

RWANDA / JUDGMENT

PROSECUTION v KABILIMA

RLR V.3-2025

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PROSECUTION v KABILIMA

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Text

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PROSECUTION v KABILIMA [Rwanda COURT OF APPEAL – RPAA/GEN00009/2019/CA– (Nyirandabaruta, P.J, Kaliwabo and Umugwaneza, J.) October 20, 2020] Production of evidence in criminal cases – The defence of Alibi – The Prosecution has the responsibility to produce incriminating evidence against the accused, but the party who pleads alibi is the one who has to produce tangible elements of evidence to prove it. Production of evidence in criminal cases – Testimony - The value of testimony - Testimony is valid based on the knowledge of the witness on the subject matter in dispute- Testimony is not invalidated by the fact that the witnesses are relatives or have interest in the case, but the value is not based on the truth of the content – The Court itself determines the value of the testimony after analyzing the statements of the witnesses. Production of evidence in criminal cases – Testimony - Value of testimony – The witnesses'contradiction does not discredit their testimonies because they are likely to be mistaken due to the time elapsed from the commission of the crime. Genocide – Special intent (genocidal intent or *dolus specialis*) – The gravity of the crime of genocide which makes it also a special crime, is a special intent (genocidal intent or *dolus specialis*) to destroy in whole or in part, a national, ethnical, racial or religious group

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and this specificity is based on in sentencing the perpetrators of this crime. Facts: The Prosecution filed a case afresh against Kabilima in the Intermediate Court of Nyamagabe following the fact that the very Court set aside all the judgments in which he was a party in Gacaca courts, and he was acquitted of the crime of genocide for which he was prosecuted, such crime is consisted of the incitement to the plan to kill, directing and controlling acts of genocide in Rusenge Sector, establishing the list of Tutsi children who had not been killed, and raping Tutsi girls. Among the charges against him, this Court ruled that he was convicted of the crime of murder and establishing the list of Tutsi children who were killed in the Genocide against the Tutsi, thoses are constitutive of genocide and he was sentenced to the life imprisonment with special provisions. Kabilima appealed to the High Court, the Specialized Chamber hearing international and transnational crimes, by stating that when the acts of which he was accused were being carried out in Bunge, he was not around, it was a conspiracy by those who falsely accused him for their personal interest. The High Court held that the appealed judgment is reversed in parts, that he is convicted of murder as a crime of genocide, he was sentenced to the imprisonment of a term of twenty-five (25) years based on the fact that he committed the crime when he was a young man and that he had no bad behavior before and after the commission of the crimes against him.

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Dissatisfied with the decision of the High Court, Kabilima appealed to the Supreme Court but his case was transferred to the Court of Appeal after the reform of the jurisdiction of courts. He submitted that he was punished twice for the same crime, that he was convicted of the crimes committed in Bunge while he presented witnesses who testified that he was in Kigali at the time, and that the incriminating witnesses were characterized by contradictions. He adds that the Court disregarded the statements of his neighbors who are some of the survivors of the killings in Bunge and some of those who participated in the killings, all of them testify that they never saw him at home in Bunge at that time. So, he ends by requesting the Court to be acquitted because he had not been involved in the crimes against him he allegedly committed in Bunge because he was in Kigali, and he arrived there when the killings had ended in that area. The Prosecution filed a cross-appeal arguing that the defendant should not have been acquitted of the crime of establishing the list of Tutsi children to be killed, that the High Court reduced the sentence without motivation, that it did not provide the ground for ruling that he committed the crime when he was young while he was 21 years old, that the Court disregarded the fact that the accused was famous in the killings that happened in Bunge. It submits that being famous is proven by the information collection in Rusenge Sector and other elements of evidence that were already in the case file. The Prosecution also explained that the statement of the defendant that he was in Kigali when the killings were committed in Bunge, has no basis because the High Court

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thoroughly analyzed the ground and found that some of his exculpatory witnesses were not telling the truth, since the information collection revealed that he became famous in that killings since 14/04/1994 until 19/04/1994 and the incriminating witnesses know him well as their neighbor; and the exculpatory witnesses changed their statements after his return in Rwanda. Held: 1. The Prosecution is responsible for producing the incriminatory elements of evidence against the accused. When a party pleads alibi, it is up to him/her to produce tangible elements of evidence to support it. Therefore, Kabilima failed to produce before this instant Court tangible elements of evidence, including uncontradictory witnesses, which clearly confirm that he was in Kigali when the killings of which he was accused, were committed in Kabuga in Bunge.

2. Testimony is valid based on the knowledge of the witness on the subject matter in dispute. Testimony is not invalidated by the fact that the witnesses are related to each other or have interest in the case, but the value is not based on the truth of the content - the Court itself determines the value of the testimony after analyzing the statements of the witnesses.
3. The witnesses' contradiction does not discredit their testimonies because they are likely to be mistaken due to the time elapsed from the commission of the crime. Appeal lacks merits. Cross-appeal is founded in parts. Court fee is borne to the Public Treasury.

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Statutes and statutory referred to: Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, articles 76, 82, 96, 113, 114 and 115. The United Nations Convention on the Prevention and Punishment of the crime of Genocide of 09/12/1948, articles 3 and 4. Law n° 027/2019 of 19/09/2019 relating to the criminal procedure, article 108. Law n° 068/2018 of 30/08/2018 Law determining offences and penalties in general, articles 1 and 92. Law n° 30/2018 of 02/06/2018 determining the jurisdiction of courts, articles 52 and 105. Organic Law n° 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts, article 6. Law N° 15/2004 of 12/06/2004 relating to evidence and its production, articles 3, 63, 65 and 119. Case laws referred to: Prosecution v. Nzajyibwami, RPA 0101/09/CS decided by the Supreme Court on 01/06/2012. Case ICTR-97-36A-A, Prosecution v. Munyakazi Yussuf, 28 September 2011. Prosecution v. Nshimiyimana Alexis al., RPAA 0059/08/CS decided by the Supreme Court on 19/11/2010. Case ICTR-2001-63-A, Prosecutor v. Nchamihigo Simeon, 18 March, 2010. Case ICTR-99-52-A, Prosecutor v. Nahimana Ferdinand and al. Case ICTR -05-88-A, Prosecutor v. Kalimanzira Callxte, 20 October 2010.

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Prosecution v. Bikindi Simon, ICT-2001-72-T, decided by International Criminal Tribunal for Rwanda (TPIR) on 02/12/2008. Prosecutor v. Kambanda, Judgment and Sentence, ICTR- 97-23-S, 4 September 1998. Croatia v. Serbia, International Court of Justice, Judgment of 03/02/2015.

Judgment

I. BACKGROUND OF THE CASE

Kabilima Jean Damascène was judged in absentia by the Gacaca Court of Bunge Sector, he was accused of the crimes of genocide he committed in Bunge, and sentenced to the imprisonment of a term of 30 years. Kabilima Jean Damascène applied for opposition of the case, the Gacaca Court of Bunge 2 acquitted him of the crimes for which he was accused of. The case file was appealed to the Gacaca Court of Kibeho Sector, which sentenced Kabilima Jean Damascène, also in absentia, to imprisonment of a term of 19 years. Kabilima Jean Damascène applied for opposition of the case, which was decided by the Gacaca Court of Kanombe B, which convicted him of crimes that put him in the first category, punishing him with a life imprisonment with special provisions.

Kabilima Jean Damascène filed the claim to the Intermediate Court of Nyamagabe, applying for case review decided by the Gacaca Court of Kanombe B

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Sector, and on 17/10/2014, that Court ruled that the cases decided by the Gacaca Courts on the issue of Kabilima Jean Damascène were set aside because the Gacaca Court of Kanombe B tried him without jurisdiction when it had already placed him in the first category of genocide perpetrators.

The Prosecution prepared a new case file, arraigning Kabilima Jean Damascène in the Intermediate Court of Nyamagabe, accusing him of the crime of genocide consisting of inciting to the intention of murder, directing and controlling the acts of genocide committed in Rusenge Sector, making a list of the Tutsis children who were not yet killed, and to rape Tutsi girls.

The Intermediate Court of Nyamagabe in the case RP GEN 003/15/TGI/NYBE decided on 21/09/2016, declared Kabilima Jean Damascène not guilty of the crime of directing and controlling the genocide and encouraging the plan to kill the Tutsis who were left in Rusenge Region and that of rape of Tutsi girls, that he is convicted of the crime of murder and that of making a list of the Tutsi children who were killed in the genocide against the Tutsis, they constitute the crime of genocide, it sentenced him to the life imprisonment with special provisions.

Kabilima Jean Damascène appealed to the High Court, the Specialized Chamber hearing international and transnational crimes, stating that he was convicted and yet he was not in Bunge between 14 and 19/05/1994, the period in which the killings against Tutsis were carried out, for the other crimes against him, it is conspiracy

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between those who falsely accuse him for their own interest.

In the case RPA GEN 00006/2017/HC/HCCI decided on 31/01/2018, the High Court declared that the ruling of the case RP GEN 00003/15/TGI/NYBE decided by the Intermediate Court of Nyamagabe on 21 /09/2016, was changed in parts, that Kabilima Jean Damascène is not convicted of the crime of genocide based on the list he made of Tutsi children who had not been killed and were killed later, that he is convicted of murder as a crime of genocide, it sentenced him to the imprisonment of a term of twenty-five (25) years based on the fact that he committed the crime when he was a young man and that he had no bad behavior before and after committing the crimes against him.

Kabilima Jean Damascène assisted by Counsel Munyemana Gatsimbanyi Pascal, appealed to the Supreme Court submitting that he was punished twice for the same crime, that he was convicted of the crimes committed in Bunge while he presented witnesses who testified that he was in Kigali at that time, and that the incriminating witnesses used to contradict themselves, he requests to be acquitted because he did not involve in the crimes against him.

The Prosecution also appealed arguing that Kabilima Jean Damascène should not be acquitted of the crime of making a list of Tutsi children who were later killed, because he himself admitted before the Gacaca Court that he established this list. They also appealed stating that the High Court reduced the sentence without

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explaining the reason, that it did not explain whether he committed the crime as a child while he was 21 years old, that it disregarded that the accused was famous for the killings that happened in Bunge.

