

## RE N.J.

[Rwanda HIGH COURT – RPA0787/15/HC/KIG (Kaliwabo, P.J., Mukakalisa and Kabagambe, J.) October 30, 2015]

*Criminal Law – Child defilement – Interpretation of articles 190 and 165 of the Organic Law N°01/2012 of 02/05/2012 instituting the Penal Code – The fact that article 190 of the Organic Law N°01/2012 of 02/05/2012 instituting the Penal Code uses the word child defilement instead of rape which is mentioned in article 165 of this Organic Law, this does not mean that the child was not raped since she is considered as a minor with no capacity to decide on sexual intercourse, and this incidence is also considered as rape.*

*Criminal Law – Right to abortion and its benefits – A child who has been defiled has right and interests to abort as long as she was impregnated as a result of defilement.*

**Facts:** N.J. filed a case in the Intermediate Court of Nyarugenge requesting that her daughter of 13 years old called I.C be entitled the right to abortion since she was impregnated through defilement after being given alcohol. The Intermediate Court of Nyarugenge rejected the request of N.J. basing on the fact that there was no criminal judgment which convicted the suspect. The Court also stated that it is also possible for someone to be pregnant without having sexual intercourse. In addition to that, the court based on the fact that N.J. did not prove that I.C. has complications from continuous pregnancy which seriously jeopardizes her health.

N.J. lodged an appeal to the High Court stating that acts related to sexual intercourse that were committed to her daughter has to be qualified as child defilement while the judge did not explain how she was impregnated.

The prosecution states that article 165 of the Organic Law N°01/2012 of 02/05/2012 instituting the Penal Code in Rwanda entitles the right to abortion to a woman who was raped and that this does not concern a child who was defiled, therefore this article cannot be interpreted together with article 190 of the Organic Law above mentioned.

**Held:** 1. The fact that article 190 of the Organic Law N°01/2012 of 02/05/2012 instituting the Penal Code uses the word child defilement instead of rape which is mentioned in article 165 of this Organic Law, does not mean that the child was not raped since she is considered without discernment ability as far as sexual intercourses are concerned, therefore this is also considered as rape.

2. A child who has been defiled is entitled the right and has interests to abortion as long as she was impregnated through defilement. Therefore, I.C. has the right to abortion.

**Appeal has merit.  
Appealed case is reversed.  
I.C. has right to abortion.  
The court fees 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 165(1) and 190.

The Protocol to African Charter on Human and People's rights on the rights of Women in Africa, article 14(2)C.

**No case law was referred to.**

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] I.C. of 13 years old, says that she was impregnated by Nizeyimana Bruce through rape after giving her an alcoholic drink. Thereafter, her mother N.J. filed the case at Intermediate Court of Nyarugenge requesting that court to grant her daughter the permission to exercise abortion since she was raped and the pregnancy was a threat to I.C.'s life. The Intermediate Court of Nyarugenge rejected N.J.'s request on the ground that there was no criminal charge yet convicting Nizeyimana of a crime of rape against I.C.; that it could as well be possible to be pregnant without being raped and that there was no evidence submitted by N.J. proving that pregnancy was a threat to I.C.'s health.

[2] On 8 October 2015, N.J. appealed on the grounds that sexual intercourse engaged with I.C. aged 13 years, could not be interpreted in any other way than rape and that the judge did not describe any other way through which I.C. got pregnant.

[3] The prosecution argues that according to article 165 of the Organic Law instituting the Criminal Code of Rwanda, only a woman pregnant as a result of rape is entitled to request for an authorization to abort and that the above article does not concern a defiled child, therefore it cannot be linked with article 190 of the same code cited above.

[4] Legal issues to be examined by the court in this case include:

- The prosecution's opinion on whether article 165 of the Organic Law instituting the Penal Code of Rwanda does not provide for child defilement;
- Whether I.C. was raped;
- Whether I.C. can be granted the right to abort.

### **II. ANALYSIS OF THE LEGAL ISSUES**

#### **✓ The prosecution's opinion regarding right to abort by I.C.**

[5] The prosecution argued that the exemption from criminal liability for the offence of abortion provided in article 165(1<sup>o</sup>) of Organic Law N<sup>o</sup>01/2012/OL of 02/05/2012 instituting the Penal Code, concerns only women impregnated through rape and it does not apply to the offence of Child defilement which is provided for by article 190 of the same code. The prosecution concludes that rape and child defilement are two different offences thus article 165 cannot be applicable to the situation of I.C. of 13 years of age who was defiled and impregnated.

