

RWANDA / JUDGMENT

PROSECUTION v. MURINZI ET. AL

RPAA0148/11/CS

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Text

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PROSECUTION v. MURINZI ET. AL [Rwanda SUPREME COURT – RPAA0148/11/CS – (Hatangimbabazi P.J) Karimunda and Gakwaya, J.) November 27, 2015] Criminal law – Penalty reduction – His guilty plea is a mitigating circumstance and the fact that he was sentenced to ten years (10) of imprisonment at the first instance, the penalty which is under that provided for by the law, while now there is a new law providing for the lesser penalty implies that it is the one which is applicable and the penalty must be imposed being under the one provided for by that law – Organic Law No 01/2012/OL of 02/05/2012 Instituting the penal code, articles 304 (2) and Decree Law No 21/77 of 18/08/1977 instituting the penal code, articles 21, 24, 82, 83 and 403 (2). Evidence law – Incriminating evidence – Failure to demonstrate the possible conflict between him and his co-accused who incriminates him in addition to his repeated contradiction in his statements is evidence that he responsible of the alleged acts. Criminal law – Armed robbery – It is not a prerequisite that the victim sees the arm or the person who intends to use it be caught in its possession. Instead, the fact that him/her or through others was in the position and has intention to possess, control and use that arm or threatening people with it while it is not available is sufficient Criminal law – Reduction of the penalty – Retroactivity in mitius – He must

benefit the reduction of the penalty based on the one granted by the previous court and sentenced to 5 and ten months based on the law that has been enacted after the commission of the crime since it is the one which provides for the less severe penalty compared to the one which was into effect, though he was not cooperative to the court – Organic Law No 01/2012/OL of 02/05/2012 Instituting the penal code, articles 304 (2) and Decree Law No 21/77 of 18/08/1977 instituting the penal code, articles 21, 24, 82, 83 and 403 (2). Facts: The case started in the Intermediate Court of Gicumbi. Murinzi Olivier, Ndayambaje Augustin Olivier and Niyodusenga Philippe were indicted for attempted armed robbery. Apart from Ndayambaje Augustin Olivier who was acquitted, the Court found all other accused guilty and sentenced them to ten years. Not satisfied of the ruling of the case, they appealed to the High Court, the latter upheld the ruling of the appealed judgment. Dissatisfied of the ruling, both Murinzi Olivier and Niyodusenga Philippe appealed to the Supreme Court. Murinzi pleaded guilty of the crime and seeking forgiveness while Niyodusenga Philippe was lamenting that he was punished for the crime he was not responsible of. The Prosecutor disputed that though Murinzi pleaded guilty and sought forgiveness thereto, he deserves not another reduction of the penalty because he was not cooperative to the court denying the crime while he knew well that he committed it. With regard to Niyodusenga, it pleaded that he accepted to have knowingly signed on the agreement under the names other than his. He concluded that his pleading aims at nothing else apart from denying the crime.

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Held: 1. The fact that that he was found guilty of attempted robbery which was punished by a term of imprisonment ranking from 15 to 20 years but the previous court sentences him to 10 years of imprisonment which is under the penalty provided for by the law implies that he benefited the reduction of the penalty. However, the fact that later on there was enacted the Law providing for the lesser penalty, 6-8 years, his sentence must be in accordance with that law in addition to his guilty plea which is mitigating circumstance; he must be sentenced to 5 years of imprisonment which is also under the penalty provided for by the law.

2. The fact that he does not demonstrate the possible conflict between him and co-accused who incriminates him but rather admits that they knew each other, his contradictions in his statements indicates that they had the same plot of the commission of the crime of which they were found guilty of attempt.
3. The elements of punishable attempt are complete because the fact that they were near by the Bank that they were plotting to rob and waiting for the gun demonstrates that they had already shaped their plot whereby they had even started its execution by breaking into the Bank's fence. The fact that that they did not commit theft therefore was not the result of their intention especially that it is not a prerequisite for the victim to perceive the arm or to seize the latter in the hands of the offender; rather, the fact that at a given time he/ she personally or through others persons was able, had intention of possessing, monitoring and using that arm is sufficient. This is the same case for he who threatens that he possesses an

arm while it is not available. Therefore, the fact that that gun was supposed to be used in that robbery had it not been prevented, implies that they are guilty of attempt thereto.