While this case was pending, the jurisdiction of the Courts has been reformed, the case was transferred to the Court of Appeal based on article 521 and article 1052 of Law n° 30/2018 of 02/06/2018 determining the jurisdiction of courts.

The case was heard in public on 02/07/2020, Kabilima Jean Damascène was assisted by Counsel Munyemana Gatsimbanyi Pascal and the Prosecution was represented by Mutayoba Alphonse, the National Prosecutor. At the beginning of the hearing, Kabilima Jean Damascène, after consulting with his Counsel, informed the Court that he withdrew the issue of being convicted twice from his list of grounds of appeal. II. ANALYSIS OF LEGAL ISSUES II. 1. Appeal of Kabilima Jean Damascène

1 Paragraph two of article 52, of the Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts: The Court of Appeal has also jurisdiction to try at the second level of appeal cases tried by the High Court, the Commercial High Court and Military High Court, if such cases... 2 Paragraph one of article 105 of the Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts: From the day this Law comes into force, except cases already under trial, all cases that are no longer in the jurisdiction of the court seized are transferred to the court with jurisdiction in accordance with the provisions of this Law.

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1. Determine whether Kabilima Jean Damascène was not in Bunge on the dates on which he allegedly committed the crime of genocide

Kabilima Jean Damascène, assisted by Counsel Munyemana Gatsimbanyi Pascal, appealed stating that the Court convicted him of the killings which happened in Bunge between 16/04/1994 and 19/04/1994 disregarding the evidence that he was in Kigali on those dates, so he could not be in different places at the same time. In explaining his evidence, Kabilima Jean Damascène avers that the testimony given by Kayibanda Jean Baptiste who explained that they were together in Kigali (at Gashugi's house) from 06/04/1994 to 09/04/1994 and that he saw him again on 23/04 /1994 in the ICRC where they met coming to receive aid. He explains that the testimony of Kayibanda Jean Baptiste is supported by the fact that after the death of President Habyarimana Juvénal, in the night of 04/06/1994, the patrol was instituted so that he could not leave Kigali to reach his home in Bunge, that he was taken by military chaplain who brought him to Butare and he continued to Bunge and he arrived there on 25/04/1994, the killings which were taken place there, were ended.

Kabilima Jean Damascène further adds that the Court disregarded the statements made by his neighbors who are some of the survivors of the killings in Bunge (Ndahunga Stefano, Nkusi Angelbert and Karera Charles), as well as some of those who participated in the killings (Nzirabatinyi Vincent, Rudatsinda Athanase and Rekeraho), all ascertain that they never saw him at his

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home in Bunge on the above dates. He further states that the Court ruled that he was in Bunge based on the statement made by Mazimpaka Désiré who was 9 years old in 1994, accusing him of the death of Batutsi, it disregarded the statement made by Nkusi Angelbert (Mazimpaka Désiré's father and elder brother of Batutsi) who maintained that they did not know the person who killed Batutsi because they were in crowd and could not see clearly.

In fact, Kabilima Jean Damascène criticized the Court's decision which based on the statement of Mukamabano Philomène who stated that she saw him with her mother at the gates of their home on April 15, 1994, and the latter was characterized by contradictions, where she submitted in the Prosecution that she fled from Bunge on 14/04/1994 and that she did not return there, but before the Gacaca Court of Kanombe B she indicated that she left on 15/04/1994, Kabilima Jean Damascène submitted that the reason for her false accusation against him is the death of her husband Musoni Festus for which she falsely incriminated him.

Kabilima Jean Damascène and Counsel Munyemana Gatsimbanyi Pascal, assisting him, also argue that the Court ruled that he was in Bunge based on the information collection from CNLG, which was illegally carried out because they state that Murindabigwi Augustin was the President of the persons of integrity of Bunge Cell while has never been in that position as well as Karemangingo whom they qualify as incriminating witness but he never existed.

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Kabilima Jean Damascène concludes on this point by arguing that he should be acquitted of the killings of which he is accused and which he committed in Bunge because he was in Kigali, that he arrived in Bunge on 25/04/1994 after the killings in that region had ended.

The Prosecution represented by Mutayoba Alphonse, the National Prosecutor, states that the issue of whether Kabilima Jean Damascène was in Kigali at the time of the killings in Bunge, the High Court analyzed it and found that Kayibanda Jean Baptiste was not telling the truth, because in the Prosecution he submitted that he spent 2 days with Kabilima Jean Damascène at Gashugi's home and then went to the CICR on 09/04/1994, after, he never saw him again, but when he was questioned again he replied that they met again on 23/04/1994. The Prosecution continues stating that the information collection carried out in Bunge Cell revealed that Kabilima Jean Damascène was famous in the murders that took place in Bunge from 14/04/1994 to 19/04/1994 and those who incriminate him know him well as their neighbor; and those he indicates as exculpatory witnesses are people who changed their statements after he returned to Rwanda.

The Prosecution also states that the fact that Kabilima Jean Damascène was in Bunge, as stated by Mukanyarwaya, Mazimpaka Désiré, KDA, and Museruka Théoneste who testified before the Prosecution that he saw him in Bunge on 17/04/1994 carrying a gun, just to this witness died inexplicably before giving his testimony before Court. It also explained that the witness

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Mukamabano Philomène disqualified by Kabilima Jean Damascène, the Court did not rely on his testimony due to doubt, while Murindahabi Augustin was presented by the accused as a defense witness, so that he cannot deny him.

The Prosecution also defended that the High Court, in paragraph 22 of its judgment, explained the reason on which it was based by rejecting the testimony of people who submitted that they did not see Kabilima Jean Damascène in the killings that took place in Bunge, and that he did not show where the High Court contradicted in its analysis.

The Prosecution continued to explain that the statement of Kabilima Jean Damascène denying the results of the information collection carried out in Rusenge Sector, mentioning that they were fabricated by the Prosecution, should not be considered as founded, because these documents bear the stamp of CNLG and that it came to request to CNLG under order of the Court. It also states that these documents complemented other elements of evidence that were in the case file, all of which are consistent in confirming the involvement of Kabilima Jean Damascène in the

killings that took place in Bunge, therefore, the ground defence that he was in Kigali instead of in Bunge is unfounded.

DETERMINATION OF THE COURT

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Article 3 of Law n° 15/2004 of 12/06/2004 relating to evidence and its production provides that “each party has the burden of proving his/her allegations”. While article 108 of Law n° 027/2019 of 19/09/2019 relating to the criminal procedure states that “the evidence is based on all the facts and legal considerations provided that parties are given an opportunity to present adversary arguments. The court decides at its discretion on the veracity and admissibility of incriminating or exculpatory evidence”.

The Court finds that the question of whether Kabilima Jean Damascène was in Kigali or Bunge between April 14, 1994 and April 19, 1994 was debated from the Intermediate Court and the High Court, the High Court having analyzed the statements of the witnesses presented by both parties and compared with the results of the information collection carried out in Rusenge Sector, where it based its ruling that Kabilima Jean Damascène was in Bunge on the dates mentioned above.

The Court finds that, regardless of the principle that the Prosecution has the responsibility to provide incriminating evidence³, this principle changes when the defendant pleads the "alibi" aiming at proving that he was in a different place other than where he is suspected of having committed the crimes, to that effect, he must produce tangible elements of evidence to prove the basis

³ Article 107 of the law relating to the 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.

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of the "alibi" he pleads. This was explained in many cases decided by the International Courts, including the case of the Prosecution v. Munyakazi Yussuf, which was decided by the International Criminal Tribunal for Rwanda⁴, in the case of the Prosecution v. Nchamihigo Siméon⁵, and in the case of Nahimana Ferdinand and al.⁶.

The Court finds that Kabilima Jean Damascène states that the crimes against him were committed in Bunge on April 14-19, 1994, while he was in Kigali, this one must provide elements of evidence to contradict those which have been based on by the High Court in ruling that he was in Bunge, which the Court will consider in the following paragraphs.

⁴ Case ICTR-97-36A-A, Prosecution versus Munyakazi Yussuf, 28th September, 2011, in parag. 25: “Furthermore, the Appeals Chamber has held that Trial Chambers are endowed with the discretion to require corroboration (...). Therefore, the Trial Chamber has not shifted the burden of proof in assessing Munyakazi’s alibi; all that it has done, and this quite properly, is to note that

there was no supporting evidence of the alibi.” 5 Case ICTR-2001-63-A, Prosecutor versus Nchamihigo Simeon, 18th March, 2010, in parag. 92 “By raising an alibi, an accused is simply denying that he was in a position to commit the crime with which he was charged. An accused does not bear the burden of proving his alibi beyond reasonable doubt. Rather, “[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime”. 6 Case No ICTR-99-52-A, Prosecutor versus Nahimana Ferdinand and al. “The Appeals Chamber recalls that, in raising an alibi defence, the defendant is claiming that, objectively, he was not in a position to commit the crime. It is for the accused to decide what line of defence to adopt in order to raise doubt in the mind of the judges as to his responsibility for the offences charged, in this case by producing evidence tending to support or to establish the alleged alibi”.

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The Court finds that the elements of evidence produced by Kabilima Jean Damascène including the testimony of Kayibanda Jean Baptiste who submitted that he saw him in Kigali on April 6-8, 1994 and April 23, 1994, and the testimonies of Nkusi Angelbert, Mudatinya Athanase, Nzirabatinyi Vincent and Rekeraho who state that they did not see him in Bunge on the abovementioned dates.

The Court finds that the witness Kayibanda Jean Baptiste presented by Kabilima Jean Damascène, has been criticized for contradicting himself in his statements, where he stated in the Prosecution that he left Kabilima Jean Damascène on 04/09/1994 and fled to the CICR and that they never met again, while before Gacaca Court of Kanombe B on 17/03/2011, before the Intermediate Court of Nyamagabe on 24/02/2012 and before the High Court on 13/09/2017 he submitted that he met Kabilima Jean Damascène again on 23/04/1994, coming to take food from ICRC. The Court finds that there was no error committed by the Trial Court in discrediting the testimony of Kayibanda Jean Baptiste because he contradicted the main point that led him to be presented as a witness.

