

PROSECUTION v. MUKANTAGARA ET AL

[Rwanda SUPREME COURT – RPA0196/11/CS (Kayitesi R., P.J., Mukandamage and Rugabirwa, J.) November 15, 2013]

Criminal law – The formation of criminal gang – A criminal gang is an independent crime different from those committed in this context or by that gang – The formation of criminal gang does not exist when it is intended to commit a crime against an individual – Law n° 01/2012 of 02/05/2012 instituting the penal code, article 681.

Criminal law – Attempt to murder – There is an attempt to offence when the plot to commit an offence has been demonstrated by observable and unequivocal acts constituting the beginning of the offence – Decree Law n° 21/77 of 18/8/1977 instituting the penal code as modified and complemented to date, article 21.

Criminal law – Penalty reduction – It may apply when the offence has minor consequences – Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, article. 77(4⁰).

Facts: Mukantagara and Nsanzimana were charged with attempted murder. The Prosecution relied upon evidence gathered from witnesses, who abandoned the conspiracy and notified security officials, and money seized from Mukantagara. The money was to be given to the killers as payment in advance. The High Court convicted both the accused and sentenced them to life imprisonment. Both appealed to the Supreme Court, Nsanzimana arguing that he was unfairly convicted of an attempt to murder rather than the formation of a criminal gang. Mukantagara contended that she was unduly convicted of attempt to murder while she only intended to get her father-in-law imprisoned.

The Prosecutor contended that the committed crime is not the formation of criminal gang but rather the attempted murder as the accused have confessed in the judicial police and the prosecution, acknowledging that they had intended to kill Ndwanaye and explaining in details how it was plotted. Regarding the statements made by Mukantagara that her intent was to make Ndwanaye imprisoned rather than killing him, the Prosecutor argued that it is groundless as she does not demonstrate the offence which might cause his father-in-law to be imprisoned.

Held: 1. The fact of forming a criminal gang is an independent crime different from those committed in this context or by that gang. It is also clear that for that crime to be committed, it is necessary that people group together with the purpose to commit an offence against persons or their property. This means that when people form an association in order to offend an individual, they should not be found guilty of an offence against public security. Thus, it cannot be considered as the formation of a criminal gang if there is no recognised criminal gang that was formed by the accused and that the acts of which they are convicted, are not meant to disrupt public security, and there are no other known offences that they have committed together.

2. It is considered as attempt to murder, when there are observable and unequivocal acts, constituting the beginning of murder. Thus, the fact that Mukantagara paid for the transportation

of Ndwaniye to Kigali; Nsanzimana guided those who were to transport him to his residence in Nyaruguru; they got him to Kigali so that Mukantagara could see him, and then pay them the advance payment of the agreed reward so that they would kill him; and the plot was interrupted by the fact that Nyirinkindi withdrew from that plot and informed the police that arrested them before Ndwaniye was killed. Therefore, Mukantagara and Nsanzimana are found guilty of attempted murder.

3. The accused may benefit the penalty reduction when the offence they committed caused minor consequences. Thus life imprisonment that was sentenced to the accused is reduced to fifteen years of imprisonment each.

**The appellants convicted of attempted murder.
Each appellant is sentenced to 15 years of imprisonment.
The appealed judgment is overturned but only with regards to the length of the penalty.**

Statutes and statutory instruments referred to:

Organic Law n^o 01/2012/OL of 02/05/2012 instituting the penal code, article 77, 40 and 681.

Decree Law n^o 21/77 of 18/8/1977 instituting the penal code as modified and complemented to date, art 21, 281, 312.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Mukantagara Séraphine was in conflict with her father-in-law Ndwaniye Thacien, because of houses which Ndwaniye alleges that Mukantagara misappropriated while he was in prison. When he was released, she refused to give them back to him. This led Ndwaniye to file a claim in Court. The court ruled against Mukantagara and she appealed.

[2] Before the case was heard, the Prosecutor argues that Mukantagara premeditated the killing of Ndwaniye, shared her intention with Nsanzimana who then shared it with Nyirinkindi Peter. The latter informed the police but remained involved in the conspiracy.