4. Though he had not been cooperative to court denying the crime while he knew he had committed it, it cannot stop him from benefiting the reduction of the penalty granted by the previous court and grounding on the law providing for the lesser penalty which was enacted after the commission of the crime Appeal filed by Murinzi Olivier has merit in part; Appeal filed by Niyodusenga Philippe has no merit; Appealed judgment changes only with regard to penalties; Murinzi Olivier is sentenced to five years of imprisonment; Niyodusenga Philippe is sentenced to 5 years and ten months of imprisonment They must be immediately released; Court fees to public fund. Statutes and statutory instruments referred to: Organic Law No 01/2012/OL of 02/05/2012 Instituting the penal code, articles 304 (2) Decree Law No 21/77 of 18/08/1977 instituting the penal code, articles 21, 24, 82, 83 and 403 (2). Cases referred to: Plaintiff-Appellee v. Elisha Rawlings, No. 02-4177, United States Court of Appeals, Seventh Circuit, 3/09/ 2003.

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State of North Carolina v. Anthony Jarret, No COA03-1248, North Carolina Court of Appeals, filed 7 December 2004.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] The case started in Intermediate Court of Gicumbi. Murinzi Olivier, Ndayambaje Augustin Olivier and Niyodusenga Philippe were all indicted for attempted armed robbery. In the judgment NO RP 0085/09/TGI/GIC decided on July 28, 2009, the Court found Ndayambaje Augustin Olivier innocent while Murinzi Olivier and Niyodusenga Philippe were all found guilty of the alleged crime. Each one was sentenced to 10 years of imprisonment in consequence (10 years). [2] Dissatisfied of the ruling, Murinzi Olivier and Niyodusenga Philippe appealed to the High Court. The Prosecution also appealed against the decision of the Court with regard to Ndayambaje Augustin Olivier. After the joinder of the appeals in the case NO RPA 0984/09/HC/KIG that was decided by the High Court on March 11, 2011, the High Court found out that appeals of the the accused as well as of the Prosecution had no merit. The appealed judgment was upheld. [3] Both Murinzi Olivier and Niyodusenga Philippe appealed against the judgment to the Supreme Court. [4] The hearing in open court took place on October 26, 2015, Murinzi Olivier was present and assisted by counsel Twagirayezu Christophe while the Prosecution was represented by Niyonkuru Françoise, a National Prosecutor. II. ANALYSIS OF LEGAL ISSUES II. 1. Whether there are grounds to reduce the penalties imposed to Murinzi Olivier [5] Murinzi Olivier pleaded that he had previously pleaded not guilty but then he accepts that he had met Niyodusenga Philippe at Expo 2008 and the latter told him that there was a woman who possessed the money and that they could manage to dispossess her of that money at any occasion they would be lucky to find a gun. In effect, Murinzi Olivier requested Ndayambaje Augustin, his ex-classmate, to find a gun for him. Toward the month of March 2009, Ndayambaje Augustin told

him that the gun was available and that they could get it from Gahunge Emmanuel who was employed by INTERSEC as a security guard at Banque Populaire, Kibari Branch, Byumba. Murinzi Olivier explained that he went together with Niyodusenga Philippe to find that gun because, as a member of Local Defence, it was him who was able to handle guns. However, he added, at their arrival at Byumba, Emmanuel forced them into the conclusion of agreement about returning it back and that he told them that he had initially to help them rob Banque Populaire, Kibari Branch, Byumba and then told them that he was going to bring it. However, instead of coming back with the gun, he came back with two men who arrested them and since then they started denying the crime.

