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NYIRABATONI v GAHIMA ET AL

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Text

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NYIRABATONI v GAHIMA ET AL [Rwanda COURT OF APPEAL – RS/INJUST/RP 00001/2019/CA, (Karimunda, P.J., Nyirandabaruta and Umugwaneza, J.) January 8, 2021] Criminal law – Offences – Continuing offence – A continuing offence, it is a crime that implies an ongoing criminal activity, and which reveals without doubt the permanent intent to commit it – The computation of the statute of limitation commences at the last day of the commission of the last criminal act, and a judge pronounces the same penalty for all constitutive acts committed. Facts: This case arose from the plaint brought by Nyirabatoni against Gahima, alleging that she donated him a plot of land through a written donation agreement, but that later on, Gahima disappointed her, which led her to initiate legal suits to get back her plot. She lost the case on ground that Gahima refuted such donation by indicating that he co- owns the said plot with his little brother Mupenzi, and they acquired it through the land sharing process between them and Nyirabatoni. Later on in 2013, Nyirabatoni sued Gahima and a person named Munyakarama who wrote the land sharing document while he was an executive secretary of Nyagahinga Cell in Rusororo Sector for having committed the offence of forgery and use of forged document. The Investigation organ transmitted the dossier to the Prosecution authority, which decided to close the file for reasons of

prescription of the offence. Nyirabatonni filed a claim in the Intermediate Court of Gasabo by way of private prosecution against Gahima and Munyakarama accusing them of forgery and use of forged

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document, and such Court dismissed the claim due to the expiry of the time limit. Nyirabatonni lodged an appeal against the decision before the High Court to request the rectification of the mistakes made by the Intermediate Court of Gasabo. She explains that she brought a case against Gahima and Munyakarama for having committed the offence of forgery and use of forged document, and the Intermediate Court of Gasabo, at the time of trial, examined about the sole crime of forgery, of which it decided to be expired, and left aside that of use of forged document whereas it is a continuing offence. The High Court found that the offence of which Nyirabatonni charged Gahima and Munyakarama consists of forgery, the same offence that she denounced to the Prosecution authority, which decided it to have been expired, and therefore it held that her right to initiate a claim by way of private prosecution is confined to the only offence of forgery mentioned in the closed file since the act of the Prosecution to close the file served her as the basis to seize the court, and for that reason, it declared her appeal without merit. Nyirabatonni applied to the Ombudsman requesting to reexamine the case for the reasons of the injustice suffered in the judgment RPA 0571/14/HC/KIG rendered by the High Court, and after the analysis of her judgment, the Office of the Ombudsman found that the decision was unjust and wrote to the President of the Supreme Court by pointing out the injustice suffered by Nyirabatonni. In the decision N° 086/CJ/2019 of 14/03/2019, the President of the Supreme Court ordered the review of the case due to injustice, and the case was heard by the Court of Appeal. Before the Court of Appeal, the case was heard by default of Gahima despite having been regularly summoned to appear, and the Court initially examined the objection raised by Munyakarama who alleged that the identification submitted by Nyirabatonni does not correspond to his. After

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hearing the statements of both parties and verification of his identification, the Court held that no one is in a position to know the identification of an individual better than himself/herself, and it rejected the objection. The hearing was resumed, Nyirabatonni alleged that she filed the claim about the forgery and use of forged document as indicated by elements of evidence in the investigation files for such an offence because according to the inventory of the file of the Intermediate Court of Gasabo and in the case RP 0140 /14/TGI/GSBO, it is evident that this constitutes the subject matter of the case and the same being the subject of appeal before the High Court, but that concerning the use of forged document, it has never been examined by both Courts, which resulted in injustice against her. She adds that the document they allege to be forged is still produced as an evidence until now and has been relied on in cases for the invalidation of the donation because the judgment rendered by the Primary Court of Rusororo held that no donation has ever been made as it was a land sharing instead, and therefore that time limit for statute of limitation should not be computed since such document is still valid

untill now, and for these reasons, they find the offence of use of forged document to be a continuing offence. Munyakarama retorts that he has never been accused of use of forged document because he was rather charged of forgery, while Gahima was charged of use of forged document too, and that as a secretary of land sharing committee, he prepared the land sharing document of the plot that belonged to Benda and Mukagatare between Nyirabatoni and Gahima, who started quarreling about it, and the administration decided to apportion it to them. Concerning whether the offence of forgery consists of a continuing offence, Munyakarama retorts that he was not accused of such crime.

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The side of the Prosecution declares that, even though it did not appear in this case for charging or discharging any one, the action brought by Nyirabatoni and that was admitted by the Investigation Bureau consists of forgery and use of forged document and that the Prosecution did not exercise caution at the time of closing the file by considering the forgery only, and thus, it requests the Court of Appeal to exercise its discretion and examine if Nyirabatoni has also denounced the use of forged document, and in the affirmative, hold that she suffered injustice. Held: Regarding the continuing offence, it is a crime that implies an ongoing criminal activity, and which reveals without doubt the permanent intent to commit it, and of which the computation of the statute of limitation commences at the last day of the commission of the last criminal act, and a judge pronounces a same penalty for all constitutive acts committed. Review of the case due to injustice has merit in parts. Statutes and statutory instruments referred to: Law N° 027/2019 of 19/09/2019 relating to the criminal procedure, articles 6,7,107 and 118. Law n° 30/2013 of 24/5/2013 relating to the criminal procedure, articles 5 (1°) and 6. Organic law n° 01/2012/OL of 02/05/2012 establishing the penal code, articles 22, 609 and 610. Law n° 15/2004 of 12/06/2004 relating to evidence and its production, article 2. No case referred to.

