

PROSECUTION v. NSHIMIYIMANA

[Rwanda SUPREME COURT – RPAA0034/10/CS (Mutashya, P.J., Kanyange and Hitiyaremye, J.)
8 November 2013]

Criminal procedure – Evidence beyond any reasonable doubt – When there exists no reliable evidence proving beyond reasonable doubt that the accused committed the offence, he/she shall be acquitted – Law n°13/203 of 24/05/ 2013 relating to the Code of criminal procedure, article165.

Evidence law – Testimony – When eye witnesses’ testimonies contradict about what they saw at the same period of time, their testimonies should not constitute evidence beyond any reasonable doubt to convict the accused – Law n° 15/2004 of 12/06/ 2004, relating to evidence and its production, articles 62 and 65.

Facts: The accused was charged with the child defilement committed against a one and a half year old child. The charges are based on witnesses’ testimonies and a medical report which provided evidence of excessive redness around the victim’s vaginal orifice. The Intermediate Court of Muhanga found him guilty, sentenced him to 15 years of imprisonment, and fined him one hundred thousand Rwandan francs (100,000 Rwf). The accused appealed to the High Court, chamber of Nyanza, which also sustained the appealed judgment.

The accused appealed to the Supreme Court, alleging that the Court convicted him based on the eye witnesses’ testimonies which indicated that he spent the day with the child while none of them saw him committing the crime, and the medical report proving that the child was actually sexually abused which could not link the accused to that abuse.

The Prosecutor argued that the Court relied on the eye witnesses’ testimonies, because they testified as to their knowledge. He added that the medical certificate does not cause any doubt, since the physician demonstrated what he found on the child’s sex especially that the Court relied on other evidence.

Held: 1. When eye witnesses’ testimonies contradict on what is observed at the same period of time, the testimonies should not be considered to have proved beyond any reasonable doubt that the accused is guilty, especially that none of the witnesses actually saw the accused committing the crime or at least heard about it from a person who has witnessed the crime at the scene.

2. In criminal cases, any doubt benefits the accused. If there is no reliable evidence proving beyond reasonable doubt that the accused committed the offence, she/he is acquitted. The court allows an appeal on merit because of doubt created by the contradiction in the testimonies of the respondent’s witness.

**Appeal granted.
Conviction for the child defilement quashed.
Immediate release of the appellant ordered.
Court fees to the public treasury.**

Statutes and statutory instruments referred to:

Law n°13/203 of 24/5/ 2013 relating to the Code of criminal procedure, article 165.

Law n° 15/2004 of 12/6/2004 relating to evidence and its production, articles 62, 65 and 98.

No case referred to.

Authors cited:

H. Bosly et D. Vandermeersch, Droit de la procédure pénale, 4^e édition, p.1316, §5.

Judgment

BRIEF BACKGROUND OF THE CASE.

[1] On 20 May 2003, a one and a half year old girl named N.B walked to Gatete's home where Nshimiyimana was employed. When her mother went to seek for the child, Nshimiyimana brought her sleeping in his arms, and she carried her on her back. U.F, the mother of the child, says that in the evening, when she was giving her a bath, the child cried when she touched her genitals. She observed and noticed a small wound and sperms inside. She immediately suspected that she was sexually abused by Nshimiyimana Samuel and reported the case to the police station. Investigations were carried out and the case was filed to the Intermediate Court of Muhanga.

[2] The Intermediate Court of Muhanga found the accused guilty. A verdict was rendered on 3 October 2008, sentencing him to fifteen years (15) of imprisonment and fine of one hundred thousand Rwandan francs (100,000 Rwf).

[3] The court considered the fact that the accused acknowledged that the child spent the day with him, as confirmed by the witnesses and the medical report which provided the evidence that the child's genital were damaged.

[4] Unsatisfied by the decision, the accused appealed to the High Court, chamber of Nyanza, where the appealed judgment was sustained. In deciding the case, the court relied on the testimonies of the prosecution's witnesses and on the medical report which proved that the child's genital was damaged.

[5] Nshimiyimana Samuel appealed to the Supreme Court, alleging that the Court wrongfully convicted him. He explained that the court based its decision on witnesses' testimonies which indicated that he spent the day with the victim, although none of them actually saw him committing the offence and the medical report proving that the child was indeed damaged but which cannot link the accused to that abuse.

[6] The public hearing took place on 9 October 2013 and both parties were present. Nshimiyimana Samuel was assisted by counsel Olivier Mukwende and the prosecution was represented by Béatrice Ntawangundi, the National Prosecutor.

II. ANALYSIS OF LEGAL ISSUE.

Whether the evidence considered by the High Court were beyond any reasonable doubt to convict Nshimiyimana Samuel.

[7] Nshimiyimana Samuel argues that he appealed because the court convicted him basing on the testimonies of the child's mother and her daughter who do not testify that they saw him committing the crime, apart from saying that they saw him holding the child in his arms. He adds that none of other witnesses interrogated, actually accused him apart from repeating what the child's mother told

them. He argues that U.F falsely accused him because of conflict she had with his employer. He adds that she might have interest in falsely incriminating him because sometimes he used to lend her money he retained from the sale of clothes for his employer, which she hardly refund him and sometimes this led them to conflicts.

