

PROSECUTION v. NYIRAMUGISHA

[Rwanda HIGH COURT – RPAA 0059/14/HC/RSZ (Bakuzakundi, P.J.) September 29, 2014]

Criminal Law – Attempted infanticide – An attempt shall be punishable even if the objective is not achieved on account of a circumstance unknown to the offender – An attempt to commit a felony or a misdemeanour shall be regarded as a felony or a misdemeanour – Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, articles 28 and 29.

Criminal Procedure – Harmonization of sentences within the same jurisdiction over the same offence – In case the court ruled on the same offences and the particularity in the offence commission of the pending case is not set out, the sentences are harmonized.

Criminal Law – Mitigating circumstances – When the offence had minor consequences, the sentence is reduced – Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, article 77 (4).

Facts: The accused gave birth to a baby boy and a week later, she threw him in the maize plantation near Rubyiro's cowshed where she put the baby in the pit, covered it with a stone and went back home. A man who impregnated the accused came back from Uganda where he was working and met her so that she can introduce him the baby, she hide him that she had thrown the baby, but instead, she arranged to get another person's baby to introduce as hers. He knew that she was lying and turned to the local authorities to interrogate her on the whereabouts of the baby.

The accused was charged of abandonment of a child and the Intermediate court of Rusizi reclassified the offence and decided that the elements of the offence she committed constitute the attempted infanticide instead of abandonment of child that she was charged of by the prosecution, and then sentenced her to twenty years of imprisonment. The accused appealed to the Supreme Court, stating that the classification of the offence as decided by the Intermediate Court was wrong, that she committed the abandonment of the child without the intent to kill the baby but to expose him to the sight of the public that could take him to the orphanage.

During the hearing in the High Court, the accused changed her grounds of appeal and stated that her appeal was intending to seek mercy from the High Court so that it reduces the severe penalty inflicted to her by the previous court. With regards to circumstances to consider in reducing her penalty, the accused explained that apart from mitigating circumstances explained by the previous court, it should be considered that she left little kids at home without a caregiver, that she does not know where they are and if possible, she could be released and join them. With regards to this ground, the prosecution states that the appeal of the accused lacks merit because the Intermediate Court of Rusizi that rendered the decision at the first instance granted her the penalty reduction she is requesting for. The prosecutor added that the previous court sufficiently reduced his penalty, considering the cruelty under which the offence was committed, where she dug a pit, put the baby inside and covered up with a stone.

Held: 1. Even though the grounds raised up by the accused as mitigating circumstances were considered by the Intermediate court of Rusizi in reducing her penalty after considering her mitigating circumstances, the High Court finds that the penalty imposition by the Intermediate Court of Rusizi did not comply with the principle of harmonization of sentences inflicted to the convicted of an offence such as that she had committed (harmonisation of sentence in same court for the same offences), while it did not motivate if there is some particularity in its commission that could led the offender to be severely punished comparing to the sentence already imposed by the same court to the

convicted of an offence such as that she had committed, who were sentenced to ten years of imprisonment.

2. The fact that the offence the accused committed had minor consequences as the baby referred to in the case was saved, got medical assistance and healed, the High Court finds that the accused must benefit the reduction of penalty inflicted on her by the appealed judgment. She must also be discharged of the court fees because she is in jail.

Appeal without merit.
Appealed judgment only changes with regards to the sentence.
Accused sentenced to ten years of imprisonment.
Court fees charged to the public treasury.

Statutes and statutory instruments referred to:

Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, articles 28, 29, 76, 77, 78 and 143.

Law n°13/2013 of 24/5/2013 relating to the code of criminal procedure, article 191.

Law n° 15/2004 of 12/6/2004 relating to evidence and its production, article 3.

Case referred to:

Prosecutor v. Mukaniyonsenga, RP 0024/14/TGI/RSZ, rendered by the Intermediate Court of Rusizi on 28 March 2014.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 03 June 2013, Nyiramugisha Joséphine gave a birth to a baby boy and a week later, she threw him in the maize plantation near Rubyiro's cowshed and she went back home.

[2] Ndungutse David who impregnated Nyiramugisha Joséphine came back from Uganda where he was working and met Nyiramugisha Joséphine for her to introduce him the baby, she hide him that she had thrown the baby and arranged to get another person's baby to introduce as hers. He knew that she was lying and turned to local authorities to interrogate Nyiramugisha Joséphine on the whereabouts of the baby.