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Authors cited: Jean-Paul DOUCET, Dictionnaire de droit criminel Michel Franchimont, Ann Jacobs et Adrien Masset, Manuel de Précédure Pénale, 4ed, Larcier, Bruxelles, 2012, p. 131 Serge Guinchard et Jacques Buisson, Procédure Pénale, 10 ed, LexisNexis, Paris, 2014, p.806

Judgment

I. BACKGROUND OF THE CASE [1] In this case, Nyirabatoni Elizabeth alleges that she donated the plot of land to Gahima Dembe Eduard through a written contract of donation. Gahima Dembe Eduard exhibited ungrateful behavior towards her, and for this reason, she initiated claims intending to get back the offered plot, which she lost due to the fact that Gahima Dembe Eduard denied such donation by rather indicating that he co- owns the said plot with his little brother Mupenzi Vincent and that they received it through land sharing carried out between them and Nyirabatoni Elizabeth. Nyirabatoni Elizabeth made a denunciation to the judicial police in the year 2013, whereby she stated that Gahima Dembe Eduard and Munyakarama Pierre who hand-

wrote the land sharing document while he was the Executive Secretary of Nyagahinga Cell in Rusororo Sector, committed the offence of forgery and use of forged document. The Judicial Police transmitted the file to the Prosecution, but the latter decided to close the file on ground of prescription of the offence. [2] Nyirabatoni Elizabeth filed a claim before the Intermediate Court of Gasabo by way of private prosecution whereby she sued Gahima Dembe Eduard and Munyakarama Pierre for the offence of forgery and forged document, and in the judgment RP 0140/14/TGI/GSBO

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rendered on 15/07/2014, the Court rejected the claim due to the expiry of the time limit to prosecute the offence. [3] Nyirabatoni Elizabeth appealed to the High Court requesting the rectification of the mistakes made by the Intermediate Court of Gasabo whereby she explains that she sued Gahima Dembe Eduard and Munyakarama Pierre by way of private prosecution for having committed the forgery and use of forged document, and that at the time of trial, the Intermediate Court of Gasabo has only tried the offence of forgery, whereby it held that it has been time barred, and left aside the offence of use of forged document, despite being a continuing offence. [4] In the Judgment RPA 0571/14/HC/KIG rendered on 31/12/2015, the High Court found that the offence of which Nyirabatoni Elizabeth charged Gahima Dembe Eduard and Munyakarama Pierre consists of forgery, the same offence denounced to the Prosecution authority, which declared it time barred. This Court held that her right to file a claim by way of private prosecution concerns only the offence that was concerned in the closed file, namely forgery, since the act of the Prosecution to close the file served her of the basis of her filing by way of private prosecution. The Court noted that the decision of the first instance Court based on article 6 of the law relating to criminal procedure is founded and therefore it rejected her appeal and upheld the ruling of the appealed judgment. [5] Nyirabatoni Elizabeth wrote to the Chief Ombudsman requesting to examine the judgment for the purpose of noting injustice within the judgment RPA 0571/14/HC/KIG rendered by the High Court on 31/12/2015. [6] After the examination of her case file, the Office of the Ombudsman realized that though the Intermediate Court

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of Gasabo decided that the prosecution of the claim filed by Nyirabatoni Elizabeth was time barred, she had indicated to the same Court that the offence she charged Gahima Dembe Eduard and Munyakarama Pierre is not only that of forgery but also that she charged them of the use of forged document, and that she came to be aware of such document when Gahima Dembe Eduard produced it as an element of evidence before the Primary Court of Rusororo in the case RC0143/011/TB/RUS tried on 25/08/2011, and in appellate case RCA 0231/12/TGI/GSBO tried on 07/09/2012 by the Intermediate Court of Gasabo, which implies that Gahima Dembe Eduard used such document for the last time on 07/09/2012. [7] The Office of the Ombudsman wrote to the President of the Supreme Court whereby it pointed out the injustice suffered by Nyirabatoni Elizabeth, and in the order N° 086/CJ/2019 of 14/03/2019, the President of the Supreme Court

approved the review of the judgment RPA 0571/14/HC/KIG due to injustice. He ordered it to be transferred to and heard by the Court of Appeal, which assigned it the docket RS/INJUST/RP00001/2019/CA. [8] The public hearing was scheduled on 16/10/2019, and at that day it was postponed due to sickness of Munyakarama Pierre, and later on, it was postponed several other times for the reasons of parties and Covid-19 pandemic until 22/9/2020 when it was heard. The Prosecution was represented by Rudatinya Nyangezi Gaspard, a national prosecutor, while Nyirabatoni Elizabeth was represented by her son Munanira John who was also represented by Counsel Karangwa Vincent and Counsel Bandora Alfred, and Munyakarama Pierre assisted by Counsel Nsengimana Emmanuel and Counsel Nizeyimana Boniface while Gahima Dembe Eduard was absent despite being summoned to appear and the case was heard by his default.