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[6] He ended concluding that their prior defence that they went at Byumba to seek the payment of the money that Gahunde Emmanuel owed them is a lie since all of them knew that they were going to bring a gun and that that was the second time that Niyodusenga Philippe had gone there since he had initially went there together with Ndayambaje Augustin. He ended requesting forgiveness for the crime he committed and praying this Court reduce the penalties to continue with his education. [7] Counsel for MurinziOlivier, Ndengeyingoma Louise, adduced that her client had pleaded guilty and that he requests forgiveness. He requested the Court to consider that as mitigating circumstance so as to show lanienmcy in reducing his penalty based on articles 82 and 83 of Decree-law NO 21/77 of 18/08/1977 instituting the penal code which was into effect at the time of the commission of the crime. [8] The Prosecutor disputed that though Murinzi pleaded guilty and explained clearly its commission and sought forgiveness thereon, the fact that he was uncooperative to the Court while he knew he was the author, it is a cause not to reduce again for him the penalty and uphold the appealed judgment. THE VIEW OF THE COURT [9] Article 403 bis of Decree-law NO 21/77 of 18/08/1977 instituting the penal code which was into effect at the time of the commission of the crime provides that robbery shall be punished by imprisonment of ten (15) years to fifteen (20) years in case the thief was in possession of a weapon whether visible or concealed or if the he was not in possession of it but found in the vicinity of the crime scene. [10] Article 304 paragraph 2 of Organic law NO 01/2012/OL of 02/05/2012 Instituting the penal code which is now into effect provides, "If the thief is in possession of an arm as defined under Paragraph One of this Article, whether the arm is visible or concealed, or if the arm he/she was carrying is found in the proximity of the crime scene, he/she shall be liable to a term of imprisonment of six (6) years to eight (8) years". Article 8 of this Organic law provides, " In case of conflict of two criminal laws including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty" [11] Article 82 of Decree-law NO 21/77 of 18/08/1977 aforementioned which was into effect at the time of the commission of the crime provides that it is the judge who consider the mitigating circumstances either those which preceded, accompanied or followed an offence. In casethose circumstances are considered valid, he must motivate them. Article

83 of this Decree Law provides that in case there are mitigating circumstances the imprisonment ranging from five years to twenty years or above may be reduced to one year. [12] Interrogated before the Prosecution, the witness Ndayambaje Augustin Olivier stated that Murinzi Olivier is the one who requested him to find a gun for him in the robbery of 40.000 US\$ in cooperation with another person he named "Type". Gahunde Emmanuel, as to him, had testified both before the Prosecution and the Judicial Police that the gun in issue had initially to be used for the robbery against Banque Populaire, Kibari branch, Byumba and then to use it in the robbery at

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Kicukiro (identification code 19, 22 and 30) which the reason why Murinzi Olivier and Niyodusenga Philippe came together to take it but unfortunately arrested just before the Bank waiting for it (identification code 31). [13] The case file reveals that apart from before this Court, Murinzi Olivier had denied all the statements made by the witnesses at all stages of the proceedings denying that he had ever commissioned Ndayambaje Augustin Olivier to find a gun for him and that he had never discussed about the plan with Gahunde Emmanuel. He stated that he had only gone to Byumba for the payment of 30 000 Frw that Gahunde Emmanuel owed him and after his arrival the debtor defaulted and he gave him a construction tool in exchange that he had to sell for the payment and give back the difference. He stated that he was together with Niyodusenga Philippe lied about his names, Niyonkuru Patrick that he could not know for which purpose he had gone Niyodusenga Philippe had gone at Byumba (identification code 4-6, 63, 67-68). Hence, the fact that he pleads guilty of the alleged crime and explains its commission and seeks forgiveness and that his statements match with those made by the aforementioned witnesses is evidence beyond doubt that he is guilty of attempted armed robbery. [14] The case file reveals that Murinzi Olivier has been sentenced to 10 years based on article 21, 24 and 403 bis of the Decree-law NO 21/77 of 18/08/1977 as above mentioned which was into force at the time of the commission of the alleged crime provides that armed robbery shall be punished by imprisonment ranging from 15 years to 20 years (identification code 76). The fact that Murinzi was sentenced to the sentence which is under that set by the law implies that he benefited the reduction of the penalty. However, since Murinzi was sentenced, there was enacted Organic law 01/2012/OL of 02/05/2015 as referred to above which provides that armed robbery is punished by the imprisonment from 6 to 8 years. It means that the new law is the one which is applicable in punishing Murinzi because it is the one which is in his interests. [15] The Court finds that since before the previous instances Murinzi Olivier had been sentenced to a reduced penalty, that he pleads guilty and seeks forgiveness again and that he repents must be considered and benefit another reduction of the penalty and be sentenced to the penalty which is under the one provided for by the law. Hence he is sentenced to five years which must be computed since March 16, 2009, the date of his pre-trial detention. It means that he must be released after the delivery of the verdict as he had served his sentence. II. 2. Whether there is incriminating evidence against Niyodusenga Philippe for the alleged crime and whether there are grounds to reduce his penalty in case he would be found guilty. [16] Niyodusenga Philippe disputed that his