[3] The Judicial Police started preliminary investigations and ended by transferring the case to the prosecution. After conducting supplementary investigation, the prosecution filed the case to the court against Nyiramugisha Joséphine for abandonment of a child.

[4] In the case RP 0030/14/TGI/RSZ rendered on 23 April 2014, the Intermediate court of Rusizi reclassified the offence and decided that the elements of the offence Nyiramugisha Joséphine committed constitute the attempted infanticide instead of abandonment of child that she was charged of by the prosecution. The court sentenced Nyiramugisha Joséphine to twenty years of imprisonment and court fees were charged to the public treasury. Not satisfied by the decision of the court, Nyiramugisha Joséphine appealed to the High Court Rusizi Chamber, where the case was registered under RPA 0059/14/HC/RSZ.

II. ANALYSIS OF LEGAL ISSUES

In the case, the legal issue to be analysed and decided upon by the court is to know whether the guilty plea and forgiveness seeking of the accused should serve as mitigating circumstances.

[5] In her appeal submissions to the High Court, Nyiramugisha Joséphine states that the classification of the offence as decided by the Intermediate Court is wrong, that she committed abandonment of the child without the intent to kill him but to expose him to the sight of the public that could take him to orphanage. She added that she made all that when his husband left her alone in the rented house where she stayed with two kids that hardly got the food and she found that she could not find means to feed the other baby.

[6] In her written submissions, Nyiramugisha Joséphine keeps on explaining that in being misled, basing on the statements made by the man who rescued the baby, neither the judicial police, the prosecution nor the court conducted investigations to find the place where she left the baby so that another person takes him to the orphanage. She added that after such long, it could not be possible to find alive a baby thrown into the pit as alleged by the person who found him.

[7] During the hearing in the High Court, Nyiramugisha Joséphine changed her grounds of appeal and stated that her appeal was intending to seek mercy from the High Court so that it reduces the severe penalty sentenced to her by the previous court. With regards to circumstances to consider in reducing her penalty, the accused explained that apart from mitigating circumstances explained by the previous court, it should be considered that she left little kids at home without a caregiver, that she does not know where they are and if possible, she could be released and join them.

[8] With regards to this ground, the prosecution states that the appeal of Nyiramugisha Joséphine lacks merit because the penalty reduction she is requesting the High Court, she already got it from the Intermediate Court of Rusizi that rendered the decision at the first instance. The prosecutor added that the previous court sufficiently reduced his penalty, considering the cruelty under which the offence was committed, where Nyiramugisha Joséphine dug a pit, put the baby inside and covered up with a stone.

[9] During her interrogation of 11 January 2014 in the judicial police, Nyiramugisha Joséphine explained that when she threw the baby aged of two weeks in the maize plantation, her intention was to expose him to anyone who could take him to his/her home, because she had no means to look after him and the man who impregnated her had left to unknown place of Uganda and she denied to have covered the pit. When a Judicial Police officer asked her the reason why she did not abandon the baby to a public place such as Sector office, Police station or religious home if she actually intended to let the baby to someone's hands, Nyiramugisha Joséphine replied that she made a mistake (mark7).

[10] During her interrogation of 13 January 2014 in the judicial police, at mark 8, Nyiramugisha Joséphine acknowledged to have put the baby in the pit and then covered it with a stone. She repeated the same statements in hearing in the Intermediate Court as indicated on page 7 of the minute of hearing of 13 March 2014. When Nyiramugisha Joséphine was asked what she intended when she covered the pit where she put the baby with the stone, she kept silent.

[11] The statements of Nyiramugisha Joséphine made in the judicial police and before the Intermediate Court of Rusizi are confirmed by Hategekimana Emmanuel at mark 14, where he states that he came when he heard people shouting that they found a baby buried and when he reached where the baby was in a pit covered by a stone, he took him off. He added that as the baby was so cold because of rain, he took him to "Centre de santé Islamique", where he got transferred to

Mibilizi hospital. The baby passed two weeks there, under blood transfusion, reanimation and a warm machine.