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[9] The hearing has initially addressed the objection raised by Counsel Nsengimana Emmanuel assisting Munyakarama Pierre according to which the identification declared by Nyirabatoni Elizabeth does not correspond to hers. After hearing the statements of the parties about the objection and examining the identification of Nyirabatoni Elizabeth, daughter of Gacemeri and Kabera mentioned in the documents available in the dossier as indicated above, and basing on article 61 of the Law n° 32/2016 of 28/08/2016 governing persons and family stating that “... Civil status records or judgments replacing or correcting them are binding upon all persons whatsoever”, the Court held that no other person is in a good position to know the identification of another person better than themselves, and that the objection raised by Counsel Nsengimana Emmanuel is baseless. [10] The hearing on the merit of the case was resumed and addressed all legal issues before being closed, but the Prosecution was instructed to hand to the Court the closed file concerning the plaint of Nyirabatoni Elizabeth against Gahima Dembe Eduard and Munyakarama Pierre. The parties were notified that the pronouncement of the judgment was scheduled on 30/10/2020. [11] On 05/10/2020, the Prosecution authority uploaded the file prepared by the Judicial Police in which Nyirabatoni Elizabeth sued Gahima Dembe Eduard and Munyakarama Pierre in this file in IECMS, and the legal counsel for Nyirabatoni Elizabeth have also uploaded a new element of evidence constituted by his court submissions she prepared while she initiated the claim by way of private prosecution as well as a document about the legal provisions governing donation. [12] On 30/10/2020, the Court held in the interlocutory judgment to resume the hearing on 10/11/2020 at 8h30 am

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for the parties to reply on the documents and elements of evidence uploaded in the file after the closure of the hearing. At that day, the case was not heard because the Prosecution did not appear, and it was postponed to 08/12/2020 where it was heard in public while the parties were represented or assisted as before. II. LEGAL ISSUES AND THEIR

ANALYSIS

1. Whether Nyirabatoni Elizabeth sued Gahima Dembe Eduard and Munyakarama Pierre before the Intermediate Court of Gasabo for having committed the offence of use of forged document and whether it is a continuing offence. [13] Counsel Karangwa Vincent states that Nyirabatoni Elizabeth seized the Court for forgery and use of forged document as indicated by elements of evidence in the Judicial Police file, since even according to the inventory of the file before the Intermediate Court of Gasabo as well as in the judgment RP 0140 /14/TGI/GSBO, it is evident that such offences were charged and the same have been the subject of appeal before the High Court whereas concerning the use of forged document, it has never been tried by both instance courts, and thus, such scenario occasioned the injustice towards Nyirabatoni Elizabeth. [14] Counsel Karangwa Vincent alludes that the document they attacked to be forged is still produced as evidence until now and that it has been relied on in the cases of invalidation of the donation because the judgment delivered by the Primary Court of Rusororo held that no donation was made because there rather happened the land sharing, and therefore that the computation of the time limit should be interrupted especially that such document is still in use, which is the basis to assert

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that the offence of use of forged document consists of a continuing offence. [15] Counsel Bandora Alfred states that Nyirabatoni Elizabeth and Gahima Dembe Eduard repatriated from Uganda, and after Nyirabatoni Elisabeth succeeded the estate of her sibling Mukagatare, she awarded Gahima Dembe Eduard a donation. Later on, the dispute arose where the family of Gahima Dembe Eduard offended that of Nyirabatoni Elizabeth, which drove her to request for the invalidation of such donation. He explains that the donation document was turned into that of land sharing, which is the origin of the offences of forgery and use of forged document, and that given that Nyirabatoni Elizabeth is octogenarian, it is her son who initiated the claim before Criminal Investigation Department (CID) for forgery and use of forged document, and that the offence that affected them as shown in their case submissions before Judicial Police consists of use of such document after they turned it into land sharing while it concerned the donation. [16] Counsel Bandora Alfred states in addition that the offence of use of forged document consists of a continuing offence since it has been in use until now, and that even Rwanda Forensic Laboratory asserted that Munyakarama Pierre and Gahima Dembe Eduard played a role in altering the document regarding donation into the land sharing, which deprived Nyirabatoni Elisabeth of the right to her property. [17] The Prosecutor states that, though he did not appear in this case to inculcate or exculpate any body, the action initiated by Nyirabatoni Elisabeth and which was recorded by the Judicial Police consisted of forgery and use of forged document, and that the Prosecution did not exercise caution while closing the file on the basis of the offence of forgery only, that courts were seized of both crimes but that they

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considered the sole offence of use of forged document. He thus requested the Court of Appeal to exercise the discretion and examine whether Nyirabatoni Elizabeth sued for use of forged document too, and that if it finds it with merit, to hold that she suffered injustice because courts would not have dismissed her claim in relation to the offence of use of forged document that Gahima Dembe Edouard and Munyakarama Pierre continued using until the year 2013 since it is a continuing offence and has affected Nyirabatoni Elizabeth. [18] Munyakarama Pierre states that he has never been charged of use of forged document, rather, he was charged of forgery whereas Gahima Dembe Eduard was charged of forgery and use of forged document. He adds that as the presiding and secretary of the land sharing committee, he drafted the land sharing document of the land that belonged to Benda and Mukagatare where he shared it between Nyirabatoni Elizabeth and Gahima Dembe Eduard, who were starting to dispute about it, and the administration decided to apportion it to them and that he did it in the interest of rwandans rather than in his personal interest, especially that he had no knowledge of any of them, and in addition to that, he neither was entitled with the power to change the agreement the two have concluded nor the administration would interfere in such agreement since the only thing it could do was affixing the stamp on such document, and that whatever he did was approved by the administration of the Sector. He requested the instant Court to hold that the offence of forgery he was accused of was time barred. [19] His legal Counsel Nsengimana Emmanuel states that the bench that has started to hear the case has instructed the legal counsel for Nyirabatoni Elizabeth to produce the document used for filing the claim in order to verify whether she denounced the accused for both offences, which was not