The Court finds that Nkusi Angelbert, Mudatinya Athanase, Nzirabatinyi Vincent and Rekeraho are mentioned by Kabilima Jean Damascène as his neighbors and they testified that they never saw him during the attacks that killed Tutsis in Bunge, the lower Court criticized them because, during the information collection before Gacaca Courts, these ones confirmed that Kabilima Jean Damascène was involved in various attacks that took

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place in Bunge and its suburbs between the date of 14/04/1994 and 19/04/1994; after the arrival of Kabilima Jean Damascène in Rwanda, these ones contradicted themselves before Gacaca Court of Kanombe B, and some of them were punished for such attitude.

The Court finds that the testimony of Ndahunga Steven who headed the information collection in Bunge Cell who maintains that he fled to Burundi on 14/04/1994 and Serubibi who was the President of the Bunge bench who states that he fled to Burundi between 14 and 15/04/1994, both

left before the arrival of Kabilima Jean Damascène in Bunge, is not substantial to prove that Kabilima Jean Damascène was in Kigali on the mentioned dates due to the time they fled, compared to the reference period (between 14/04/1994 and 19/04/1994) of the killings in Bunge for which Kabilima Jean Damascène is accused.

The Court finds that, apart from the fact that the witnesses who submit that they did not see Kabilima Jean Damascène in Bunge contradicted themselves, and this "alibi" issue he puts forward, should be corroborated by the elements of evidence of those who saw him in Kigali on the mentioned dates, it is evident that he could not be at the same time in Kigali and Bunge according to the distance separating those areas, than those who testify that they did not see him in Bunge because they could not ascertain before the Court that the fact of not seeing him where they were in a given time means that he could not have been anywhere else in Bunge Cell.

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The idea that the accused puts forward "alibi" must provide witnesses who testify that they saw him where he alleges that he was instead of where he is suspected to have committed the crimes, was reiterated by the International Criminal Tribunal for Rwanda in the case of Kalimanzira Callixte by holding that: "The notification of alibi shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi." The Appeals Chamber has held that the manner in which an alibi is presented may impact its credibility. Therefore, it was within the Trial Chamber's discretion to take this into account in assessing the alibi evidence in this case".⁷

The Court finds that the statements of those who sustain that they saw Kabilima Jean Damascène in Bunge on 14/4/1994 and 15/04/1994 include the testimonies of Mukazera Marie Jeanne (côte 7-8), Kabagwiza Veneranda, Mukambonera Alivera (côte 21-24), Museruka Théoneste (côte 26-28), Kabarenzi Xaverine (côte 34-36), Mukanyarwaya Josepha (côte 19-20), Mukanyarwaya Josée (côte 38-39) Mukanyarwaya Annonciate (côte 41-42), Mukamabanano Philomène (côte 13-14) and Kankesha Agnès.

The Court also finds that the investigation carried out by the Intermediate Court of Nyamagabe in the National Commission for Fight Against Genocide

⁷ Case ICTR -05-88-A, Prosecutor versus Kalimanzira Callixte, 20th Oct. 2010, parag. 56.

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(CNLG), revealed the notebooks containing the information collected in Bunge Cell, where in the notebook number 1 Kabilima Jean Damascène appeared on the list of people who were in Bunge Cell during the massacres in April 1994, and he is also found in the list of people who were given weapons to kill Tutsis and in the list of people who manned the roadblock. The investigation revealed that in the notebook number 2, Kabilima Jean Damascène was among the people who made a list of Tutsis from Bunge who should be killed, and that he was found in a zone led by

Kagaba in Bunge, providing tools to kill and being a member of a militia troop. The investigation also revealed a notebook without a number and without a cover, in which there are the houses which were attacked, Kabilima Jean Damascène was one of the attackers. Again, in the notebook number 5, the collected information revealed that in the zone led by Ngayaberura Evariste, Kabilima Jean Damascène appeared on the list of perpetrators of genocide and those who provided tools to kill and those who gave instructions to go to the roadblocks, while in the notebook number 215, it is indicated that he established the list of those who had to be killed and participated in the attacks that killed the Tutsis in Bunge.

The Court finds that the information provided in the previous paragraph is evidence provided that Kabilima Jean Damascène was in Bunge between 14th and 19th of April 1994 because both sides agree that it was the time when the killings were committed in Bunge Cell which are also the same acts reported that reveal his role.

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The Court finds that the evidence related to the information collection is substantial in ascertaining that Kabilima Jean Damascène was in Bunge between April 14, 1994 and April 19, 1994 because this information collection was not intended to accuse Kabilima Jean Damascène personally, but it was conducted in a general manner in order to gather information about what happened during the genocide against the Tutsis in 1994, so the fact that one is repeatedly mentioned in different notebooks constitutes a substantial evidence which complements the statements of the witnesses mentioned above.

The Court finds that, apart from the contradictions of some of the witnesses who, according to Kabilima Jean Damascène, did not see him in Bunge on April 14-19, 1994, yet none of them could undoubtedly testify that due to the fact that he did not see him where he was, the accused was not elsewhere in Bunge Cell; therefore, the testimony of those who claim to have seen him in Bunge on the said dates is more valid than that of those who claim not to have seen him.

Based on the foregoing elements of evidence, the Court finds that the alibi issue put forward by Kabilima Jean Damascène by stating that he was in Kigali between 14/04/1994 and 19/04/1994 instead of Bunge where were committed the crimes against him, has no basis.

2. Determine whether Kabilima Jean Damascène was convicted of the murder of Batutsi and Musoni based on inconsistent and contradictory testimonies

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Kabilima Jean Damascène submits that the testimonies on which the Court relied for convicting him include that of the non-existent people, that in paragraph

[25] it based on the testimony of Murindahabi Augustin who was the president of the persons of integrity in Bunge Cell, the so named person never existed, and in paragraph

[9] it based on the testimony of Karemangingo who allegedly confessed the crimes of genocide in the Gacaca Court of Kanombe B wherein Kabilima was tried, yet such person does not exist and his testimony does not appear in the case file.

He submits that in paragraph [75], the Court declared that he was involved in the death of Tutsis, including Batutsi based on contradictory testimony, that in paragraph [50] it invalidated the testimony of Nkusi Anglebert, the elder brother of Batutsi who was with him when he was killed because he stated that it was night, while it based on the testimony of Mazimpaka Désiré (paragraph [45]), the son of Nkusi Anglebert, a young child who was nine (9) years old at that time, who was with his father, and his uncle Batutsi in that night, and the child contradicts his father, because he submits that Kabilima Jean Damascène threw a grenade on them, while his father who was holding his hand while fleeing stated that he did not see the people who killed his brother Batutsi, the Court validated the statement of a child but did not take into account the statement of his father and yet they were all together with Batutsi, while the testimony of Nkusi Anglebert was rejected on the grounds that he indicated that he could not see, and that of his son

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who was with him that night also should not be valid because it contains serious doubts.

Kabilima Jean Damascène also submits that where the child Mazimpaka Désiré lived, in Cyuna, is very far from Bunge, that it is about fifty kilometers (50km), so a 9-year-old child could not recognize him as there was no place where they had met, what he states is what he was taught because of the case, he did not see the person who threw the grenade, especially that his father ascertains that he saw the attack, the killers were Ntanzwa and a policeman who threw the grenade on them, yet the Court considered the testimony of the child, and did not consider the testimony of the father who was with him.

Kabilima Jean Damascène argues that the death of Batutsi is explained by his elder brother Nkusi Anglebert who was with him by the time he was killed (côte 201), Kaberuka Alexis (côte 200) Kabera Charles (côte 200) and those who confessed the attack in which he was killed including Mudatinya Athanase (côte 200) who states that it was on Sunday 17/04/1994, such attack killed Batutsi and those who were with him as submitted by the survivors and those who confessed themselves, and nowhere they state that Kabilima Jean Damascène participated in the attack, so the appealed Court should rely on it and acquit him.

Kabilima Jean Damascène sets forth that the witness KDA submitted that he fled from Nyakibanda, Runyinya and that he left there on 19/04/1994, others sustain that the Bunge massacres happened on 15/04/1994, which means that KDA fled after the

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occurrence of the massacres in Bunge, but he indicates that he saw Kabilima Jean Damascène with Batutsi, the Court relies on it and Mazimpaka Désiré and Nkusi Anglebert also maintain that they were with him and that they all did not come from the same place; that the issue he has with the witness KDA is that he stated that he saw him during the genocide, otherwise he submitted that he saw him throwing grenade, this makes his testimony doubtful.

Kabilima Jean Damascène puts that the witness Mukanyarwaya Josepha, the sibling of KDA, also states that he fled from Nyakibanda, at Runyinya, and that he witnessed the death of Batutsi in Cyuna, the problem with his testimony is based on the dates, because he submits that they left from Nyakibanda on 19/04/1994, while Mazimpaka Désiré and Nkusi Anglebert who came from Nyakizu maintain that a grenade was thrown on them in Bunge at Kabuga on 15/04/1994, while Mukanyarwaya Josepha states that Batutsi was killed at Kamabuye, that this testimony contradicts with what the witnesses saw and when they saw it, where they saw it, and what saw others who were with them who survived including Karera Charles (côte 200) who asserted that he was with Batutsi and saw the person who threw the grenade that killed him, that he was a policeman called Ntaganzwa Etienne and there was Kaberuka Alexis (côte 200). Kabilima Jean Damascène also sustains that there were killers, namely Mudatinya Athanase (côte 200) who states that he was in the attack that killed Batutsi and those who were with him.

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Kabilima Jean Damascène submits that the Court ruled that Musoni died with Batutsi while Rekeraho Vincent who was among those who killed him stated that when they killed Musoni he was not with Batutsi and they were not killed in the same place, that Musoni also was killed in Bunge but not in Kabuga in Bunge, that those who buried him including Ndahunga Etienne (côte 247) submit that he did not die with Batutsi.