[8] Regarding the medical report, Nshimiyimana argues that although it proves that the victim's genital was swollen, the child defilement could not be the only cause of the swelling especially that the physician was doubtful of the fact that the victim was sexually abused. The physician attested that the victim's genital had sore which caused her a lot of pain. Therefore, if the child was sexually abused, she would have cried and Gatete who was sleeping in the same place at that time, should have heard her.

[9] Mukwende, Nshimiyimana's counsel, states that he does not understand why U.F did not immediately take the victim to the physician, instead of waiting for two days, when she noticed that she was sexually abused.

[10] The Prosecutor states that the court relied on the witnesses' testimonies, because they testified as to their knowledge. He further argued that based on article 65 of the Law n° 15/2004 of 12/06/2004 relating to evidence and its production; only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence.

[11] The Prosecutor argues that there is no doubt on the medical report because the physician demonstrated what he found on the child's sex. Moreover, the court relied on other evidence.

THE VIEW OF THE COURT

[12] In convicting Nshimiyimana Samuel, the High Court considered the witnesses' testimonies of the victim's mother and U.G her sister. The Court also relied on the medical report proving that the child sex had signs of the child defilement.

[13] With regards to the testimonial evidence, article 62 of the Law n° 15/2004 of 12/06/ 2004 relating to evidence and its production, attests that testimonial evidence includes the statements made in court by an individual regarding what he or she personally saw or heard that is relevant to the object of trial. Article 65 of that law stipulates that only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence. The court shall not be influenced by the number of witnesses; it shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonies.

[14] In this case, the court finds that among the witnesses interrogated, those accusing Nshimiyimana Samuel include U.F, the victim's mother. She says that on the day the crime was committed; she asked where her daughter was and returned to the house after being told that she was with Nshimiyimana Samuel. She adds that after she asked Samuel to bring her daughter, he brought her sleeping in his hands. While she was giving a bath to the child, the latter cried when she touched her genital. She observed and saw small wounds and sperms on the child's genitals and immediately went to inform Samuel's employer, Gatete. Another witness interrogated is U.G, the other daughter of U.F; who confirms that they looked for the child everywhere but could not find her. When her mother started cursing her, they saw Samuel holding her in his arms from Gatete's home. She pursued stating that it was evening when her mother noticed that her daughter was sexually abused and immediately went to inform Samuel's employer. This is contrary to the statement of her mother, that she asked Samuel to bring her child (as she was aware that the victim was with him).

[15] The Court finds that the contradicting testimonies do not constitute evidence, beyond any reasonable doubt, to make Nshimiyimana Samuel guilty. This is especially true considering that neither U.G nor U.F confirm that they saw him committing the offence or heard it from those who witnessed it. Moreover, Gatete, Nshimiyimana Samuel's employer states that he was at home and did not see or hear anything.

[16] The Court also finds that in the testimonies of Gatete and his wife Uwizeye, they state that U.F came to their home in the morning, saying that her daughter was sexually abused by their employee. However, during the interrogation, U.F stated that she went there immediately in that same evening, after noticing that her daughter has been abused. The contradiction of U.F on the time creates doubt on what abused her.

[17] The medical report shows an exaggerated redness of the vulva around the vaginal orifice. The Court finds that the exaggerated redness does not prove that it was caused by sexual violence or that Nshimiyimana is guilty. This is especially true that if he had sexually abused the child as grave as proved by the physician, the child would have cried and her mother and Gatete who were in the vicinity could have heard her.

[18] For this ground, article 98 of the Law n° 15/2004 of 12/06/ 2004 relating to evidence and its production, which provides that the court is not bound to follow the opinion of experts if it is contrary to their conviction, the Court cannot rely on the medical report to confirm that what was found on the child's vagina was actually caused by Nshimiyimana Samuel.

[19] The court also finds that there is uncertainty in determining whether actually N.B had that redness of the vulva for two days, bearing in mind that her parent stated that the offence was committed on 20 May 2003 ,but took the victim to the Doctor on 22 May 2003 and that is when the medical report was established. The Court wonders why the victim's parent took that long to take her child to the hospital while her child was in agony.

[20] Article 165 of the Law n°13/2013 of 24 May 2013 relating to the code of criminal procedure provides that the benefit of doubt must be given in favour of the accused. If the proceedings are conducted as completely as possible, but do not enable judges to find reliable evidence proving beyond reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal. In this case, based on Nshimiyimana's defence, all evidence raise doubt, therefore, he must be acquitted.

[21] Doctrines on criminal procedure also state that none can be convicted at the end of the trial, unless the prosecution has proved beyond any reasonable doubt of his guilty¹.

III. THE DECISION OF THE COURT

[22] Decides that Nshimiyimana Samuel's appeal has merit.

[23] Acquits Nshimiyimana Samuel of the crime he was charged of, because of doubt.

[24] Overrules Judgment RPA 0219/08/HC/NYA rendered by the High Court, Chamber of Nyanza.

¹Henry Bosly et Damien Vandermeersch, *Droit de la procédure pénale*, 4^e édition, p. 1316, § 5.

[25] Orders immediate release of the appellant.

[26] Orders the court fees to be charged to the public purse.