[6] The right for abortion claimed by I.C. is based on the fact that she was engaged in sexual intercourse at the age of 13 years and thus an offence of child defilement provided for by article 190 of Organic Law instituting the Penal Code of Rwanda that "Child defilement

means any sexual intercourse or any sexual act with a child regardless of the form and the means used”. This the ground I.C. relies on to request authorization to carry out abortion with reference to article 165 of the same code which provides various conditions under which a pregnant woman can be permitted to abort, one of those being in circumstances whereby a woman was unwillingly impregnated as a result of rape.

[7] The word [Umugore] in Kinyarwanda, [Woman] in English, [Femme] in French was continuously repeated in the Prosecution’s arguments with the aim to describe that there is no child stated in the above provision of article 165, rather only women are granted the right to exercise abortion in the case of rape.

[8] The Court finds that the confusion between child defilement and rape is resolved by the fact that in the occurrence of both offences, there is no consent of the victim. With regard to a child, when he/she is under 18 years, he/she is considered to be a minor with no capacity to decide on sexual intercourse, and in this case, it is also assimilated to rape. Therefore, In spite of the fact that article 190 of the Penal code stated above mentions the word “child defilement” instead of “rape” as mentioned in article 165 of the same code, it does not change the fact that a child is raped since his/her consent is ever absent.

[9] The above is also supplemented by the Rwanda National Protocol for operations of exemptions for abortion in the Penal Code, set out by the Ministry of Health in 2012, where it is provided at page 9 that cases of young women who become pregnant while they are less than 18 years of age should also be treated as rape cases<sup>1</sup>.

**Determining whether I.C. was raped and whether this could be a basis for granting the permission to carry out abortion.**

[10] N.J. and her lawyers challenged the decision of the Intermediate Court of Nyarugenge which deprived I.C. the right to abort her pregnancy which resulted from rape, because as long as there was no doubt on I.C.’s age, the Court could not wait until the accused is found guilty. Furthermore, they argued that there is no doubt that I.C. is pregnant as it was clarified by the medical report submitted after her medical test carried out at Muhima Hospital on 27 October 2015, whereby Dr. Kajeneza Delphine affirmed that I.C. was 18 weeks and 3 days pregnant.

[11] The lawyers of N.J. added that they criticize the appealed Court decision whereby it held that a woman could become pregnant without necessarily being raped, without however clarify other means by which I.C. might have become pregnant than being raped. Her lawyer furthermore argued that the right N.J. seeks on behalf of her daughter I.C. is provided for by article 165 of the Organic Law instituting the Penal Code of Rwanda as well as the International conventions ratified by Rwanda.

[12] The Court finds that pursuant to articles 190 and 217 of the Organic Law mentioned above, it is provided that a child is any person under eighteen (18) years unless provided otherwise by other laws.

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<sup>1</sup> Young women under the age 18, who become pregnant are also considered as child defilement according to Article of Law N°54 of 14/12/2011 relating to the rights and the protestation of children and article 190 of the penal code, and should be treated as rape cases.

[13] The fact that I.C. was born on 12 July 2002 as evidenced by her Birth Certificate issued on 20<sup>th</sup> August 2015 by the Executive Secretary of Kicukiro Cell, this indicates that she is 13 years old.

[14] The defilement of I.C. is indicated by the medical report which states that I.C. lost her virginity and is also pregnant<sup>2</sup>. Therefore, this report contradicts the first instance court's decision which held that a woman could become pregnant without necessarily being raped, without describing any other ways through which I.C. could have been pregnant of the fetus she requests to abort.

[15] Basing on I. C.'s age written on her Birth Certificate and the doctor's report mentioned above, the Court finds that the crime committed against her is qualified as child defilement as provided for under article 190 of the above mentioned Organic Law, which in other words is rape.

