayeho guhana abagore gusa abagabo ntibahanwe. Ingingo yose iramutse ivuyeho, haba icyuho mu mategeko, bisobanura ko uzakora icyaha cy'ubusambanyi, yaba umugore cyangwa umugabo atazagihanirwa. [30] Urukiko rw'Ikirenga rwahawe ububasha n'itegeko bwo kuvanaho itegeko, igice cyaryo, cyangwa ryose mu gihe rusanze rinyuraniye n'Itegeko Nshinga. Ariko na none, mu guca urubanza, Urukiko rugomba no kwita ku nyungu rusange, ari nayo mpamvu rudakwiye gukuraho ingingo y'itegeko rugasiga icyuho mu mategeko gishobora gutuma abantu bakora icyaha cy'ubusambanyi ntacyo bikanga kuko baba bazi ko nta tegeko rizabahana. Mu gushakira umuti ikibazo kigaragara mu ngingo ya 354 yo mu gitabo cy'amategeko ahana ibyaha mu Rwanda, Urukiko rurasanga umuti ari ugutandukanya ibika bigize iyo ngingo, igika cya mbere kikavaho, igika cya kabiri gisigaye kikongerwamo amagambo "cyangwa umugore", nyuma y'ijambo "umugabo". Bityo ingingo ya 354 ikaba yanditse mu buryo bukurikira: "Umugabo cyangwa umugore uzahamwa n'icyaha cy'ubusambanyi azahanishwa igifungo kuva ku kwezi kumwe

kugeza ku mezi atandatu n'ihazabu y'amafaranga igihumbi cyangwa kimwe gusa muri ibyo bihano". Ese Urukiko rw' Ikirenga rufite ububasha bwo guhindura ingingo y'itegeko muri ubu buryo? Mu gusubiza iki kibazo Urukiko rusanga rwakwifashisha ibikorwa mu zindi nkiko hirya no hino ku isi. [31] Mu rwego rwo gukemura ibibazo bituruka ku ngingo y'itegeko inyuranye n'Itegeko Nshinga, ibihugu bitandukanye, nka Canada, Leta Zunze Ubumwe z'Amerika, Afurika y'Epfo byagiye bikoresha uburyo butandukanye harimo ibyitwa "severence" (gutandukanya ibice by' ingingo binyuranije n'itegeko nshinga bikavanwaho hagasigara ibice bitanyuranije n'Itegeko

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9 Nshinga), "reading down" (gusobanura ingingo mu buryo bwaguye butuma itegeko ryumvikana mu buryo butanyuranije n'itegeko nshinga), "reading in" (kongera amagambo mu ngingo y'itegeko bigatuma kunyuranya n'itegeko nshinga bivaho)⁴. Uburyo bwo gutandukanya ibice bigize ingingo y'itegeko hakavanwaho igice kinyuranije n'Itegeko Nshinga, ni bwo buryo bwakoreshejwe n'uru Rukiko mu rubanza RS/Inconst/Pén.0001/07/CS rwaciwe ku wa 11/1/2008. Muri uru rubanza, Urukiko rusanga uburyo bukwiranye n'iki kibazo ari ubwa "severence" na "reading in" nkuko byagaragajwe haruguru, havanwaho igika cya mbere cy'ingingo ya 354 hakongerwa mu gika cya kabiri amagambo atuma ingingo itanyuranya n'itegeko Nshinga. [32] Inkiko ziburanisha ibirego bisaba kvanaho itegeko cyangwa ingingo y'itegeko kubera ko binyuranije n'itegeko nshinga, zihabwa ububasha bwo kuzuza itegeko cyangwa gufata ibindi byemezo bituma hatabaho icyuho. Mu Itegeko Nshinga ry'igihugu cy'Afurika y'Epfo ryo mu 1996, mu ngingo yaryo ya 172 biteganyijwe ko mu guca urubanza, urukiko rushobora kuvuga ko itegeko cyangwa igikorwa binyuranije n'itegeko nshinga bivaho. Ikomeza ivuga ngo ".....it may make any order that is just and equitable"....., bivuga ngo "urukiko rushobora kugira ibyo rutegeka, rugafata icyemezo kiboneye kandi kitarenganya". [33] Urukiko rw'ikirenga rwa Canada narwo rwagiye rufata ibyemezo bikemura ikibazo cy'amategeko anyuranije n'itegeko nshinga. Ibyo rukabikora rushingiye ku ngingo ya 52 y'Itegeko Nshinga ryo muri 1982 ryo muri icyo gihugu ivuga ngo: "The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect"⁵. Urwo rukiko rwasobanuye ububasha bw'urukiko muri bene izo manza mu rubanza *Schachter v Canada*⁶, rwemeza ko urukiko rushobora gukuraho itegeko cyangwa igice cyaryo, gusobanura itegeko mu buryo ritanyuranya n'itegeko nshinga cyangwa kongera amagambo mu ngingo y'itegeko nk'igisubizo gikwiye cy'ibibazo by' amategeko anyuranije n'itegeko nshinga, gishingiye ku ngingo ya 52 y'Itegeko Nshinga rya Canada. [34] Ingingo ya 200 y'Itegeko Nshinga ry' u Rwanda isa n'ingingo ya 52 y'itegeko nshinga rya Canada yavuzwe haruguru. Iyo ngingo ya 200 ivuga ngo: "Itegeko Nshinga niryo tegeko ry' igihugu risumba ayandi. Itegeko ryose, icyemezo cyose binyuranije na ryo nta gaciro na gato bigira". Biragaragara rero ko Urukiko rw'Ikirenga rw' u Rwanda rufite ububasha bwo kuba rwavanaho igice cy'ingingo y'itegeko inyuranye n'Itegeko Nshinga, rukongera amagambo mu gice gisigaye, hashingiwe ku ngingo ya 200 y'Itegeko Nshinga yunganirwa n'ingingo ya 93 y'Itegeko N°01/2004 ryo ku wa 29/01/2004 rigena imitunganyirize, imikorere, n'ububasha by'Urukiko rw'Ikirenga nk'uko ryahinduwe kandi ryujijwe kugeza ubu. Iyo ngingo ivuga ngo "iyi urukiko rusanze ikirego gite