[3] Nsanzimana and Nyirinkindi sought for help from Haridi, who was to bring the gun and accompany them to Nyaruguru to get Ndwaniye. Mukantagara gave them fifty thousand Rwandan Francs (50.000 Rwf) for fuel, and promised them an advance of five hundred thousand Rwandan Francs (500.000Rwf) when they would have brought him to Kigali. Later on, they were

arrested at their arrival in Kigali when Mukantagara brought the promised advance, and therefore their conspiracy was interrupted before they killed Ndwaniye.

[4] The Prosecution filed the case in the High Court at Kigali, accusing Mukantagara Séraphina and Nsanzimana Antoine of attempted murder, as they conspired to kill Ndwaniye Thation but were surprisingly interrupted by the police. The verdict RP 0105/10/HC/KIG was delivered on 24 June 2011, and each of them was convicted and sentenced to life imprisonment.

[5] Mukantagara appealed, alleging that she was sentenced to the highest penalty for the attempted murder while she did not intend to kill her father-in-law, but rather to get him imprisoned.

[6] As for Nsanzimana, he appealed alleging that the Court ruled the case by analogy and convicted him of an attempted murder which he did not commit. He requested the Court to reclassify the offence, for him to be punished for the formation of criminal gang.

[7] The hearing was conducted in public on 14 October 2013; Mukantagara was assisted by the Counsel, Habimana Adolphe, while Nsanzimana was assisted by the counsel Ruberwa Silas. The Prosecution was represented by Mutayoba Alphonse, the Prosecutor at national level.

II. ANALYSIS OF LEGAL ISSUES

Whether the crime committed by Mukantagara Séraphine and Nsanzimana Antoine is the formation of a criminal gang or attempted murder.

[8] Mukantagara and her Counsel, Habimana Adolphe, state that the crime committed was not attempted murder. They argue that she only intended to get her father-in-law Ndwaniye imprisoned. She bribed Nyirinkindi and Haridi who were recommended by Nsanzimana to help her in her plot.

[9] They state that they should not be accused of attempted murder because their intent was to get Ndwaniye imprisoned. They kept on stating that Nyirinkindi and Haridi were supposed to concoct the crime for him and find a place to imprison him.

[10] Mukantagara contends that her statements to the judicial police and the prosecution are not accurate and should not be considered because Haridi misled her that her penalty would be reduced if she admitted that she intended to kill her father-in-law.

[11] Nsanzimana and his Counsel, Ruberwa Silas state that the fact that Nyirinkindi and Haridi retracted provides evidence that the intended crime would not be consumed. Thus the offence for which they are charged should be reclassified to the formation of a criminal gang. He requested the Court to rely on RP 0067/11/HC/KIG, Prosecutor v. Africa Bernard and Uwamahoro Théoneste, the case in which the Court decided that the appeal lacked merit with regards to the formation of a criminal gang of which they were convicted.

[12] The Prosecutor contended that the committed crime is not the formation of a criminal gang but the attempted murder because the accused confessed to the judicial police and the

prosecution, that they had intended to kill Ndwaniye, and that their intent was interrupted by the fact that Nyirinkindi informed the police.

[13] The prosecutor argues that Mukantagara's contention that she did not intend to kill Ndwaniye but rather to get him imprisoned is groundless, because she does not demonstrate the offence which may cause his father-in-law to be imprisoned. In addition, the facts transpired in 2010, when no one could be unfairly imprisoned.

[14] Concerning the case n° RP 0067/11/HC/KIG09/09/2011 MP v Africa Bernard and Uwamahoro, which Nsanzimana and his counsel request the Court to rely on, the Prosecutor contends that it is about the criminal gang formed by Afrika and Uwamahoro in order to execute the intent of killing Ndagiwenimana; they tried to involve Hope and Nkurikiwenimana Gaston. The prosecutor keeps on stating that the fact that the latter could not be prosecuted does not mean that a criminal gang did not exist, because it existed since the members agreed to kill Ndagiwenimana; Hope and Nkurikiwenimana joined the gang in order to inform security officials so that the action may be stopped. The fact that they were not prosecuted pursuant to article 283 of the former penal code, does not mean that the criminal gang did not exist.