[16] The Court finds that article 165 of Organic Law N<sup>o</sup>01/2012 of 02/05/2012 instituting the Penal Code provides that "There is no criminal liability for a woman who commits abortion and a medical doctor can help a woman to abort if one of the following conditions is met: 1<sup>o</sup> When a woman has become pregnant as a result of rape (...); the exemption from criminal liability under items 1<sup>o</sup>, 2<sup>o</sup> and 3<sup>o</sup> of Paragraph One of this article shall be permitted only if the woman who seeks abortion submits to the doctor an order issued by the competent Court recognizing one of the cases under these items".

[17] The court also finds that article 14(2) C of the Protocol to African Charter on Human and People's rights on the rights of Women in Africa ratified by Rwanda and domesticated by Presidential Order N<sup>o</sup>05/01 of 03/05/2015 reserving article 14.2.c, provides that State Parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault and rape<sup>3</sup>.

[18] The Court therefore finds that N.J. has the right to request for an abortion on behalf of I.C. because it is evident that I.C. was defiled at the age of 13 years, and child defilement is considered as rape regardless of any mean used due to the absence of the child's consent in the act of sexual intercourse.

✓ **In regard to I.C.'s interests/benefits to request for abortion.**

[19] N.J. explained before the Court that I.C. was uncomfortable with her pregnancy because it hindered her from returning back to school, and furthermore, she later was frustrated to the extent that she tried to illegally abort through the use of some drugs that are likely to endanger her life. The Court asked I.C. (who was summoned for informational purpose) if it was her wish to abort and her reasons for that, and she said that the pregnancy embarrasses her among her fellow children and hinders her from pursuing her studies.

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<sup>2</sup>Examination form in case of alleged rape or other sexual offence, made by Kacyiru Police Hospital on 07/30th /2014: pregnancy positive, hymen not intact, multiple old tears.

<sup>3</sup>Article 14(2) C of the Protocol to African Charter on Human and People's rights on the rights of Women in Africa: States Parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus. See [http://www.achpr.org/files/instruments/womenprotocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/womenprotocol/achpr_instr_proto_women_eng.pdf), accessed on 28<sup>th</sup> October 2015.

Furthermore, she says that she was defiled by a person called “Bruce” after being given an alcoholic drink called “coffee” and hence she was consequently defiled unconsciously.

[20] Basing on the age of I.C. who is 13 years old, a pupil in Fifth form of Primary school (P.5), the Court finds no doubt that her pregnancy embarrasses her as she declares because she is still young. This assertion is emphasized by the fact that she tried to illegally abort as her mother stated in court. The Court also finds that, it is difficult for I.C. to assume parental responsibility at the age of 13 years consideration made of the majority age which is 21 years as provided for by the Rwanda Civil laws whereby an individual is able to assume parental responsibilities as well as 18 years of age whereby a person is allowed to decide on sex related issues as provided for by other laws.

[21] The Court also finds with merit the need for I.C.’s to pursue her education, given that she is a primary five (P.5) pupil; thus giving birth and caring of the baby would obstruct her education as well as her life in future.

[22] The Court finds that I.C. who is 13 years old has the right and interest to abort as requested for by her mother, N.J., because her pregnancy was a consequence of child defilement as explained above. The Court also finds that as approved by Doctor Kajeneza Delphine who carried out tests on her on 27<sup>th</sup> October 2015, the fetus I.C. requests to abort has not yet reached 22 weeks provided for by the “National Protocol for operations of exemptions for abortion in penal code 2012”.

[23] As requested by N.J. and her lawyers, the Court rules that I.C.’s abortion should be carried out at Kacyiru Police Hospital because it holds the capacity to do so. Furthermore, this court’s decision must be immediately communicated to the concerned Director of the Hospital in order to carry out the abortion before the fetus reaches 22 weeks as explained above.

### **III. THE DECISION OF THE COURT**

[24] The Court Affirms that N.J.’s appeal is well-founded.

[25] The Court declares the ruling of the judgment RP0561/15/TGI/NYGE modified.

[26] The Court declares that I.C. has a right to carry out abortion.

[27] The Court orders Kacyiru Police Hospital through its representative director, to carry out the act of abortion for I.C. immediately before the fetus reaches 22 weeks.

[28] The Court orders this judgment to be communicated to the Director of Kacyiru Police Hospital with immediate effect.

[29] The Court orders that the Court’s fees incurred are charged to the Government Treasury since this case was filed in the interests of the child.