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done, and that considering the documents of the file (page 38), it contains the statement of closure of the file indicating that the offence denounced by Nyirabatoni Elizabeth consists of that of forgery that was provided for by article 609 of the penal code, and that pursuant to article 111 of the law relating to criminal procedure, he finds that doubt emerged because Nyirabatoni Elizabeth failed to produce the supporting evidence to her claim, especially that in the course of interrogation by the Judicial Police, she declared that she denounced the offence of forgery against Gahima Dembe Eduard and Munyakayanza Pierre, meaning that she had no interest to sue, as she submitted her claim in the year 2013 after having been entitled with the right to succession, and that the fact for the Prosecution to allege that there occurred a mistake should benefit the accused. [20] Counsel Nizeyimana Boniface assisting Munyakarama Pierre too, states that he would like to rectify his first statements according to which Munyakarama Pierre and Gahima Dembe Eduard were accused of forgery and use of forged document as they were rather accused of forgery only, that Nyirabatoni Elizabeth submitted it by way of private prosecution and lost the case and without requesting the rectification of such mistake, and that the judgments that occasioned injustice to her are not the ones that were reconsidered, therefore that, would the use of forged document affected her, the Court will examine whether Munyakarama Pierre or Gahima Dembe Eduard have used it. [21] Regarding whether the offence of use of forged

document consists of a continuing offence, the Counsel for Munyakarama Pierre states that he was not accused of such offence. [22] Munanira John (son of Nyirabatoni Elizabeth who also represents her mother), states that Nyirabatoni

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Elizabeth is not related to Gahima Dembe Eduard; instead, that the plot that was inherited by Nyirabatoni Elizabeth was misappropriated by Gahima Dembe Eduard, which drove her to complain against him before the administration, but that Gahima used the authorities who helped him to forge the document where they mentioned that there has been land sharing. He states that at the time of donation, Gahima Dembe Eduard requested the draft be made, which Nyirabatoni Elizabeth accepted, and they asked Munyakarama Pierre to record it in the registry of information of the Cell, the act which served him to forge the document because he was deputy to the chairperson of the Cell, but that be it the chairperson of the Cell or the Chairperson of the Sector, none has declared that land sharing document was established, which was supported by the Forensic Laboratory. [23] Mupenzi Vincent (the sibling to Gahima Dembe Eduard) heard as an informer, states that Gahima Dembe Eduard occupied such plot of land since 1994 while Nyirabatoni Elizabeth came in the year 2000 after Gahima Dembe Eduard erected a house in the plot, and Nyirabatoni Elizabeth requested his expulsion from that land. The administration decided that Nyirabatoni Elizabeth should remain in that house because she alleges that it belongs to his sibling and the remaining estate be shared within the context of land sharing government policy, but that what was considered as donation did not happen because Nyirabatoni Elizabeth and Gahima Dembe Eduard did not know each other as they rather came in confrontation within that land. DETERMINATION OF THE COURT

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- a) Whether Gahima Dembe Eduard and Munyakarama Pierre were accused of use of forged document [24] Article 2 of the Law n° 15/2004 of 12/06/2004 relating to evidence and its production provides that case evidence is the demonstration of the truth of a fact in judicial case. Similarly, article 3 of the same Law reads that each party has the burden of proving his/her allegations. [25] Article 107 of the n° 027/2019 of 19/09/2019 relating to criminal procedure provides that “The burden of proof is on the public prosecution or, in case of a claim for damages or private prosecution, on the victim of an offence or his or her rightful beneficiaries (...)” [26] Regarding the offence of forgery, the Court finds that there is no contestation between the parties on whether the plaint Nyirabatoni Elisabeth initiated against Gahima Dembe Eduard and Munyakarama Pierre consisted of forgery or whether the prosecution of such crime was time barred due to statute of limitation; rather, disputes are based on the determination of whether in her plaint, Nyirabatoni Elizabeth accused them of the use of forged document as well. [27] Regarding the offence of use of forged document, the case file reveals that on 30/7/2013, the Judicial Police transmitted to the Prosecution at primary level of Rusororo the case file indicating that the offences of which Gahima Dembe Eduard and Munyakarama Pierre were accused consist of forgery and use of

forged document whereas the document of 14/8/2013 closing the file of the plaint submitted by Nyirabatoni Elizabeth shows that the Prosecution closed the file on the basis of article 609 of the penal code providing and punishing the offence of use of forged document, which implies that the closing of the file