He adds that the High Court disregarded all those facts, also it refrained from conducting the field visit to his home in order to inquire about its location and realize that in Nyakizu, Akabuga of Bunge, Akabuga of Jali and Akabuga of ADEPR Church, the events cannot occur there in one day because of the distance.

Counsel Munyemana Gatsimbanyi Pascal, assisting Kabilima Jean Damascène, submits that Musoni Festus was the husband of Mukamabano Philomène, that the genocide happened when Kabilima Jean Damascène studied in the sixth year of high school in a minor seminary, that compared to his age at that time, the testimony of Mukamabano Philomène would not be considered because she stated that Kabilima Jean Damascène was in the attack of those who killed her husband, however in the Gacaca Court of Bunge Cell on 21/02/2012, Ruzindana himself sustained that they were the ones who killed him, and the time they killed him, even in his testimony, Kayitaba Melane never submitted that Kabilima Jean Damascène was in the attack.

Counsel Munyemana Gatsimbanyi Pascal further argues that on page 25, paragraph 60 of the appealed

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judgment, the Court held that the testimonies of KDA, Mazimpaka Désiré and Mukanyarwaya Josepha are complementary while they are contradictory, a person who fled from Cyahinda to Burundi, could not pass through Bunge, that it was impossible for those people to be killed at the same place, and that Mazimpaka Désiré, who was with his father Nkusi Anglebert, sustained that Fidèle gave a grenade to Kabilima who threw it on the people who felt down and some died, while Mukanyarwaya Josepha indicated that Kabilima threw a grenade on them, on the other hand, she did not see what he held, in addition, considering where she came from, she could not know Kabilima Jean Damascène who was a growing young man.

Counsel Munyemana Gatsimbanyi Pascal submits that in paragraph [53], the Court upheld that the testimony of Mukamabano Philomène should not be considered, and it considered the testimonies of Mazimpaka Désiré and Mukanyarwaya Josepha, at this point the Court contradicted itself and the genocide perpetrators admitted it and they did not mention Kabilima Jean Damascène as co-offender.

Counsel Munyemana Gatsimbanyi Pascal supports that as he explained in the Court that ruled on the appealed case, Kabilima Jean Damascène was convicted of murder based on the statements of the witnesses and the information revealed in the various notebooks of Gacaca Courts, that the witness Mukamabano Philomène in the Gacaca Court of Kanombe B (Côte 33) falsely sustained that she witnessed to the charges against Kabilima, while

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she fled before Kabilima Jean Damascène arrival in Bunge because he fled on 14/04/1994 or on 15/04/1994 and Kabilima Jean Damascène arrived on 25/04/1994, but she states that she saw him at the gate of his home fleeing (Kabilima's family home); the fact that she sustains that she never saw again Kabilima Jean Damascène after crossing him when she was fleeing (côte 36), for this, a person wonders about where she witnessed what she is relating about him.

Counsel Munyemana Gatsimbanyi Pascal maintains that, regarding those who were killed and thrown in the toilet, of whom Kabilima Jean Damascène is accused by the prosecution witnesses, that Sindikubwabo (Côte 46/Kanombe B) and Rekeraho Vincent (Côte 46- 47/Kanombe B) explain the fact, that they never went anywhere with Kabilima Jean Damascène. He adds that the witness Habimana (Côte 2-3/Bunge) has a list of those who were involved in such act and Kabilima Jean Damascène does not appear on it, and that others are of the same stance; that Mudatinya Athanase (Côte 49/Kanombe B) explains that he confessed and admitted his role in the genocide, but during that killing, he did not cooperate with Kabilima Jean Damascène in the genocide; that Nzirabatinyi Vincent (Côte 50/Kanombe B) explained that the information collection carried out in Prison did not reveal anything about the role of Kabilima in the killings committed in Bunge.

Me Munyemana Gatsimbayi Pascal sustains that Mukazera Jeanne (Côte 37/Kanombe B), in addition to being 9 years old at the time of the genocide, avers that

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she heard that they stated that the grenade that killed the Tutsis was thrown by Kabilima Jean Damascène; that Mulindabigwi Augustin (Côte 39/Kanombe B) who was the President of the persons of integrity of Gacaca courts in Bunge Cell, testifies that in the information collection Kabilima Jean Damascène was never mentioned in the murder of Mukamabano Philomène's family members, that this also appears in the document addressed to the Gacaca bench (Côte 21/Kanombe B); that Mukanyarwaya Josepha (Côte 40/Kanombe B) was asked if she knew what she was accusing Kabilima Jean Damascène even previously, and she replied that when he previously pleaded she did not know it, she incriminated him when she knew it; Sindikubwabo Célestin (Côte 45/Kanombe B) explained that he participated in the attacks and mentioned the co-offenders, but Kabilima Jean Damascène did not cooperate with them, and he knew him since before the genocide.

Counsel Munyemana Gatsimbanyi Pascal avers that, regarding to the death of Batutsi of which Kabilima is accused, Karera Charles who survived the genocide who was with the Batutsi when they were fleeing, explains what happened (Côte 50/Kanombe B), that the grenade that killed him was thrown by a person called Ntaganzwa who was a policeman, that Kaberuka Alexis (Côte 60/Kanombe B) explains what happened, and that what the Court found on Côte 4-5/Bunge, was also the same as stated about the death of Batutsi; that Ndahunga Etienne who fled from Bunge (Côte 50/Kanombe B), submits that he fled before seeing Kabilima and that he does not know anything about him in the information

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collection and that he was its President; the interviewed witnesses (Côte 53-54/Kanombe B) testify that Batutsi killed by a grenade. Karerangabo (Côte 54/Kanombe B) identifies the individual responsible for the death of Musoni Festus who was Mukamabano Philomène's husband. Mukambonera Alivera sustains that Kabilima Jean Damascène was involved in the killing of her elder brother, based on what she heard in the camp. Kayitaba Melane (Côte 54/Kanombe B) affirms that he confessed to the death of Musoni Festus and did not cooperate with Kabilima Jean Damascène.

He also advances that the various notebooks relied on by the Court, apart from the fact that any of these notebooks has been presented to Kabilima Jean Damascène for his comments, and the contents are not accurate as they contradict what people stated during the Gacaca bench hearing, which is surprising that the Court relies on documents claimed to contain accurate information, especially when the evidence is insufficient and needs corroboration for a more accurate depiction of the truth, and finds that this instant Court should go beyond that perception.

He further adds that in his testimony, Museruka mentioned the issue of gun while the issue about Kabilima Jean Damascène is a grenade, additionally, KDB, the brother of Mazimpaka Désiré, testify that the children of Nkusi Anglebert were together at that time, this means that their testimonies should be identical, that they wonder where they found grenade while in their interrogation, he stated that when he saw Kabilima Jean Damascène, the

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latter had nothing, he notes that the Prosecution failed to establish the role of Kabilima Jean Damascène in the death of Batutsi and Musoni.

The Prosecutor argues that, regarding the witnesses on whom the High Court, the Specilised Chamber hearing international and transnational crimes based to declare that Kabilima Jean Damascène is convicted of the murder of Batutsi and others who were killed in Bunge, and the fact that the Court relied on the testimony of Mazimpaka Désiré instead of basing on the testimony of his father Nkusi Anglebert, that his uncle Batutsi was the one who held his hand, not his father, what Mazimpaka Désiré sustained was that he saw something exploding which killed his uncle, that he never saw the person who threw it, that he passed through that crowd, and that the testimony given by Mazimpaka Désiré who testified that the grenade was thrown by Kabilima Jean Damascène is consistent with that of Mazimpaka Désiré; Mukanyarwaya asserts that, upon leaving Nyakizu, she learned of her husband's death by being thrown a grenade and he was killed by Kabilima Jean Damascène and fellows, it cannot insist on the statements that those people were in different places, that the people can come from different locations and meet in a given place as the killers surrounded the places.

He further adds that Kayitaba Melane admitted to have been among those who killed Musoni Festus together with Kabilima Jean Damascène, that Ndatinya accused Kabilima Jean Damascène that he was given a gun on 17/04/1994, that Karerangabo submitted that they

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attacked the home of Musoni Festus together with Kabilima who had a gun, while Nkusi Anglebert in the statement of 24/09/2012 stated that he did not know Kabilima Jean Damascène, later in the High Court, the Specilised Chamber hearing international and transnational crimes on 13/09/2017, he maintained that Kabilima Jean Damascène is not from Bunge, instead from Cyuna, and that when the genocide was committed, Kabilima Jean Damascène was not in Bunge, his testimony is not based on the truth.

The Prosecutor further adds that, regarding the dates on which the killings occurred, on 14 and 15/04/1994 the people had started telling each other that the killings had started on 16th and 17th, while Mukanyarwaya's testimony was based on information she obtained during the information collection when she came from Burundi.

He avers that a person called Museruka Théoneste (Côte 5-28) was interrogated in the Prosecution but he died without being heard before the Court, and before dying, he asserted that Kabilima Jean Damascène had the gun he was using which was given to him by the Conseiller on 17/04/1994, and such information was given before the return of Kabilima Jean Damascène to the country because he signed on the statement on 14/09/2005, they freely provided it, but, upon Kabilima's return to the country they changed their statements, as indicated on "côte 103", Nkusi Anglebert collaborated with the head of the cell to look for the people to discharge Kabilima Jean Damascène, in 2012 he stated that he did

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not know him, in 2017 before the Court, he maintained that he knew him and he is not from Bunge instead from Cyuna, his truth is insufficient, he concludes by sustaining that there is no doubt about their elements of evidence on the role of Jean Damascène Kabilima in the murder occurred in Bunge, as they are substantial.

DETERMINATION

OF THE COURT

Article 3 of Law n0 15/2004 of 12/06/2004 relating to evidence and its production, article 3 provides that “each party has the burden of proving his/her allegations”.