ishingiro, ruvanaho iryo tegeko, haba igice cyaryo cyangwa ryose, bitewe n'uko urega arinenga..." Ubu bubasha bw' urukiko butuma hatabaho icyuho mu mategeko kubera ivanwaho ry'agace k' ingingo mu itegeko kanyuraniye n'Itegeko Nshinga.

4 Ubu buryo butandukanye bwo gukemura ibibazo biterwa n'amategeko anyuraniye n'itegeko nshinga busobanurwa neza n'abahanga mu by'amategeko, Iain Currie and Johan de Waal, *The new Constitution and Administrative Law*, Vol.I, Cape Town, JUTA, 2001, p 290-293. 5 Bivuze ngo "Itegeko Nshinga rya Canada niryo tegeko risumba ayandi yose, itegeko iryo ari ryo ryose rizanyuranya n'ingingo z'Itegeko Nshinga ntabwo rizakoreshwa nta nagaciro rizagira" 6 Schachter v Canada (1992) 2 S.C.R 679, P21. <http://CSC.Lexum.Umontreal.ca>.

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10 [35] Ku byerekeye iyi nzira yo kudasiga icyuho mu mategeko bitewe n' ivanwaho ry'ingingo cyangwa agace kayo kubera kunyuranya n' itegeko nshinga, Urukiko rubona urugero rwiza mu rubanza rwa S v Manamela, rwo muri Afrika y'epfo. Muri urwo rubanza, Urukiko rushinzwe kurinda itegeko nshinga rwo muri icyo gihugu, rwahuye n'ikibazo cy'uko hari ingingo rwasanze inyuranye n'itegeko nshinga, ariko kuyikuraho yose bigatera icyuho mu mategeko, kuko kugirango inteko ishingamategeko iterane byari gutwara igihe kinini hakaba hononekaye ibintu bitari bike. Urukiko rwafashe icyemezo cyo kongera amagambo mu ngingo y'itegeko aho kugirango habeho icyuho. Rwaravuze ruti: "The striking d own of the reverse onus in section 37, without more, would leave a vacuum in the present legislative structure designed to deal with "fencing" which is a pervasive evil in our society. Parliament could remedy the situation, but that takes time, and in the interim that gap would remain. To read in the words necessary to establish an evidential presumption is less invasive of the legislative purpose of section 37 than simply striking down the presumption"7. [36] Nyamara mu gukuraho agace k' itegeko no kongera amagambo mu itegeko bigomba gukorwa mu bushishozi n'ubwitonzi, urukiko rwirinda kwinjira mu bibazo bya politike, ahubwo rukagerageza kubahiriza icyerekezo n'icyari kigamijwe n'umushingamategeko mu gushyiraho itegeko rinengwa ku byerekeye imiterere y'iryo tegeko nyuma y'igikorwa cy'Urukiko. Mu rubanza rwa National Coalition, Urukiko rushinzwe kurinda itegeko nshinga rw'Afurika y'Epfo, rwavuze ko gutandukanya ibice bigize ingingo y'itegeko, igice kimwe kikavaho, igisigaye kikongerwamo amagambo ari icyemezo urukiko rufatana ubushishozi kugirango n'igice cy'ingingo gisigaye cyongewemo andi magambo ntikinyurane n'itegeko nshinga kandi kube cyubahirije amahame shingiro y' igihugu. Rwaravuze ruti: "The severing of words from a statutory provision and reading words into the provision are closely related remedial powers of the court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible"8. [37] Ku byerekeye kutarengera inshingano y'ubucamanza, no kutavogera inshingano y'umushingamategeko mu kongera amagambo mu itegeko, urukiko rugomba kwibanda gusa ku kiri ngombwa kugirango itegeko nshinga ryubahirizwe. Nk'uko byavuzwe n'Urukiko rw'Ikirenga rwa Canada mu rubanza MvH9