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by the prosecution took into account the sole offence of use of forged document, which it deemed to be time barred. [28] According to the submissions filed by Nyirabatoni Elizabeth to the Intermediate Court of Gasabo by way of private prosecution, the offences she accused Gahima Dembe Eduard and Munyakarama Pierre are forgery and use of forged document. It is also evident in paragraph 13 of the judgment RP 0140/14/TGI/GSBO rendered on 15/07/2014 that the respondents were tried about both crimes, where the counsel for Nyirabatoni Elizabeth stated that the offence of forgery of which Gahima Dembe Eduard is accused of, is a continuing offence, which the Court dismissed, on ground that it is not an ongoing activity because if the forged document is produced, the time runs from and ends at the very day and that the fact that he would produce it as an evidence for the second time is not what makes it a continuing offence. [29] The case file of the judgment RPA 0571/14/HC/KIG rendered by the High Court on 31/12/2015 indicates that Nyirabatoni Elizabeth lodged an appeal in such Court stating that the position adopted by the Intermediate Court is erroneous since it focused on the forgery only without addressing its use, which she requested to be mended. Basing on the document of the Prosecution closing the file, that Court found that the right that Nyirabatoni Elizabeth had to exercise the action by way of private prosecution is only limited to the offence denounced in the closed file, which means that of forgery, therefore that the decision taken at the first instance is not irregular and should be maintained. [30] Concerning the offence of use of forged document, the Court notes that as indicated above, the file of Nyirabatoni Elizabeth claim which the Judicial Police transmitted to the Prosecution and closed by the latter, and

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the court submission by Nyirabatoni Elizabeth before the Intermediate Court of Gasabo by way of private prosecution as well as in the judgment RP 0140/14/TGI/GSBO tried by such Court, Nyirabatoni Elisabeth denounced the offences of forgery and use of forged document, therefore the statements of Munyakarama Pierre and his legal counsel according to which Nyirabatoni Elizabeth accused them of the sole offence of forgery, lack merit. [31] The Court finds that the fact that the analysis of the High Court on the determination of whether Nyirabatoni Elizabeth accused Gahima Dembe Eduard and Munyakarama Pierre the offence of use of forged document on the basis of the document established by the Prosecution in which it decided that the action was time barred regarding the sole offence of forgery whereas accusation concerned also that of its use, especially that even the Prosecution admitted before the instant Court that it did not exercise caution to close the file, and that Court having considered the sole statement closing the file without examining the entire closed file, where it upheld the ruling of the judgment RP 0140/14/TGI/GSBO rendered by the Intermediate Court of Gasabo; the foregoing shows the

mistake made by such Court and the injustice enticed to Nyirabatoni Elizabeth by the decision against which she applied for review due to injustice. [32]

[33]

- b) Whether the offence of use of forged document consists of a continuing crime [34] Article 6 of the Law n° 30/2013 of 24/5/2013 relating to criminal procedure that was into force at the time of filing states that the prescription period for a criminal action shall start from the date on which the offence is committed when during that time interval no investigation or prosecution has

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been conducted. As to instantaneous offences, the prescriptive period of a criminal action shall run from date of the commission of the offence. As to continuing offences, the prescriptive period of a criminal action shall run from the date of the cessation of the last act of the offence. The same provisions are repeated in article 7 of the Law n° 027/2019 of 19/09/2019 relating to criminal procedure¹ [35] Article 5 (1°) of the aforementioned Law n° 30/2013 of 24/5/2013 into force at the time of filing the action provides that except the crime of genocide, crimes against humanity and war crimes which are not subject to prescription, a criminal action for other offenses shall lapse after a period of ten (10) years for felonies. [36] Article 22 of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code that was into force at the time of the commission of the offence Gahima Dembe Eduard and Munyakarama Pierre are accused of, states that a felony is an offence punishable under the law by a main penalty of an imprisonment of more than five (5) years. [37] Article 609 of the Organic Law n° 01/2012/OL of 02/05/2012 provides that “Any person who forges or alters documents by forged signature or fingerprint, falsifying documents or signatures or impersonation, forging agreements, its provisions, obligations, discharged obligations shall be liable to a term of imprisonment of more than five (5) years to seven (7) years”. Similarly, article 610

1 Article 7 of the Law n° 027/2019 of 19/09/2019 relating to criminal procedure provides that the prescriptive period for a criminal action starts to run from the date on which the offence was committed if during that time no investigation or prosecution was conducted. For instantaneous offences, the prescriptive period of a criminal action runs from the date on which the offence was committed. For continuing offences, the prescriptive period of a criminal action runs from the time of the cessation of such an act (...).

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states that “Any person who knowingly, uses a counterfeit document shall be liable to the same penalty as the person counterfeiting a document.” [38] The case file contains a document written on 28/5/2000 in which Nyirabatoni Elisabeth donated a plot of land to Gahima Dembe Eduard. It contains also a document established on 28/4/2000 and titled land sharing report between Nyirabatoni Elizabeth and Gahima Dembe Eduard, where it is stated that Nyirabatoni Elizabeth

and Gahima Dembe Eduard shared a plot of land, and that Gahima Dembe Eduard shall have to get back the plot he was attributed during the prior sharing between him and Nyirabatoni Elizabeth. [39] The file contains the