Article 65 of Law n0 15/2004 of 12/06/2004 mentioned above provides that “The court assesses with discretion the relevance, pertinence and admissibility or rejection of testimonial evidence. It is not bound by the number of witnesses. It shall mainly consider their knowledge of facts and the objectivity and sincerity of their declarations”.

As indicated in the appealed judgment from the paragraph [46] to [61], the High Court analyzed the testimonies incriminating and exculpating Kabilima Jean Damascène in order to find out his role in the killings of Tutsis occurred in Kabuga of Bunge wherein Musoni Festus and others were killed, it concluded in the

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paragraph [60] that the testimonies of Mazimpaka Désiré, KDA and that of Mukanyarwaya Josepha are corroborative in a way that they clearly indicate what happened, because all testimonies relate about the attack that occurred in Kabuga of Bunge and everyone saw Kabilima Jean Damascène throwing a grenade, and Mazimpaka Désiré and Mukanyarwaya Josepha already knew him, and KDA found out that it was Kabilima Jean Damascène who threw the grenade on them as told by her husband who was agonizing after being shot, and Mazimpaka Désiré stated that the grenade killed Batutsi while KDA and Mukanyarwaya Josepha have mentioned other people who were killed by that grenade in the attack of which Kabilima Jean Damascène is accused, namely Musoni Festus, Nshimiyimana, Karitanyi and others.

According to the statement of Kabilima Jean Damascène, in the paragraphs [9] and [25] of the appealed judgment, the High Court convicted him (his role in the murder in Kabuga of Bunge) based on the testimony of Karemangingo who confessed the crimes of genocide in the Gacaca Court of Kanombe B wherein Kabilima Jean Damascène was tried and yet that person never existed and his testimony does not appear in the case file, and according to the testimony of Murindabigwi who was the president of Abunzi in Bunge and the so called person never existed, this instant Court finds his statement unfounded, because in the paragraph [9] there is the statement of the Prosecution and the name of Augustin Murindabigwi is not mentioned in that paragraph, while what is stated in paragraph [25] is the statement of Kabilima Jean Damascène himself, not of the Court.

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The Court also finds that, in the analysis of the statements of the witnesses made by the High Court from paragraph [46] to paragraph [59], and in the decision made by such Court on the role of Kabilima Jean Damascène in the killings occurred in Kabuga of Bunge, which appears in paragraph [60], of the appealed case, the Court did not decide about Karemangingo or Murindabigwi, the statements of Kabilima and Counsel Munyemana Gatsimbanyi Pascal that the Court based on the testimony of the non-existed persons, are unfounded.

Concerning the statement of Kabilima Jean Damascène and his counsel that the High Court would not have convicted him on basis of the testimony of Mazimpaka Désiré, who testified that he was one of those who threw the grenade that killed his uncle Batutsi and others, while it rejected the testimony of Kabilima's father Nkusi Anglebert who was with him on the ground that he submitted that it was night, the High Court did not base on the testimony of Nkusi Anglebert on the grounds that he contradicts himself in his statements, because he maintains (paragraph [50]) that his brother Batutsi was killed by a grenade thrown by a communal policeman named Ntaganzwa and he added that due to the darkness, he could not see and, therefore, could not identify the attackers, the Court finds his testimony doubtful. While the testimony of Mazimpaka Désiré who testified that Kabilima Jean Damascène was among the people who threw grenade that killed his uncle Batusi and others, was considered for the fact that Mazimpaka Désiré added that he already knew Kabilima Jean Damascène well because they used to meet in the valley, where the latter used to

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coach him how to play football, corroborates with that of Mukanyarwaya Josepha who submitted (paragraph [59]) that she was among many Tutsis who fled from Nyakizu via Bunge, where they met the attack, and she saw Kabilima Jean Damascène in Bunge among the killers, he threw grenade on them which killed many people including her husband called Karitanyi Innocent who was a businessman, the son of her sister-in-law called Nshimiyimana, Batutsi from Cyuna and others, and it injured his son called Kabarisa Eugène, as well as KDA who stated that he knew Kabilima Jean Damascène during the genocide, that he saw him in Bunge in the midst of

murders... (paragraph 58); that he threw a grenade on them that killed his mother-in-law, and that her husband was also shot in the spot and told her that Kabilima Jean Damascène, who studied together with his brother, was the one who threw the grenade on them.

The Court of Appeal finds that the High Court considered the testimony of Mazimpaka Désiré and rejected that of Nkusi Anglebert, as it has explained in paragraph [50], Nkusi Anglebert contradicts himself in his statements, as he submitted that it was night so that he could not identify the attackers, however he confirmed that the grenade was thrown by Ntaganzwa while he sustained that he could not see clearly, while the testimony of Mazimpaka Désiré who related the facts he witnessed and the testimonies of Mukanyarwaya Josepha and KDA who narrated the events they witnessed are in line with the statements about the grenade he threw and killed many persons as above mentioned.

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Therefore, it finds that the High Court rejected the testimony of Nkusi Anglebert on the grounds of contradictions in his statements, the statements of Kabilima Jean Damascène and his counsel that such testimony was not considered because he stated what it was night, they intentionally denote that Nkusi Anglebert was with Mazimpaka Désiré, meaning that his statements that he mentioned what he witnessed should not be considered as both did not see clearly, thus they are unfounded, because Mazimpaka Désiré's testimony is in line with that of the others who were interrogated, while the testimony of Nkusi Anglebert is contradictory because he sustained that it was night on the other hand and on the other one he stated that Batutsi was killed by a communal policeman named Ntaganzwa.

The Court of Appeal finds that the statements of Kabilima Jean Damascène and his counsel assisting him that they notice that during the genocide against the Tutsis in 1994, Mazimpaka Désiré was only nine (9) years old, and where he lived (in Cyuna) it was impossible for him to know Kabilima Jean Damascène, should not be considered, because as stated above, Mazimpaka Désiré already knew Kabilima Jean Damascène well because they used to meet in the valley where he was coaching them to play football, and his statements are in line with that of the other witnesses interrogated; therefore, there is no reason for Mazimpaka Désiré's testimony not to be

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considered, especially since it is corroborated with that of Mukanyarwaya Josepha and KDA.⁸

Regarding the statements of Kabilima Jean Damascène and Counsel Munyemana Gatsimbanyi Pascal, assisting him, that the attack killed Batutsi mentioned by survivors such as Kaberuka Alexis, Kabera Charles, Ndahunga Stefano, Nkusi Anglebert and Nyirimana Innocent and those who self confessed such as Mudatinya Athanase and Nzirabatinyi Vincent, but that as they have presented it before the Gacaca Court of Kanombe B, none of them states to have seen Kabilima Jean Damascène in the attack, and even the death of Musoni Festus, Karerangabo identified the person who killed him before the Gacaca Court of Kanombe B and Kayitaba Melane has

confessed it, the High Court, mentioned from paragraph [48] to [51], that the testimony of those people could not benefit to Kabilima Jean Damascène from the charges against him, that what Rekeraho Charles contends that he was neighbouring with Kabilima Jean Damascène and they were raised together, explaining that the attacks he was involved in, no grenade was thrown but instead using weapons, do not exculpate Kabilima Jean Damascène because they do not relate with the charges against him.

8 Article 63 of the law n° 15/2004 of 12/06/2004 relating to evidence and its production provides that Minors not exceeding fourteen (14) years of age as well as incapacitated adults who are able to narrate facts are allowed to testify in court without taking an oath but their testimony must be corroborated by other elements of evidence.

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The High Court also indicated that Mudatinya Etienne also does not discharge Kabilima as he claims not to have already known him, he did not also know whether he was in the same attack that killed Batutsi. Mudatinya learned about Batutsi's death only after his release from prison, that Nkusi Anglebert's testimony should not be considered as he contradicts himself, whereby he claims that he could not know exactly the individuals who were in the attack, but he confirmed that the "grenade" was thrown by Ntaganzwa. As for the testimony of Ndahunga Stefano and that of Nzirabatinyi, would not do with this instant case as their self confessions are not in line with the charges against Kabilima Jean Damascène in this instant case.

The Court of Appeal finds that Kabilima Jean Damascène and his counsel, Munyemana Gatsimbanyi Pascal, have failed to refute the High Court's basis declaring that the testimonies of Kaberuka Alexis, Kabera Charles, Ndahunga Stefano, Nkusi Anglebert, Mudatinya Athanase and Nzirabatinyi Vincent should not be relied upon, since they did challenge the motivation of the Court, so they have no basis to ask this instant Court to rely on these testimonies to overturn the decision taken to Kabilima Jean Damascène in the appealed case.

Regarding the statements of Kabilima Jean Damascène and his counsel that the testimony of KDA and that of Mukanyarwaya Josepha should not be considered on the ground that they state that they saw Kabilima Jean Damascène with Batutsi in Bunge on 15/04/1994 and submitting that they arrived there

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escaping from Nyakibanda, where they left on 19/04/1994, their testimonies contradict with what other witnesses who were with those survivors saw, such as Karera Charles (côte 200), Kaberuka Alexis (côte 200), the location and the time they saw it, the Court of Appeal finds that, as mentioned above, the testimonies of Mazimpaka Désiré, Mukanyarwaya Josepha and KDA are concurring and should not be invalidated on the ground that they contradict with what have presented by Nkusi Anglebert, Kabera Charles, Kaberuka Alexis and Mudatinya Athanase because the Court declared that their testimonies cannot be based on the grounds that it cannot

benefit to Kabilima Jean Damascène in this instant case.

The Court finds that, apart from that, the testimonies of Nkusi Anglebert, Kabera Charles, Kaberuka Alexis and Mudatinya Athanase are questionable on the grounds that they were illegally produced with the conspiracy of Kabilima Jean Damascène, aiming at contradicting the information provided during the information collection, as stated in the statement of the Prosecution made to Rindiro Tharicisse, who was a person of integrity in the Gacaca Court of Kanombe B, who asserted that some of those witnesses (Mudatinya Athanase and Nzirabatinyi Vincent) had accused Kabilima Jean Damascène in the information collection contradicted and lied the Gacaca Court intending to discharge him, this led to their punishment of six months of imprisonment, where in the documents on côte 188-190, côte 191-194, côte 195-197, côte 198-199 and côte 200-201, it is indicated that Kabilima Jean Damascène wrote to Nsengimana Jean

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Marie Vianney , the Executive Secretary of the Bunge Cell telling him the people to look for him who should relate what they saw in Bunge, and he looked for them and make written statements which were sent to Kabilima Jean Damascène and they are on côtes 200-201, that leader was also prosecuted for conducting the investigation activities which were not in his duties.