appeal is motivated by the fact that he had been punished for the crime he had not committed. He explained that he had gone to Byumba accompanying Murinzi Olivier to ask for the payment of his money so that he could also get paid. He articulated that upon their arrival, he saw him discussing with in charge of security of Banque Populaire de Byumba for two times. However, he added, he could not know what they were discussing about and later on, he took him to the restaurant for the lunch and about 2 p.m, they concluded agreement in which it was stipulated that that man in charge of security was going to give them a construction tool which had to be sold for the payment. He conceded that he had signed under the name of someone else with full knowledge and after the conclusion of that agreement, they got arrested being accused about the gun and he gave explanations that what he

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had signed for was the tool. He added that Murinzi had recanted and pleaded guilty of the crime that he had not committed due to the time he had spent in prison. He stressed that his guilty plea is amatakirangoyi and he falsely incriminate him so as not to be only incarcerated. [17] Asked whether it was the first time that he had ever gone to Byumba, replied that he had once accompanied Ndayambaje Augustin to see her former girl friend who was a secretary of the Banque Populaire of Byumba and that they had passed the night at the boy who had an appointment with Ndayambaje Augustin Olivier but he never known what the appointment was all about, On the matter of whether he was close to Gahunde Emmanuel, he replied that it was the first time that he saw him. Whether he had paid for that tool that he had signed for, he replied that he had never paid any coin. He ended praying the Court to consider his statements denying the crime so that he can be acquitted of the crime because he had not committed it. [18] Twagirayezu Christophe, the counsel for Niyodusenga Philippe stated that the allegations that it his client who was supposed to find a gun has no merit because the negotiations about that started between Murinzi Olivier and Ndayambaje Augustin, which indicates that when he travelled to Byumba, Niyodusenga Philippe did not know the purpose of their trip and that the conspiracy of finding a gun and robbery against the Banque was entered into by Ndayambaje Augustin Olivier and Gahunde Emmanuel who knew the Bank of Kibari, Byumba in the the qualities of the one who has been an employee at that place and of the one in charge of security while Murinzi and Niyodusenga could not know the place as they had been there while they were doing masonry. He continued stating that with regard to 80 000Frw which is alleged to have been paid for construction apparatus that Niyodusenga has signed for has never occurred because he asked him about that and he denied it, which he does it again before the Court. [19] He ended adducing that there has been conspiracy of robbery but failed, it means that the elements of attempted armed robbery that Niyodusenga Philippe is charged with are incomplete. Therefore, the Court must confirm that no crime was committed, so that it can declare that his client is innocent and immediate order his release. However, he added, in case the Court would find it otherwise, then it would sentence him based on the new law 1 because it is the one providing for the lesser penalties compared to the one which was into effect at the time of the commission of the crime. He added that thanks to Niyodusenga Philippe's first offender status, he would benefit the

reduction of the penalty to the time equivalent to that he had spent jailed [20] The Prosecution contended that Niyodusenga Philippe conceded that he had signed on under the names other than his while aware and yill now, he had not demonstrated the possible conflict between him and Ndayambaje Augustin who accuses him, which means that his pleading aims at denying the crime and misleading the Court. This pleading further, the Prosecution added, is stressed by that of the defiance counsel, Twagirayezu Christophe who alleges that Niyodusenga Christophe is innocent but end up requesting this court to determinine his penalties based on the new law which is the one which imposes the lesser penalties compared to the one which was into effect when he committed the alleged crime. Therefore, the Prosecution concluded, it is not comprehensible how, if he is innocent, he could request penalty for him. Therefore, this Court must confirm that Niyodusenga Philippe continues to be uncooperative to the Court and hence uphold the ruling of the appealed judgment. 1Organic law No 02/2012/OL of 02/05/2012 instituting the penal code.