judgment

RC 0143/011/TB/RUS rendered by the Primary Court of Rusororo on 25/8/2011 opposing Nyirabatoni Elizabeth to Gahima Dembe Eduard for the invalidation of donation where such Court held that “the claim of Nyirabatoni Elizabeth lacks merit on ground that there was concluded a donation contract of the plot of land between her and Gahima Dembe Eduard in writing on 20/8/2009 (as noted in the judgment) at Nyagahinga Cell, and for this reason it remains valid and should be performed”. [40] The file indicates that Nyirabatoni Elizabeth lodged an appeal against the judgment RC 0143/011/TB/RUS before the Intermediate Court of Gasabo, which tried the case RCA 0231/12/TGI/GSBO of 7/9/2012, and held that the claim of Nyirabatoni Elizabeth is groundless, that land sharing was carried out between her and Gahima Dembe Eduard and his brother Mupenzi Vincent, therefore that the ruling of the case RC 0143/011/TB/RUS is upheld, which is an indication that during the deliberation, the Court relied on the fact that Gahima Dembe Eduard and Mupenzi Vincent produced the land sharing document established on

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28/4/2000 which was not contradicted by Nyirabatoni Elizabeth. Nyirabatoni Elizabeth stated that she does not know the existence of such document, because when she made the donation to Gahima Dembe Eduard, they established a written document on 28/5/2000, the same document that Gahima Dembe Eduard turned into land sharing document on 28/4/2000. [41] According to the content of the file, both the documents of 28/04/2000 and 28/05/2000 have been examined by the Forensic Laboratory that realized that: “the figure 5 that was mentioned in the date has been turned into 4, therefore that the accurate date of the donation contract between Nyirabatoni Elizabeth and Gahima Dembe Eduard is 28/05/2000; that the words “Gusaranganya hagati ya ... y’abantu (2)” were added after as compared to the rest of the text of the donation contract between Nyirabatoni Elisabeth and Gahima Dembe Eduard, and shows that the handwriting of the alphabet and a figure 2 mentioned at the top of the contested contract, correspond to the writings style of the contract between Nyirabatoni Elizabeth and Gahima Eduard”. [42] Concerning the continuing offence, a legal scholar Jean-Paul Doucet, in Dictionnaire de droit criminel², states that it is an offence that results from an activity which extends over time and which concretely marks the

² Jean-Paul DOUCET, Dictionnaire de droit criminel, (Infraction continue. Une infraction est dite continue, ou continuée, lorsqu’elle résulte d’une activité qui se prolonge dans le temps et qui marque concrètement la persistance d’une intention délictueuse (tel est le cas du délit d’édification d’un bâtiment sans permis de construire, qui se prolonge pendant toute la durée des travaux). Les auteurs parlent parfois, dans un sens proche, d’infraction successive*, ou

d'infraction continue successive. Le délai de prescription ne commence à courir que du jour où l'infraction a pris fin, mais les juges ne peuvent prononcer qu'une seule peine pour l'ensemble des agissements reprochés.)

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persistence of a criminal intention. The limitation period for the offence only begins to run from the day the offense ended, but the judges can only pronounce a single sentence for all of the alleged acts (...), while Michel Franchimont, Ann Jacobs and Adrien Masset³, state that the continuing offence aims at creating and maintaining a tortious situation, therefore prescription does not begin to run until the day the tort ends⁴. [43] The Court finds that as indicated by the content of the file, the author of the donation contract document of 28/5/2000 is the same person who altered it to be that of land sharing alleged to have been carried out on 28/04/2000, because the Forensic Laboratory indicated that the handwriting of the text of the top of such document where it is stated "Gusaranganya hagati ya ...y'abantu (2)" relates to the handwriting of the contract, which implies that such document of 28/04/2000 is a counterfeited document. [44] The Court finds that since such document of 28/04/2000 was used till 07/09/2012 while GAHIMA Dembe Eduard produced it as evidence for land sharing between him and Nyirabatoni Elizabeth before the Intermediate Court of Gasabo in the judgment RCA 0231/12/TGI/GSBO rendered on 07/09/2012, where Nyirabatoni Elizabeth filed for counterfeit and use of counterfeited document before the Intermediate Court of Gasabo in the year 2013, but such Court held that the prosecution of her claim was time barred because the document attacked was established in 2000. In addition,

3 Michel Franchimont, Ann Jacobs et Adrien Masset, Manuel de Procédure Pénale, 4ed, Larcier, Bruxelles, 2012, P. 131 (Lorsque l'infraction est continue, c'est-à-dire lorsqu'elle vise la création et le maintien d'une situation délictueuse, la prescription ne commence à courir que le jour où l'état délictuel prend fin). 4 Serge Guinchard et Jacques Buisson, Procédure Pénale, 10 ed, LexisNexis, Paris, 2014, p.806

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such Court misinterpreted the facts because, though the document was established in 2000, but it continued to be produced in different cases until the year 2012. [45] The Court finds that Nyirabatoni Elizabeth became aware of the document of 28/05/2000, which Gahima Dembe Eduard altered to the land sharing document, when he produced it as evidence in the judgment rendered on 25/08/2011. Thus, the fact that Gahima Dembe Eduard continued to use it until the year 2012, as stated above, the prescription period of prosecution should have been computed since the last time of use of such document, meaning from the year 2012, which entails that since the use of counterfeited document was attacked in the year 2013, the prosecution of such offence was not yet time barred at that time, because as explained basing on the provisions of law referred to above, the prescription for felonies is ten years, and the offence of use of counterfeited document that Gahima Dembe Eduard and Munyakarama Pierre are charged of is a

felony, and the foregoing supports the fact that the accusation for the crime they are prosecuted for intervened before the expiry of time limitation. [46] The Court finds that the fact that Nyirabatoni Elizabeth has initiated a claim that was not admitted on the ground that the prosecution was time barred, amounted to injustice that should be mended by admitting her claim and prosecute the accused for use of counterfeited document.