Regarding the statements of Kabilima Jean Damascène and his counsel that the testimonies of KDA and Mukanyarwaya Josepha should be invalidated based on the date on which they saw him and the date on which they fled, because they sustain that they fled from Nyakibanda in Runyinya on 19/04/1994, but they maintain that they saw Kabilima Jean Damascène with Batutsi on 15/04/1994, the Court of Appeal finds that the statements of KDA and Mukanyarwaya Josepha corroborated with those of others who confirmed that Kabilima Jean Damascène was involved in the killing of Batutsi as indicated in the information collection, that he was in the attack that killed him in Bunge, the fact that KDA and Mukanyarwaya Josepha were not been able to match the dates on which they fled with the dates on which occurred the killings in Bunge wherein were murdered Batutsi and many others, cannot discredit their testimonies, because it is possible that they are wrong about the dates, due to the difficult times they went through and it could also be possible due to the long time that had elapsed since the genocide against the Tutsis happened, so as upheld in the case ICT-2001-72-T, of the Prosecution versus Bikindi Simon, decided by the International Criminal Tribunal for Rwanda (ICTR) on

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02/12/2008, where it recognises that a significant period of time has elapsed between the events alleged in the Indictment and the testimonies given in court. Therefore, lack of precision or minor discrepancies between the evidence of different witnesses, or between the testimony of a particular witness and a prior statement, was not regarded in general as necessarily discrediting their evidence Court.⁹

Regarding the fact that the High Court did not CONU conduct the field visit at home of Kabilima Jean Damascène to inquiry how it locates, this instant Court finds that in case the High Court is satisfied with the evidence provided and found unnecessary to conduct further investigation (because the Intermediate Court of Nyamagabe did one in CNLG), does not invalidate its decision, especially since it is not mandatory for the Court to investigate whenever it is requested.¹⁰

The Court finds that the statements of Kabilima Jean Damascène and his Counsel Gatsimbanyi Pascal that the High Court declared that Musoni died with Batutsi and Rekeraho Vincent, who was among those who killed him, stated that when they killed Musoni, Kabilima was not together with him, that Musoni also died at Bunge but not in Akabuga of Bunge, that even the one who buried him, called Ndahunga Etienne (côte 247) submits that Musoni

9 ICTR –2001 -72 –T The Prosecutor v. Simon Bikindi, par. 32 rendered on 2/12/2008 10 Rwanda Law Report, Volume 4, number 15, October 2012 (Judgment RPA 0101/09/CS decided on 01/06/2012, Prosecution vs Nzajyibwami, p,38).

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Festus did not die with Batutsi, have no basis as nowhere appeared in the appealed case that the Court found Kabilima Jean Damascène guilty based on the testimony given by Rekeraho Vincent and Ndahunga Etienne, because it held that their testimonies would not be beneficial because it does not correspond with the charges against Kabilima Jean Damascène. This instant Court finds that, as mentioned above, the Court convicted him of the murder committed against Batutsi, Musoni and others based on the testimonies of the people who incriminated him including Mazimpaka Desiré, Mukanyarwaya Josepha and KDA.

The Court finds that the statement of Counsel Munyemana Gatsimbanyi Pascal that what Mukamabano Philomène accuses Kabilima Jean Damascène of being involved in the attack that killed her husband should not be valid because at that time, Kabilima Jean Damascène was studying in a minor seminary, should not be considered on the grounds that, the fact that he was studying in a minor seminary, does not mean that he did involve in the attacks that killed the Tutsis. It also finds the fact that he argues that Mukamabano Philomène's accusations against him should not be considered because Ruzindana testified before Gacaca Court of Bunge on 21/12/2012 that they were the ones who killed him and even Kayitaba Melane did not mention that Kabilima Jean Damascène was involved in the attack, should also be considered, because before they contradicted before that Gacaca of Bunge, in the information collection, Ruzindana confessed to have been involved in the attack that killed Musoni together with Kabilima Jean

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Damascène, Ndatinya Athanase who accused Kabilima Jean Damascène of providing him with a gun on 17/04/1994, while Karerangabo submitted that when they attacked at Musoni's home, they were with Kabilima Jean Damascène holding a gun.

It finds that the statements of Kabilima Jean Damascène that the testimony of Mukamabano Philomène saw Kabilima Jean Damascène when she was fleeing on 15/04/1994, are not accurate, this is because she allegedly fled before Kabilima arrived at Bunge ; therefore, they should not be considered, especially given the evidence proving that on those dates, Kabilima Jean Damascène was in Bunge, not in Kigali as she submits. Additionally, the argument that a person fleeing from Cyahinda to Burundi could not have passed through Bunge should also not be considered. As someone fleeing from potential harm, they could have taken any route necessary, regardless of the direction, due to the circumstances she was facing of being hunted and targeted for murder.

The Court finds that the fact that Kabilima Jean Damascène has not been provided with notebooks containing information for comments, should not be a ground to invalidate that evidence because the Court found that information while conducting an investigation in the CNLG and as indicated on page 7, paragraph [14] of the case RP GEN 0003/15/TGI/NYBE, in the Intermediate Court of Nyamagabe, Kabilima Jean Damascène and his Counsel Munyemana Gatsimbanyi Pascal had commented about it. The fact that the contents

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of those notebooks are not true, should not be considered because, as mentioned above (paragraph 33), the information was not given in order to accuse him, but was collected in a general way in order to gather information about what happened during the Genocide against the Tutsis in 1994. There is nothing that prevents the information and other elements of evidence to be based on, for determining whether he is guilty of the crimes against him.

The Court of Appeal, after this analysis, finds that Kabilima Jean Damascène and his Counsel Munyemana Gatsimbanyi Pascal, failed to challenge the elements of evidence on which the High Court relied to convict him for his role in the killings that occurred in Bunge during the genocide against the Tutsi in 1994, wherein were murdered Batutsi and Musoni Festus and others who were with him; therefore, the statement that he was convicted of the murder committed against Batutsi and Musoni Festus based on the contradictory testimonies are unfounded. II.2. The appeal of the Prosecution

1. Determine whether Kabilima Jean Damascène established a list of Tutsi children who were not yet killed intentionally and knowing that they should be killed so that he can be punished for such act as genocide perpetrator

The Prosecution argues that the High Court acquitted Kabilima Jean Damascène of the crime of genocide based on the fact that he established the list of Tutsi children who had not yet been killed and were later

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killed, disregarding the elements of evidence it produced before the Court based mainly on the statements of Kabilima Jean Damascène himself and the testimonies that he did not contradict, that the Court in paragraph 68 of the appealed case declared that Kabilima Jean Damascène had

no intention of committing the crime of establishing the list and that there is no evidence proving that he shared the intent with Rwandenzi and Nyamukaza in the killing of those Tutsi children, yet that Kabilima Jean Damascène intentionally established that list knowing that the intent was to kill those children, and as explained in paragraphs 64-66 of the appealed case, Kabilima Jean Damascène was an adult of over 20 years old, who was graduating from the high school, knowing that the Tutsis were being killed.

The Prosecution further argues that Kabilima Jean Damascène, in his explanation provided regarding the fact of establishing the list of children who should be killed, has changed the statements. During the Gacaca proceedings, he claimed to have established the list to ensure the safety of the children. On the other hand, he stated that they intended to know how they should share the property belonging to the targeted individuals (Tutsis), before the Intermediate Court, he denied to have established the list, but before the High Court he admitted it, the Prosecution asserts that changing the statements proves that he knew that his acts constituted a crime.

The Prosecution submits that in the High Court, they asked to Kabilima Jean Damascène to explain how he was requested to write down the properties, and he did

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not do so, but, he wrote down the names of the children hidden in the place and he failed to answer, but the Court never considered it, and that the Court reconsidered the testimonies of the old women who hid these children and disregarded that of Kayitaba Melane who also hid them, and the fact that Naramè Thacienne stated that she did not see Kabilima Jean Damascène among the people who came to take the children from her home, such fact does not mean that he never went to other homes, because in her testimony she added that she did not know who went to other homes. He sustains that the Court also disregarded the testimony of Ndutiye Jean Baptiste before Gacaca court (côte 538 doc CNLG – Kanombe B) where he indicated that Kabilima Jean Damascène participated in the killing of the children of Ruhinguka Claver. He puts forth that the Court was reminded many times that Kabilima Jean Damascène in Gacaca Court stated that he used to cross with Rwandenzi Michel and Nyamukaza knowing that they were well-known murderers, that it is not clear how the killer asked him to make a list of properties and write down the names of the children who were not yet killed, that the High Court does not indicate the basis to declare that Kabilima Jean Damascène did not share the intent with the murderers in the killing of those children.

Kabilima Jean Damascène and his Counsel Munyemana Gatsimbanyi Pascal argue that there are people who, according to the Prosecution, allegedly were his co-offenders, including Rwandenzi and Nyamukaza, yet there are no case files against them in Gacaca or other Courts so that he was their co-offender, that there are

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people who confessed and apologized to the death of those children including Nzirabatinyi Vincent and Ndutiye Jean Baptitse and he is not directly or indirectly accused of being involved in the death of those children.

Counsel Munyemana Gatsimbanyi Pascal, Counsel for Kabilima Jean Damascène, argues that this ground of the appeal of the Prosecution should not be considered because it does not show the explanations that contradict the analysis made by the Court on this issue, that in analyzing this issue the Court insisted on the testimonies provided by those who were present on the crime scene, the conduct of those who were present and the events that followed such act and it ruled that Kabilima Jean Damascène had no direct or indirect involvement in their death, subsequently it acquitted him for such act, that such serves as motivation for them to support that this ground of appeal of the Prosecution has no basis.