[12] When analysing the poverty as averred by Nyiramugisha Joséphine and the way she hide that she was pregnant until she gives birth as she explains in the judicial police; considering also that she did not look for a nice person who could take care of the baby after she explains him/her her economic situation, but rather she put the baby into a pit dug in the maize plantation, covered it with a stone and went away without looking back to see if someone had rescued the baby in order to avoid that he passes night there and succumb to the coldness or be killed by wild animals; considering that when Ndungutse David (mark10-14) who acknowledges to be the father of the baby, came back from Uganda asked Nyiramugisha Joséphine where was the baby and she did not want to tell him the truth but went to take someone's baby and put her on the back, pretending to be hers, until the baby's mother came to recuperate him; being confused, Ndungutse Davide went to the Sector office to report the case against Nyiramugisha Joséphine and then the case was known; analysis of all these matters led the High Court to find that the previous court explained enough in paragraph 8 at page 2 of the case RP 0030/14/ TGI/RSZ, that Nyiramugisha Joséphine was intending to commit infanticide but could not fulfil it for circumstances unknown to her.

[13] Article 28 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code provides that an attempt shall be punishable even if the objective is not achieved on account of a circumstance unknown to the offender. Paragraph 29 of the Organic Law n° 01/2012/OL of 02/05/2012 provides that an attempt to commit a felony or a misdemeanour shall be regarded as a felony or a misdemeanour. However, its paragraph 2 provides that the judge may reduce penalties for the attempt according to the circumstances in which the attempt occurred. Considering the above mentions provisions of the Law, the High Court finds that the offence Nyiramugisha Joséphine committed is punished by article 143 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, providing that a person who kill his/her biological or adopted child shall commit infanticide and shall be punishable to life imprisonment.

[14] As ground of appeal, Nyiramugisha Joséphine requests the penalty reduction, but as mentioned in paragraph 9 and 10 at page 3 of the judgment RP 0030/14/TGI/RSZ, it is well explained that Nyiramugisha Joséphine should have been sentenced to life imprisonment basing on incriminating evidences such as her guilty plea, but due to mitigating circumstances considered by the Intermediate Court basing on article 76 and 77 of Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code (the fact of being the first offender and the fact that she pleads guilty and seeks forgiveness), the sentence was reduced to twenty years of imprisonment based on the provisions of paragraph 1 of article 78 of the Organic Law n° 01/2012/OL above mentioned, that provides that when there are mitigating circumstances, life imprisonment or life imprisonment with special provisions is replaced by a penalty of imprisonment of not less than ten years.

[15] However, even though the grounds raised by Nyiramugisha Joséphine as mitigating circumstances were considered by the Intermediate court of Rusizi in reducing her penalty after considering her mitigating circumstances, the High Court finds that the penalty imposition did not comply with the harmonization of sentences already imposed by the Intermediate Court of Rusizi to the convicted of an offence such as that she had committed (harmonisation of sentence in same court for the same offences), while it did not motivate whether there was some particularity in its commission that could led the offender to be severely punished comparing to the sentence already

inflicted to other convicted of the offence such as the one she had committed¹, who were sentenced to ten years of imprisonment.

[16] Considering the above mentioned holdings and the fact that the offence Nyiramugisha Joséphine committed had minor consequences (paragraph 4 of article 77 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code) as the baby referred to in the case was saved, got medical assistance and was healed, the High Court finds that the sentenced inflicted on Nyiramugisha Joséphine in the appealed judgment RP 0030/14/TGI/RSZ must be reduced. Considering the provisions of article 191 paragraph 2 of the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure, Nyiramugisha Joséphine must also be discharged of the court fees because she is in jail.

III. THE DECISION OF THE COURT

[17] Admits Nyiramugisha Joséphine's appeal because it respected the procedure.

[18] Decides that the judgment RP 0030/14/TGI/RSZ rendered by the Intermediate Court of Rusizi on 23 April 2014 only changes with regards to the sentence, Nyiramugisha Joséphine is sentenced to ten years of imprisonment.

[19] Orders that Nyiramugisha Joséphine is discharged of the court fees as she is in jail, they are charged to the public treasury.

¹In the case RP 0024/14/TGI/RSZ rendered by the Intermediate Court of Rusizi on 28 March 2014, Mukaniyonsenga Frolence who committed the same offence as Nyiramugisha Joséphine was convicted, with same mitigating circumstances as those considered for Nyiramugisha Joséphine, basing on same provisions of law in sentence imposing, was convicted to ten years of imprisonment while Nyiramugisha Joséphine was sentenced to twenty years of imprisonment.