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THE VIEW OF THE COURT [21] Article 403 bis of Decree law No 21/77 of 18/08/1977 instituting the panl code which was into effect at the time of the commission of the crime provides, " Theft shall be punished by imprisonment from 15 to 20 years if the offender was in possession a visible or hidden weapon, although he was not the bearer and whether or weapons were found near the crime scene" [22] Article 304 paragraph 2 of Organic law NO 01/2012/OL of 02/05/2012 instituting the penal code which is now into effect provides, "if the thief is in possession of an arm as defined under Paragraph One of this Article, whether the arm is visible or concealed, or if the arm he/she was carrying is found in the proximity of the crime scene, he/she shall be liable to a term of imprisonment of six (6) years to eight (8) years" while article 8 of the same Organic law provides," in case of conflict of two criminal laws including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty" [23] In his testimony, Ndayambaje Augustin Olivier stated that Murinzi Olivier there is anoither person whom he named "Type" who would help him in their plot of the robbery and Gahunde Emmanuel also testifies that Murinzi Olivier came to take gun being together with Niyodusenga Philippe. He added that he signed them a contract to which Niyodusenga Philippe has signed after impersonifying himself as Niyonkuru Patrick while Murinzi conceded that he left with Niyodusenga Philippe to take a gun that had to be used in the robbery. He declared that he opted for cooperating with him because it was him who knew how to handle guns as he was Local Defence Force Member. [24] The Court finds that Niyodusenga had failed to mention the possible conflict that might have been between him and Ndayambaje Augustin Olivier so that he could have falsely accused him. Insteady, he admits that they are close friends to such extent that he used to accompany him to Byumba to pay a visit to his girl friend and after they passed the night at the house of the boy who had an appoitment with Ndayambaje Augustin but without knowing what was the appoitment about. In addition, with regard to Gahunde Emmanuel, he testified that it was the first time he has seen him, which means that he could not falsely accuse him while

they were not close friends and without any existing conflict between them. Further, he does not indicate the purpose for which he travelled to Byumba since, has it been for the taking money that Murinzi Olivier was to get from Gahunde Emmanuel, as he declares, it would not while Murinzi Olivier was in the good position to bring it to him at Kigali. Hence, his statement is full of contradictions which shows his intention of the denial of the crime. [25] The Court further notes that this contradiction is shown by the declarations of Niyodusenga Philippe that he had never paid for what referred to as "apparatus" in the agreement while in his interrogation before the Judicial Police Officer about whether he had bought that apparatus, he responded, "I was supposed to sell it and bring him money but meanwhile, I had already paid him 80 000Frw (identification code 8). However, him who was a local defence force member does not demonstrate the reason why he committed himself to the sale of that construction apparatus instead of being done by Murinzi Olivier who studied construction and had never gave explanations about the price for that apparatus while he stated that they do not know each other and that he had personally stated that he owed him no money and that he had not give

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the motive of knowingly signing under the names of Niyonkuru Patrick had it not been the tricks so that those who took the gun could not be identified. This statement is full of lies, contradiction and misleading and it emphasizes that the defence is intended to decline the attempted armed robbery that he committed after the conspiracy he entered into with Murinzi Olivier and which was interrupted. [26] Further, the statements of Twagirayezu Christophe, the counsel for Niyodusenga Philippe that the elements of punishable attempt are not complete have no merit because Gahunde Emmanuel at 6h40 is the hour in which Murinzi Olivier and Niyodusenga have been arrested being near by the Bank from in its backyard toward the place which was under reparation site waiting for the gun so as to execute their plan of attacking the staff of the Bank during the hours of closing (identification code 31). This statement is stressed by the detention statement which indicates that it was done at 19h30 (identification code 24 and 25) and the statements of Murinzi Olivier (identification code 5). It implies that they had conspired on the robbery and even had started executing their plan when they broke into the fence of the bank and enter in its backyard whereby they were waiting for the tool which was to lead them to the final step. The fact that they have not committed the robbery was not the result of their intention. They have been rather surprised to see the person who was supposed to bring a gun back with security officers who subsequently arrested them. Hence, in case there is no doubt that such a gun was to be used in the commission of that robbery which was interrupted, it leads to the conclusion that they are guilty of attempted armed robbery. [27] The Court notes that the Law provides that armed robbery occurs when when the thief was in possession of visible or hidden arm or the arm was found in the vicinity of the crime scene. It means that it is not a requirement for the victim to see the arm so that the elements of the crime may be completed because in case such an arm is hidden or has been picked in the vicinity of the crime, it may be possible that the victim has not seen it. However, it does not hinder the qualification of the crime to remain attempted robbery. This means that in case evidence proved that immediately after their arrest