He further argues that on “côte 41”, in the hearing held in the Gacaca Court of Kanombe B, a witness Naramé Thacienne explained that Nyamukaza and Rwandenzi ordered to Kabilima Jean Damascène to write down the names of persons who were still alive in Bunge, on the "côte 42" she explained that Kabilima Jean Damascène was not in the attack that brought the Tutsi children; and that on “côte 41”, there is a testimony of Kabarenzi Xavérine who explained that Kabilima was ordered to write down as someone who was present and that he had nothing at that time, on “côte 43”, Kabarenzi Xavérine sustained that they had no weapons when they

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were with Kabilima Jean Damascène because they were standing like children, this was also said by Kayitaba Melane on "côte 55" in the hearing held by the Gacaca Court of Kanombe B.

Counsel Munyemana Gatsimbanyi Pascal also submits that there was no act of murder following the meeting that was committed as a result of the list allegedly made by the accused, that the Court should not base on the ground that Kabilima Jean Damascène was in the meeting because he was there like other persons who were ordered by the authorities to attend it, and that attending the meeting itself does not constitute a crime, that the Court should analyze the statements of the witnesses who believe that Kabilima Jean Damascène as a child who was in that meeting and able to write was ordered by the authorities to establish the list, especially since they believe that at that time he had nothing, this indicates that he had no bad intent.

Counsel Munyemana Gatsimbanyi Pascal adds that their statements were analyzed by the International Criminal Tribunal for Rwanda (ICTR) in the Prosecution against Mugenzi Justin and Mugiraneza Prosper case, where Mugenzi Justin as Minister was convicted of acts of participating in meetings led by the President Sindikubwabo Théodore, but the Appeal Chamber declared that he was not guilty because he was fulfilling his duties as a Minister, and this was also upheld in the case decided by the Court of First Instance of Kibuye on 31/07/2002 where it ruled that, regarding the meeting held at Kibuye chaired by Kambanda Jean, no one immediately

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can confirm that anyone who attended the meeting killed, especially that before and after the meeting there were no bad acts followed containing charges against him, and he did not pronounce any bad word, that nothing proves that he effected the bad statements he made during the meeting because attending the meeting is not a crime as to accomplish what was discussed about within the meeting; therefore Hategekimana Sabine was not convicted of the crimes against him as the grounds for accusation were tainted with suspicion and doubt, so he finds that the rulings of both Courts indicate that the appeal of the Prosecution and its evidence are unfounded, and it is inappropriate that the accused should be convicted of the crime of genocide based on analogy because the ICTR declared that this crime is not subject to analogy.

Counsel Munyemana Gatsimbanyi Pascal assisting Kabilima Jean Damascène, argues that the High Court analyzed the testimonies of Naramè Thacienne, Ruhinguka and Kabarenzi Xavérine who were all interrogated and attended the meeting, and it found that either in the preparation of the meeting or in the killing of those children, there was no involvement of Kabilima Jean Damascène, as stated in paragraphs 70 and 72 of the judgment and in paragraph 73, the Court based on article 96 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code which was into force at that time.

He concludes that from the Prosecution Kabilima Jean Damascène asserted that he never established a list in order to kill children, that the statement of the

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Prosecution that he contradicts with the accused is not true, that the Court also declared that there is no evidence to prove that Kabilima Jean Damascène had conspiracy to plan or commit such murder.

DETERMINATION**OF THE COURT**

Article 119 of Law N0 15/2004 of 12/06/2004 relating to evidence and its production, provides that in criminal cases, evidence can be established by all means of fact or law provided they are subject to adversarial proceedings. The court rules sovereignly on the validity and relevance of the prosecution or defence evidence.

Article 65 of the abovementioned Law provides that the court assesses with discretion the relevance, pertinence and admissibility or rejection of testimonial evidence. It is not bound by the number of witnesses. It shall mainly consider their knowledge of facts and the objectivity and sincerity of their declarations.

In the

ruling

of the appealed case RPA/GEN00006/2016/HCCIC, the Court relied on the testimonies of Naramé Thacienne and Kabarenzi Xavérine, both witnesses affirmed that Kabilima Jean Damascène was present at the meeting, during which Nyamukaza and Rwandezi Michel handed him a paper and a pen to record the names of the children and those who were hiding them. The ruling states that, apart from the acts of Kabilima Jean Damascène, the Prosecution failed to present any other evidence regarding his

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behavior that would establish his involvement in a conspiracy with Rwandezi and Nyamukaza, on which it based and declared him not convicted of that crime.

In her testimony (côte 35-36), Kabarenzi Xavérine states that the meeting was convened by Sector Conseiller Rwandenzi Michel for the purpose of bringing the people who were hiding the Tutsis, she also was also requested to bring the child she was hiding because she was not among the targeted persons, and Nyamukaza and Rwandenzi Michel postponed the meeting because it was by night, they stated that another meeting should be held in Bidandi, but they added that they should write down the Tutsis and those who hosted them, by that time they gave by force to Kabilima Jean Damascène a piece of paper and a pen to write down the names of those people, Nzirabatinyi Vincent was a cell responsible who read out to him the names. She also adds that they did not kill anyone on that day, those who were recorded were killed in June 1994.

In her testimony (côte 32), Naramé Thacienne explained that she saw Kabilima Jean Damascène among those who attended the meeting, Nyamukaza and Rwandenzi Michel gave to him a pen and a piece of paper to write down the names of the people who hid the Tutsi children, that if they did not find them, they would be held responsible, she remembers that others who helped them to write them down, include Bizuremyi and Mbonimpa. Someone called Museruka Théoneste, also in his testimony, testifies that Kabilima Jean Damascène was among those who made the list of Bunge Tutsis who were

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to be killed (côte 27). This also was testified by Mukamabano Philomène who submitted that during the genocide against the Tutsi in 1994 Kabilima Jean Damascène worked with the leaders of Nyakizu Commune, he behaved as a soldier, that in the meetings held for planning the genocide, he was the one who took the minutes for them and it is in this context that he made the list of Tutsis to be killed (côte 13-14).

In the Intermediate Court of Nyamagabe in the case RP GEN 0003/15/TGI/NYGBE, Kabilima Jean Damascène submitted that the meeting was convened by the Bourgmestre and attended by all residents including himself as well as others, before the meeting started, they requested them to look for a person who would take the minutes for them and he was chosen, before he wrote, they stated that it was night and the meeting should be resumed in Bidandi. In his pleading in the

High Court, he indicated that he did not deny that he made a list of Tutsi children who had not yet been killed and later they were killed, but that he made that list under the orders of Rwandenzi Michel and Nyamukaza (côte 69). Before the Court of Appeal, Kabilima Jean Damascène sustained that at that time a public meeting was convened, that when they were in the meeting, they asked if there is a person able to read and write, he raised his hand and they told him to come forward, but that day the meeting was postponed, that he never made a list, all statements are emotional.

The Court of Appeal finds that, as mentioned in the previous paragraph, Kabilima Jean Damascène was characterized by contradictions regarding the

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circumstances in which was established the list of Tutsi children who had not yet been killed and later they were killed, because he first stated that the people were the ones who chose him but that he did not make a list that day because the meeting was immediately postponed because it was night, on the other hand he submitted to have made it under pressure, and then he sustains that he was the one who decided to make the list of those children of his own free will, unfortunately he never did it because the meeting was postponed.

The Court of Appeal finds that, as provided under the foregoing article 65 of the Law n° 15/2004 of 12/06/2004 relating to evidence and its production, the principal element for the testimony validity is the witness knowledge of the facts. As also upheld by the Supreme Court in the case RPAA 0059/08/CS decided on 19/11/2010, the testimony is not invalidated due to the witnesses' relationships or their interest in the case, because its validity is not based on the witnesses but on the truth of the testimony, such validity is confirmed by the Court after analyzing the statements of the witnesses¹¹. It therefore finds that the statements of the witnesses Naramé Thacienna and Kabarenzi Xavérine concur on the fact that the meeting was postponed because it was night, but the list of Tutsi children was established on that day, those statements should be taken into account because even if they have relationship with the killed children, it is evident that they were later killed at the place where they were hidden; therefore, the statements of

¹¹ Case RPAA 0059/08/CS decided on 19/11/2010, Prosecution vs Nshimiyimana Alexis al.

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Kabilima Jean Damascène that he did not make a list of those children because the meeting of that day was postponed and the list was not made should not be taken into consideration.

Contrasting the statements of Kabilima Jean Damascène with the testimonies of the witnesses, namely Naramé Thacienne, Muberuka Théoneste, Mukamabano Philomène and Kabarenzi Xavérine, the Court finds that his denial does not eliminate the fact that he was the one who made the list of those Tutsi children who had not been killed and were later murdered, the remaining issue is to examine whether the list was made with the intent to kill the children who were put on it and whether it was the one that was based on to kill those children.

Regarding to whether Kabilima Jean Damascène knew the plan behind the compilation of that list of Tutsi children who had not been killed, the Court of Appeal finds that in the testimony of Kabarenzi Xavérine mentioned above, she stated that she was among the people not targeted (Hutu), that they also wrote her because she had a hidden child, this is upheld by the statement of Kabilima Jean Damascène submitting that the purpose of making the list of these children was to facilitate them to share their properties, this indicates that when Kabilima Jean Damascène was making the list of those children, he was well aware of the plan of killing them, because they could not share the properties of the people who were still alive. This indicates that he already had conviction and behavior supporting the murder plan shared with Rwandenzi Michel and Nyamukaza who

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hired him to write them down, the ruling of the High Court that he did not share the plan with the killers involved in the murder of these children lacks merit.