[15] With regards to Mukantagara and Nsanzimana, the Prosecutor concluded, stating that they conspired to kill Ndwaniye, minutely planned it, but their conspiracy was interrupted by an unpredictable event. The police was informed of the conspiracy by an individual and was thus capable of disrupting them when they got Ndwaniye to Kigali. This is where Mukantagara was waiting for them in order to give them the promised advance payment of 500,000 Rwf for the killing of Ndwaniye. The Prosecutor states that these two cases should not be compared because they are not similar.

THE VIEW OF THE COURT.

a. Concerning the crime of formation of the criminal gang.

[16] Article 281 of Decree Law n° 21/77 of 18 August 1977 of the penal code that was in effect when the crime was committed, is similar to article 681 of Law n° 01/2012 of 02 May 2012 instituting the penal code which provides: "to form an association, regardless of its duration or number of members, for the purpose of preparing offence against persons or property, is a felony" constituted by that very fact of forming¹ a group of trouble makers".

[17] The notion behind both provisions is that "the fact of forming a criminal gang is an independent crime different from those committed in this context or that gang. It is also clear that for the crime to be committed, it is necessary that people group together with the purpose to commit an offence against persons or their property (criminal gang). Furthermore, in the former penal code as in the current code, these provisions appear under chapter IV which establishes offences against public security. This means that when people form an association in order to offend an individual, they should not be found guilty of an offence against public security.

¹"Forming a group of trouble makers" that was not taken back in the new code, is the only difference of the articles 261 and 681, but it does not change the meaning of the offence itself.

[18] Based on the explanations listed above, the Court finds that the formation of a criminal gang, as pleaded by the accused, lacks merit. This is because there is no recognised criminal gang they formed; the acts the accused committed were not directed against the public security, and there were no other offences which the accused had committed together. In addition, it was not necessary to form a criminal gang in order to kill Ndwaniye.

b. Concerning the attempted murder.

[19] Article 21 of the penal code in effect at the time the offence was committed states that “An attempt is punishable when the plan to commit an offence has been demonstrated by observable and unequivocal acts constituting the beginning of the offence meant to enable the commission and that were suspended or failed in their purpose only because of circumstances beyond the offender’s control”.

[20] Regarding the attempted murder of which Mukantagara was accused, the Court finds that her defence that she only intended to get her father-in-law Ndwaniye imprisoned, lacks merit, because she failed to demonstrate the offence for which he could be imprisoned. Her argument that the offence would be concocted by those she paid to transport him from Nyaruguru to Kigali is also groundless because they were not in conflict with him, they had no litigation, a part from the payable “task” of bringing him to Kigali, so that she may first see him and then pay them the agreed advance payment before killing him. Furthermore, if her sole intention was to get him imprisoned, she fails to provide the reason why they could not imprison him in Nyaruguru.

[21] The case analysis demonstrates that in his interrogation in the judicial police, Nyirinkindi stated that Nsanzimana came to him and told him that he had a “deal” from Mukantagara for the killing of her father-in-law who was about to win a case between them relating to the houses she owned for long time and that she had repaired(mark6). He further declared that they agreed the payment of 1.200.000 Rwf and on page 5 he explained the way they were first given fifty thousand for fuel and the hiring of the car which would be used to transport the old man Ndwaniye, who was supposed to be killed. Mukantagara also acknowledged the money on page 15 before the judicial police. Nyirinkindi also confirmed that after getting him to Kigali, Mukantagara would have paid them 500.000 Rwf and the balance was to be paid after killing him.

[22] In the course of Nsanzimana Antoine’s interrogation, he admitted that in the beginning the intent was to get Ndwaniye imprisoned, but upon Haridi and Nyirinkindi’s advice, he decided to kill him. On mark 11 Nsanzimana admitted that he was the one who wrote the piece of paper which contained Ndwaniye’s address. In addition, he admits that the 500.000 Rwf advance would have been paid before killing him. He confirmed that in bringing Ndwaniye, Nyirinkindi and Haridi had to kill him but he did not know the place of killing. He also confirmed that he went with them to bring him.