2. Whether there are inculpatory elements of evidence against Gahima Dembe Eduard and Munyakarama Pierre for the offence of use of counterfeited document [47] The legal counsel for Nyirabatoni Elizabeth states that Gahima Dembe Eduard and Munyakarama Pierre counterfeited the document by altering the donation

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document of 28/5/2000 into land sharing, of which they pretended to have been established on 28/4/2000. They also state that there are inculpatory elements of evidence including the documents established by authorities confirming that no land sharing has ever been carried out, and even Rwanda Forensic Laboratory has proved that the document of 28/4/2000 is counterfeited, and that such document continued to be used in different court cases, and that they were relied on to defeat Nyirabatoni Elizabeth. Thus, they requested that Gahima Dembe Eduard and Munyakarama Pierre should be punished according to the law. [48] Munyakarama Pierre as well as his legal counsel state that he did not counterfeit any document because the land sharing was carried out and recorded in the appropriate registry, and that in the event he committed it, the prosecution of such an offence would be time barred as the document alleged to be forged dates back in 2000 while Nyirabatoni Elizabeth filed a claim in 2013, and that it is not indicated the time Munyakarama Pierre committed the offence of using it which was qualified as a continuing offence; therefore they request the Court to declare him not guilty of the charges against him. [49] The Prosecutor states that the file was closed in relation to the offence of counterfeit and not that of use of counterfeited document, the reason why, basing on the evidence as explained by the legal scholars as well as the document established by the administration of Rusororo Sector, the accused are guilty of the charges against them, and should therefore be punished in accordance with articles 609 and 610 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code that was into force at the time of the commission of the offence.

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DETERMINATION OF THE COURT [50] Article 609 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code at the time the offence that Gahima Demde Eduard and Munyakarama Pierre are charged of was committed, states that “Any person who forges or alters documents by forged signature or fingerprint, falsifying documents or signatures or impersonation, forging agreements, its provisions, obligations, discharged obligations shall be liable to a term of imprisonment of more than five (5) years to seven (7) years and a fine of three hundred thousand (300,000) to three million (3,000,000) Rwandan francs”. Similarly, article 610 of the same Organic

Law provides that “Any person who knowingly, uses a counterfeit document shall be liable to the same penalty as the person counterfeiting a document”.⁵ [51] Article 118, paragraph 2 of the Law no 027/2019 of 19/09/2019 relating to criminal procedure provides that “Private prosecution is carried out when the victim of an offence files a claim in a criminal court demanding that the offender, his or her co-offender or accomplice be punished and be ordered to pay damages proportional to the injury caused.” [52] Article 6 of the aforementioned Law no 027/2019 of 19/09/2019 states that: “Except offences that are not subject to prescription as provided by Law, criminal action for other offences lapses: 1° after a period of ten (10) years for felonies” [53] According to the content of the file, it is evident that the Executive Secretary of the Rusororo Sector wrote to the

5 Such penalty is similar to the penalty provided for by paragraph 3 of article 276 of the Law n°68/2018 of 30/08/2018 determining offences and penalties in general.

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Kabuga Police Station head, informing him/her that they don't have the record in relation to land sharing between Nyirabatoni Elizabeth and Gahima Dembe. [54] It is also evident according to the content of file as stated above that the document of 28/05/2000 relating to donation as well as that of 28/04/2000 titled as that of land sharing were examined by Rwanda Forensic Laboratory, which discovered that the figure 5 which was part of the date was altered to be 4, and the words “gusaranganya hagati y'abantu (2)” were added after as compared to the rest of the text of the donation contract between Nyirabatoni Elisabeth and Gahima Dembe Eduard; therefore, the accurate date of the contract between Nyirabatoni Elizabeth and Gahima Dembe Eduard is that of 28/05/2000. [55] It is evident from the file that on 8/7/2013, the person named Ntidendereza Anaclet who was the chairman of Runyonza Cell from 1997 to 2004 who participated in the land sharing committee, testified that no land sharing has occurred between Nyirabatoni Elizabeth and Gahima Dembe Eduard; rather, Nyirabatoni Elizabeth donated him but the donation which was altered to be land sharing by the Executive Secretary of the Cell named Munyakarama Pierre who was recording the deed, since the donation happened in the presence of Munyakarama Pierre, the donee and the donor, which, unlike land sharing, did not attract the attendance of many people. [56] The Court finds that though Gahima Dembe Eduard and Munyakarama Pierre were not prosecuted for counterfeit due to statute of limitation, it is crucial to determine whether the land sharing document of 28/04/2000 is counterfeited before determining whether or not both are guilty of the offence of using such document.