The Court of Appeal also finds that when Kabilima Jean Damascène made a list of Tutsi children and noted the houses where they were hidden, these children were not yet killed, this occurred during the genocide against the Tutsi, and the killings had already commenced and were ongoing, some parents of these children were killed, while others who managed to escape fled as well, so he cannot state that he made the list without being aware of the purpose, and yet he maintains that they had to share their properties. Also, the list made by Kabilima Jean Damascène was not a list of all children, but a special list of Tutsi children who had not been killed, knowing that the purpose of this selection was to ensure that no Tutsi would be forgotten and could escape from the plan to exterminate them during the genocide against the Tutsis to facilitate them to share of their properties.

The Court finds that Kabilima Jean Damascène made a list of Tutsi children surely knowing that the purpose was to kill them and they were finally killed because of their ethnic group, this makes him an accomplice of perpetrators of genocide because of his strong support provided, as explained in article 1, 50 point b, of Law n° 68/2018 of 30/08/2018 determining offences and penalties in general¹², because he made a list of those

¹² This article states that: accomplice is a person having aided the offender in the means of preparing the offence through any of the following acts: b) a person who knowingly aids or abets the offender

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children surely knowing that, the purpose was to be killed even if he did not directly or indirectly participate in killing them as he claims, the fact is that the act he committed, is that he wrote them down, he did it knowing that they would be killed and take possession of the properties belonging to their parents who had already been killed and others fled, in addition to that, such act of making a list helped the killers not to be mistaken about them while the murder was ongoing in Bunge. Therefore, it finds that, as already mentioned above, regarding the list, Kabilima Jean Damascène became the accomplice of the perpetrators of genocide, this crime is provided and punished by articles 3 and 4 of The International Convention of 09/12/1948 on the Prevention and Punishment of Genocide¹³, and Article 114 of Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code which was into force at the time the judgment was decided, it is punished under article 115 of that Organic Law.

in the means of preparing, facilitating or committing the offence or incites the offender. ¹³ This article states that: "The following acts shall be punishable:

- (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. Article IV Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

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2. The fact that the High Court reduced the penalty imposed to Kabilima without any supporting ground The Prosecution appealed on the ground that the High Court reduced the penalty of Kabilima Jean Damascène based on the fact that he committed the crime of genocide when he was a young man and that he was not characterised by bad behavior before committing the crime of genocide for which he is prosecuted and after committing this crime. The Prosecution explained that Kabilima Jean Damascène who was in his final year of high school in a minor seminary, was well aware of the atrocities that were being committed in the country. Moreover, the Court did not clarify whether the minority mentioned about Kabilima Jean Damascène is considered as an "minority excuse" since it appears that he committed the crimes against him when he was 21 years old. The Prosecution contends that the High Court did not explain its basis to declare that Kabilima Jean Damascène was characterized by good behavior before committing the crime of genocide while the evidence presented by the National Commission for the Fight Against Genocide indicated that he was notably involved in the killing at Bunge, so that having good morals cannot prevent him from being well-known for murder. The Prosecution also adds that the High Court ignored article 82 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the Penal Code, which states that in determination of penalties, the Court must first look at the

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aggravating circumstances before looking at mitigating circumstances. The Prosecution concluded by requesting this instant Court, in accordance with article 113 and article 115 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the Penal Code, to uphold the life imprisonment sentence for Kabilima Jean Damascène as ordered by the Intermediate Court, because he became well-known in the genocide against the Tutsis in Bunge; due to the fact that he attended the planning meetings and was in the armed groups, due to the fact that he appeared at the barriers where Tutsis were killed, and was given a gun, the Gacaca Courts put him in the first category. The Prosecution submits that the fact that Kabilima Jean Damascène was well-known in the murder was pointed out in the course of the collection of information carried out in Bunge and contained in the note books kept by the National Commission for the Fight Against Genocide and even the High Court found those elements of evidence and that he appeared in many attacks together with the well-known killers included Rwandenzi and Nyamukaza, so that in sentencing him, the Court should have considered the aggravating circumstances before analysing the mitigating circumstances as stipulated by article 82 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the Penal Code. Kabilima Jean Damascène defended himself on the appeal arguing that nothing would make him well-known killer and famous in the murder for which he is accused because he was not involved in it, and he never

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admits the truth from the documents provided by CNLG because they are among the elements of evidence against which he filed appeal and he requested that they should be brought in Court but his request was not granted. Additionally, he mentioned that the Prosecution accused him of being well-known killer in collaboration with Rwandenzi who was the Bourgmestre of Nyakizu commune and Nyamukaza who was the Conseiller, but the Prosecution did not present any indictment incriminating him as co-offender or accomplice of these leaders. Counsel Munyemana Gatsimbanyi Pascal assisting Kabilima Jean Damascène, requested the Court not to base on the documents provided by the CNLG which portray the suspect as well-known killer in the murder of which he is accused because the contents are doubtful due to the fact that the information they allegedly contain was not provided in compliance with article 6 of Organic Law n°16/2004 establishing the organisation, competence and functioning of Gacaca Courts.

DETERMINATION OF THE COURT Article 76 of the Organic Law no 01/2012/OL of 02/05/2012 instituting the Penal Code, which was into force when the case of Kabilima Jean Damascène was decided in the High Court, provides that the judge may consider the appropriateness of mitigating circumstances

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which preceded, accompanied or followed an offence. The decision to accept mitigating circumstances must be justified.

- a. With regard to the behaviour of Kabilima Jean Damascène before and after the genocide committed against Tutsis in 1994 The High Court, in reducing the sentence of Kabilima Jean Damascène, explained that he was not characterised by bad behavior nor his behavior threatened the society either before or after the genocide committed against the Tutsis in 1994 and he is accused to have participated in it. The Court finds that the genocide is a crime classified as a "crime under the law of nations" and the International Courts consider it a "crime which shocks the conscience of mankind"¹⁴.

¹⁴ Croatia v. Serbia, International Court of Justice, Judgment of 03/02/2015, parag. 87: "The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law. That was emphasized by the Court in its 1951 Advisory Opinion .The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and the spirit and aims of the United Nations (resolution 96 (I) of the General Assembly, 11 December 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-

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The behavior of Kabilima Jean Damascène who is convicted of this crime cannot be a mitigating factor because a person who intends to exterminate ethnic group and executes his intent, cannot be attributed with good behavior either before committing a crime, because he did not commit the crime in an unexpectedly way, or after committing it, because he did not remorse and asked for forgiveness. The Court finds that the High Court failed to fully explain the mitigating circumstance relating to the good behavior of Kabilima Jean Damascène and connect with the gravity of the crime of genocide of which he was convicted.

- b. With regard to the fact that Kabilima Jean Damascène committed the crime while he was still a young man The Court finds that the identification of Kabilima Jean Damascène indicates that he was born in 1973, he committed the crimes for which he is accused in April 1994, which means that he was 21 years old. The Court finds that, as the Prosecution submits, the High Court did not explain the basis on which it relied by declaring that he committed the crime at a young age, as a person who was in his last year of high school in a minor seminary, he was convinced enough to know the gravity and consequences of the crime of genocide he

operation required 'in order to liberate mankind from such an odious scourge. (Preamble to the Convention)."

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committed, therefore this should not be a reason for reduction of the gravity of the crime he committed.

- c. With regard to the fact that Kabilima Jean Damascène should be punished on basis of the fact that he was well-known in the killings committed in Bunge The Court finds that the case against Kabilima Jean Damascène is related to the attack he was involved in that killed Batutsi and others who were with him, the Prosecution did not charge him with other attacks in which he was involved. The Court finds that it cannot determine the penalty based on the fact that the accused was well-known in the murder he committed in different places while the Prosecution did not indicate any other attacks in which he was involved other than the above mentioned.
- d. With regard to penalty that should be imposed to Kabilima Jean Damascène Article 115 of Organic Law n° 01/2012/OL of 02/05/2012 instituting the Penal Code which was into force when the appealed case of Kabilima Jean Damascène was decided, provides that any person, who commits, in time of peace or in time of war, the crime of genocide as provided in the preceding article, shall be liable to life imprisonment with special provisions. The Court finds that, as the United Nations General Assembly declared, the crime of genocide is a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and

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results in great losses to humanity¹⁵ and the International Convention of 09/12/1948 on the Prevention and Punishment of Genocide, states that “at all periods of history genocide has inflicted great losses on humanity”¹⁶. The Court finds that the gravity of the crime of genocide makes it also a special crime, it is a special intent to destroy, in whole or in part, a national, ethnical, racial or religious group and this specificity is based on in sentencing the perpetrators of this crime as explained by the International Criminal Tribunal for Rwanda in the case of the Prosecutor v. Kambanda Jean.¹⁷ The Court finds that, based on the aforementioned explanations about the nature of the crime of genocide and its specificity, such crime must be punished in a special way due to the special effects caused by it on the place where it was committed and to the victims, therefore

15 U.N General Assembly, 1946, Res. 260, The crime of genocide is “a denial of the right to existence of entire human groups and noted that such denial shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations.”

16 The Preamble of International Convention of 09/12/1948 on the Prevention and Punishment of the Crime of Genocide 17 See judgment Prosecutor v. Kambanda, Judgment and Sentence, ICTR-97-23-S, 4 September 1998, para. 16. Where it ruled that: “The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be

committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.”

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Kabilima Jean Damascène who is convicted of the crime of genocide and that of being an accomplice in the crime of genocide, must be sentenced to life imprisonment provided for in article 92 of the Law n0 68/2018 of 30/08/2018 determining offences and penalties in general because it is the lesser penalties compared to the life imprisonment with special provisions provided for in article 115 of the Organic Law n0 01/2012/OL of 02/05/2012 instituting the penal code which was into force when the case was decided in the previous Courts. III. DECISION OF THE COURT Holds that the appeal of Kabilima Jean Damascène is unfounded. Holds that the appeal of the Prosecution is founded in parts. Holds that the case RP Gen 00006/2017/HC/HCCIC decided on 31/01/2018 by the High Court, Specialized Chamber hearing international and transnational crimes is reversed in parts. Holds that Kabilima Jean Damascène is convicted of genocide crime and that of being an accomplice of genocide perpetrators. Sentences Kabilima Jean Damascène to life imprisonment.

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Orders that the court fees are borne to the Public Treasury.

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