[23] In the course of Mukantagara’s interrogation, on mark 15, she admitted that she gave them the money for fuel to bring Ndwaniye. She also admitted that although they did not make a decision, they discussed the notion of killing him. In addition, she mentioned that she had no relationship with Nsanzimana Antoine while during interrogation, her young sister, Mukankindi Dévotastated that Nsanzimana was their brother-in-law. In his interrogation, Ndwaniye confirmed that both Mukantagara and Nsanzimana were natives of his village.

[24] In the case file on mark 17, there is a seizure statement of 500.000 Rwf from Mukantagara Séraphine and signed by the latter acknowledging to be the owner.

[25] As decided by the High Court, the Court finds that there is evidence of unequivocal acts proving that Mukantagara and Nsanzimana intended to kill Ndwaniye, and that their plot was suspended by the police. The evidence is as follow:

The fact that they admit to have discussed their plot to kill him, even if Nsanzimana states that he would have been killed by Nyirinkindi and Haridi, that is not surprising, because they were called for that mission.

The fact that Mukantagara admits to have paid money to transport Ndwaniye from Nyaruguru, even if she states that she wanted them to get him imprisoned, she does not demonstrate the reason, the place, or the period of time he would be imprisoned in order to be sure that their house related disputes would be ceased.

The fact that Nyirinkindi explained how the plot was set out; the way Mukantagara would have given them 500,000 Rwf if they had brought Ndwaniye to Kigali and the same amount was seized from Mukantagara when she came to see them.

The fact that Mukantagara denies having family relationship with Nsanzimana, yet her young sister confirms that he is their brother-in-law. Furthermore, Nsanzimana states that he does not know where Ndwaniye lives, yet he latter confirms that they are natives of the same village.

[26] The Court finds that there are observable and unequivocal acts constituting the beginning of an offence. This is constituted by the fact that Mukantagara paid for the transportation of Ndwaniye to Kigali, Nsanzimana guided those who were to transport him to his house in Nyaruguru, they brought him to Kigali so that Mukantagara could see him, and then pay them the advance payment of the agreed reward so that they would kill him. However, the plot was interrupted by the fact that Nyirinkindi withdrew from that plot and informed the police who arrested them before Ndwaniye was killed. Therefore, Mukantagara and Nsanzimana are found guilty of attempted murder as provided for by article 312 of the penal code which was in effect at the time perpetrations were made for the crime.

[27] Nsanzimana argues that they should not be accused of any offence because Nyirinkindi and Haridi retracted and did not finalize their plot. Consequently, the crime intended for was impossible. Despite this defence, the Court finds that the retraction of Nyirinkindi and Haridi from the plot to kill Ndwaniye cannot serve as an excuse from the crime. This is because there is no proof that they had retracted before their arrest. This was the case for Hope and Nkurikiwenimana Gaston in the judgment RP 0067/11/HC/KIG09/09/ MP v. Africa Bernard and Uwamahoro. They withdrew themselves from the plot of killing Ndagiwenimana before being prosecuted. However, their act of retraction from that plot did not exclude Africa Bernard and Uwamahoro from the offence. Even though their plot was interrupted by security officials, they nevertheless formed a criminal gang intending to kill Ndagiwenimana.

[28] Regarding Mukantagara and Nsanzimana's penalties, the Court finds that they deserve the penalty reduction per article 77, 4^o of the Organic Law n^o 01/2012/OL of 2 May 2012 of the

penal code because their offence did not cause severe consequences. Their life imprisonment sentence has to be reduced to fifteen years (15) of imprisonment each.

III. THE ORDER OF THE COURT

[29] Decides that Nsanzimana Antoine and Mukantagara are guilty of attempted murder.

[30] Sentences each of them to fifteen years of imprisonment (15)

[31] Rules that the ruling of the judgment RP 0105/HC/KIG of 24 June 2011 is overturned only with regards to the extent of the penalty.