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- [57] Concerning that document, considering the witness declarations by Ntidendereza Anaclet, the former chairman of Runyonza Cell, who was present at the time the donation was made and signed it, as well as the report by Rwanda Forensic Laboratory stated above, the Court finds that as indicated by the analysis made in paragraph [49] of this case, the document of 28/04/2000 titled as land sharing between Nyirabatoni Elizabeth and Gahima Dembe Eduard is a counterfeited document.
- a) Regarding Gahima Dembe Eduard [58] Regarding the offence of forgery, the Court of Appeal finds that Gahima Dembe Eduard is guilty of the offence of the use of counterfeited document of 28/4/2000, because as stated above, he used it in the case RC 0143/011/TB/RUS tried by the Primary Court of Rusororo on 25/8/2011, and used it again on 7/9/2012 in the case RCA 0231/12/TGI/GSBO tried by the Intermediate Court of Gasabo where he produced it as an evidence to prove that they shared the land that was under dispute between him and Nyirabatoni Elizabeth, and the Court relied on such document to decide that the claim of Nyirabatoni Elizabeth lacks merit as there occurred the land sharing between her and Gahima Dembe Eduard. For these reasons, he should be held liable for such an offence. [59] Based on the provisions of articles 609 and 610 of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code that was into force at the time of the commission of the offence, the Court finds that Gahima Dembe Eduard should be liable to a term of five (5) years and a fine of three hundred thousand (300,000). [60] It finds however that the punishment of five (5) years given to Gahima Dembe Eduard deserves to be suspended within one year, because until now, he has never been subject to another criminal sanction in form of

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imprisonment or community service exceeding six (6) months in a final judgment.

- b) Regarding Munyakarama Pierre [61] The Court finds that neither Nyirabatoni Elizabeth nor the Prosecution has produced any elements of evidence to prove that while Gahima Dembe Eduard used the counterfeited document stated above, he was with Munyakarama Pierre, and they did neither indicate another instance where Munyakarama Pierre personally used such document; consequently, he must be declared not guilty of the offence of use of counterfeited document. [62] The Court finds that the issue regarding the invalidation of the contract of donation requested by the counsel for Nyirabatoni Elizabeth, should not be examined in the instant case since it has never been tried in the judgment RPA 0571/14/HC/KIG rendered by the High Court on 15/07/2014 against which the application for review due to injustice was initiated.
- c) Regarding damages [63] Counsel Karangwa Vincent and Counsel Bandora Alfred requests the Court to order to Gahima Dembe Eduard and Munyakarama Pierre to pay to Nyirabatoni Elisabeth 5,000,000Frw of moral damages for being dragged into unnecessary lawsuits,

1,000,000Frw of judicial fees and 3,000,000Frw of counsel fees. [64] Munyakarama Pierre states that he should not be liable of damages and his legal Counsel Nsengimana Emmanuel also states that damages sought from Munyakarama Pierre are groundless because he played no role in the use of such counterfeited document, while concerning the counsel fees, he states that the legal counsel

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for Nyirabatoni Elizabeth should request them from their client. DETERMINATION OF THE COURT [65] Regarding moral damages requested by Nyirabatoni Elizabeth for being dragged into lawsuits, the Court finds that any act whatsoever of man which causes damage to another obliges the person responsible to repair it. Accordingly, the fact that Gahima Dembe Eduard used the counterfeited document enticed the loss to Nyirabatoni Elizabeth in civil case whereby she was requesting the invalidation of the donation she offered to him, the reason why she denounced to Judicial Police Gahima Dembe Eduard and Munyakarama Pierre to have committed forgery and use of counterfeited document, and when the Prosecution closed the file on ground of prescription of the offence, she seized the Court by way of private prosecution, which implies that she aggrieved due to the fact that she donated the plot of land to Gahima Dembe Eduard, but who prejudiced her, the act which led her to seek the services of an advocate. For these reasons, Gahima Dembe Eduard should be ordered to pay to Nyirabatoni Elizabeth, moral damages, as well as judicial damages for all such cases based on article 111 of the Law no 22/2018 of 29/04/2018 relating to civil, commercial, social and administrative procedure. [66] The Court deems however that the amount of 5,000,000Frw of moral damages claimed by Nyirabatoni Elizabeth is excessive, and should therefore be awarded a discretionary amount of 1,000,000Frw. [67] The Court finds in addition that Gahima Dembe Eduard should pay her the discretionary amount of 500,000Frw of judicial fees and 1,000,000Frw of counsel fees for all levels of court instance because the amount

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Nyirabatoni Elizabeth claimed is excessive, and the total amounts to 2,500,000Frw. [68] The Court finds that Munyakarama Pierre should not be ordered to pay damages since he is not guilty of the offence of use of counterfeited document; therefore, damages should only be paid by Gahima Dembe Eduard. III. DECISION OF THE COURT [69] Decides that the claim of Nyirabatoni Elizabeth for case review due to injustice of the judgment RPA 0571/14/HC/KIG rendered on 15/07/2014 has merit in parts; [70] Decides that Munyakarama Pierre is not guilty of the offence of use of counterfeited document; [71] Decides that Gahima Dembe Eduard is guilty of the offence of use of counterfeited documents; [72] Sentences Gahima Dembe Eduard to a term of five

- (5) years of imprisonment suspended within one year and a fine amounting to three hundred thousand (300.000 Frw); [73] Orders to Gahima Dembe Eduard to pay to Nyirabatoni Elizabeth 1,000,000 Frw of moral damages, 1,000,000 Frw of counsel fees and 500,000 Frw of judicial fees for all instance levels, the total amount is 2,500,000 Frw.

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