Niyodusenga Philippe and Murinzi Olivier were waiting nothing else in the backyard of the Bank apart from the gun which was to assist then in the robbery against the Bank. Therefore, they must be prosecuted for attempted armed robbery. [28] This is the same opinion that is followed by foreign courts for example whereby the Court of Appeal of Seventh Circuit, the USA which held that "To decide whether a person who has a felony record possesses a gun... it is not enough to ask whether the gun is in his hand or his pocket or even under his pillow or in his desk drawer... To fix the outer limits of the concept of possession in the criminal law, courts employ the notion of "constructive possession", [i.e.], the power and the intention at a given time to exercise dominion and control over the firearm, either directly or through others." Further, the Court of North Carolina held that an armed robbery defendant could be found guilty without finding that he actually possessed a firearm the threatened use of a firearm is sufficient to sustain a conviction. This also stresses that the crime that "To decide whether a person who has a felony record possesses a gun... it is not enough to ask whether the gun is in his hand or his pocket or even under his pillow or in his desk drawer... To fix the outer limits of the concept of possession in the criminal law, courts employ the notion of "constructive possession", [i.e.], the power and the intention at a given time to exercise dominion and control over the firearm, either directly or through others." Plaintiff-Appellee v. Elisha Rawlings, No. 02-4177, United States Court of Appeals, Seventh Circuit, 3/09/ 2003.

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both Murinzi Olivier and Niyodusenga Philippe are prosecuted for must remain attempted armed robbery.³ [29] With regard to the issue of whether Niyodusenga Philippe can benefit the reduction of the penalty, the Court finds that article 304 paragraph 2 of Organic law NO 01/2012/OL of 02/05/2012 instituting the penal code punish the crime of armed robbery by imprisonment from 6 to 8 years. It means that this article is the one which is applicable sentencing Niyodusenga Philippe because it is the one which provides for the lesser penalty compared to article 403 of Decree law NO 21/77 of 18/08/1977 which has been referred to above which was into effect at the time of the commission of the alleged crime which provides for imprisonment ranging from 15 to 20 years. Hence, Niyodusenga must be sentenced to 8 years. [30] The Court finds, however, that though Philippe had not been cooperative to the Court, denying the crime while knowing that there is incriminating evidence against him, this cannot constitute cannot erase his opportunity of having benefited the reduction of the penalty so that he can be sentenced to 5 years of imprisonment, that is, he must be released immediately after the judgment delivery since his imprisonment has started running since March 12, 2009 when he was arrested. III. THE DECISION OF THE COURT [31] Holds that appeal of Murinzi Olivier has merit in part; [32] Holds that appeal of Niyodusenga Philippe has no merit; [33] On Murinzi Olivier and Niyodusenga Philippe, the Court declares that the judgment RPA 0984/09/HC/KIG that was rendered by the High Court on March 11, 2011 is only changed with regard to the penalties; [34] Sentences Murinzi Olivier to 5 years of imprisonment; [35] Sentences Niyodusenga Philippe to 5 years and 10 months; [36] Orders Murinzi and Niyodusenga Philippe immediate release after the pronouncement of the judgment [37] Orders the Court fees to be charged to the public fund. 3

“An armed robbery defendant could be found guilty without finding that he actually possessed a firearm...the threatened use of a firearm is sufficient to sustain a conviction...” Reba State of North Carolina v. Anthony Jarret, No COA03-1248, North Carolina Court of Appeals, filed 7 December 2004.

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