“..... remedial precision requires that the insertion of a handful of words will without more, ensure the validity of the legislation and remedy the constitutional wrong”, bisobanura ngo kugirango hatabaho kurengera, bisaba kongera amagambo make mu itegeko, ibyo ubwabyo bikaba bihagije ngo itegeko rigire agaciro binakosore kunyuranya n’itegeko nshinga. Muri uru rubanza, kvanaho igika cya mbere, hakagumaho igika cya kabiri kikongerwamo amagambo abiri akenewe ariyo “cyangwa umugore” ubwabyo bituma itegeko rigumana agaciro bikanavanaho ukunyurana n’Itegeko Nshinga rya Repubulika y’u Rwanda bigaragara mu ngingo ya 354.

7 S v Manamela 2000 (3) SA1 (CC) 8 National Coalition of Gay and Lesbian Equality v Minister of Home Affairs 2000(2) SA 1 (CC) para 75. 9 MvH (1999) 2 SCR, para 139

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11 [38] Muri uru rubanza, kvanaho igika cya mbere cy’ingingo ya 354 yo mu gitabo cy’amategeko ahana ibyaha mu Rwanda, hakagumaho igika cya 2, nacyo kikongerwamo amagambo, nkuko byasobanuwe, bizatuma iyo ingingo ya 354 itanyurana n’Itegeko Nshinga rya Repubulika y’u Rwanda. Uru Rukiko kandi rusanga amagambo yongerewe mu ngingo ya 354 yo mu gitabo cy’amategeko ahana ibyaha mu Rwanda bitaba ari ukurengera ahubwo byaba ari ukuzuzanya kw’inzego za Leta mu rwego rwo kwirinda ingaruka zishobora guturuka ku cyuho cyaterwa n’uko nta ngingo y’itegeko ihana icyaha cy’ubusambanyi. V. ICYEMEZO CY’URUKIKO RW’IKIRENGA [39] Urukiko rw’Ikirenga rwemeye kwakira ikirego rwashyikirijwe na Murorunkwere Spéciose. [40]

[40] Rwemeje ko gifite ishingiro. [41] Rwemeje ko igika cya mbere cy’ingingo ya 354 yo mu gitabo cy’amategeko ahana ibyaha mu Rwanda kavuyeho. [42] Rwemeje ko igika cya kabiri cy’ingingo ya 354 yo mu gitabo cy’amategeko ahana ibyaha mu Rwanda cyongewemo amagambo “cyangwa umugore” ayo magambo agakurikira ijamba umugabo riri muri icyo gika. [43] Rwemeje ko ingingo ya 354 yo mu gitabo cy’amategeko ahana ibyaha mu Rwanda ihinduwe ku buryo bukurikira “umugabo cyangwa umugore uzahamwa n’icyaha cy’ubusambanyi azahanishwa igifungo kuva ku kwezi kumwe kugeza ku mezi atandatu n’ihazabu y’amafaranga igihumbi cyangwa kimwe gusa muri ibyo bihano”. [44] Rukijije ko Murorunkwere Spéciose atsinze. [45] Ruvuze ko amagarama y’uru rubanza angana na 5900FRW aherera ku isanduku ya Leta.

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