

PROSECUTION v. MUNYANKUMBURWA

[Rwanda SUPREME COURT – RPA 0210/10/CS (Kayitesi Z., P.J., Mukanyundo and Rugabirwa, J.) July 18, 2014]

Criminal law – Murder – Qualification of an offence – It cannot be considered as involuntary homicide since the intent to kill is evidenced by the fact of loading the gun and disobey the order of the superior prohibiting to fire – Decree law n° 21/1977 of August 18, 1977 instituting the penal code, article 311.

Law relating to contracts or obligations – The vicarious liability of an employer – An employer is civilly held liable for the tortuous acts of his/ her employee when their commission occurred in the exercise of his/ her duties – An officer in charge of territorial integrity and security of citizens and their properties cannot remain indifferent in the sight of the acts threatening the national security or deteriorating the national economy including smuggling, on the ground that they are not occurring in his/her territorial jurisdiction – Law of 30/07/1888 relating to contracts or obligations, article 260.

Facts: The Prosecution seized the High Court against Munyankumburwa Valens for murder where alongside Munyurasi Gakara, the policeman pursued smugglers and when they reached to them, he ordered them to put down their belongings. In the meantime, he loaded the gun. When Munyurasi heard the loading, he prohibited him twice from shooting but he disobeyed and gunned down one of them named Nkunuzimana. As an employer of the suspect, Burera District was forced to intervene in the case so as to pay potential damages. The accused was found guilty and sentenced to 10 years of imprisonment while Burera District was ordered to pay 7, 450,000 Rwf of damages.

Both Munyankumburwa and Burera District appealed to the Supreme Court. Munyankumburwa stated that the High Court sentenced him to the heavy penalty of 10 years of imprisonment despite his guilty plea and forgiveness seeking. He added that he had not had any criminal intention. His Counsel adduced that there was error in facts and requested the Court to qualify the offence as involuntary homicide in consequence. Munyankumburwa requested the penalty reduction. The Prosecution stated that the accused defense would not be considered because Munyurasi prohibited him from shooting but the accused disobeyed and shot bullets which cost the life of the deceased. He concluded that this justifies the mens rea to murder.

State Attorney disputed that the Court held Burera District liable of damages disregarding the pleading of the accused and their written submissions. Another ground was that the Court determined the damages basing on article 27 of Law n° 25/2004 of 19/11/2004 establishing and determining the organisation and functioning of the local service in charge of assisting in maintenance of security referred to as “Local Defense” but did not hold anything on paragraph 2 of the same article while it was of paramount importance in the defence of Burera District. The paragraph provides that if he or she commits acts contrary to his or her duties, Local Defense Member shall be punished in accordance with the law. Civil parties requested for advocate fees through the cross appeal.

Held: 1. The qualification of an offence should match the facts. The acts of the accused are far different from the qualification he requests the Court to confirm for the offence he committed as long as the intent to commit the offence is demonstrated by the shooting of three bullets that cost the life of the deceased despite the order of his superior prohibiting him from shooting. Thus, his acts constitute homicide.

2. He cannot benefit the penalty reduction since he had been sentenced to 10 years of imprisonment after gunning down deliberately a citizen who did not fight him while he would have been sentenced to life imprisonment.

3. The maintenance territorial integrity and the security of citizens and their properties is the preoccupation of the National Police and Local Defence. Therefore, Munyankumburwa could not remain indifferent in the sight of the acts threatening the national security or deteriorating the national economy including smuggling, on the ground that they are not occurring on his territorial jurisdiction. In addition, he could not have denied executing such a task in case it is mandatory for Local Defence to cooperate with other Security Organs in security maintenance.

4. In deciding the case related to the request of damages resulting from the offence committed by an employee, Courts must assess whether the committed acts had a link with his (employee) actual duties; otherwise the employer cannot be held liable for the tortuous acts of an employee in case the faults were not linked to his/her duties and occurred at the time when the employer could not supervise them (acts). However, the employer should be liable for damages in case the employee committed the offence while he was on his duties even in the case of wrong execution of the latter. The wrong use of weapon in security maintenance cannot prevent the employer from being held liable for the damage caused by the fault in case the employee did not deviate from his duties.

Appeal on both sides lacks merit.

Cross appeal has merit.

Burera District is ordered to pay 7,450,000 of damages and 500,000 for counsel fees.

Court fees to the public fund.

Statutes and statutory instruments referred to:

Decree law n° 21/1977 of 18/08/1977 instituting the penal code, article 311.

Law of 30/07/1888 relating to contracts or obligations, article 260.

Cases referred to:

Prosecution v Pte Niyoyita, RPA 0074/07/CS rendered by the Supreme Court, June 7, 2007.

Authors Cited:

Ch. Larroumet, *note sous cass. Com. 12 oct. 1993*, Dalloz.1994.124, séc.p.125.

F.Benac-Schmidt, *Responsabilité du fait d'autrui*, Répertoire de droit civil, Dalloz, TIX, mise à jour en 1999, p.17, n° 135.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The case commenced in the High Court when Prosecution seized the Court against Munyankumburwa Valens alleging that on August 26, 2008 toward 10 p.m, together with the policeman, Munyurasi Gakara pursued people who were smuggling and when they reached them, Munyurasi stopped the motor bike while Munyankumburwa ordered them to put down their belongings. He moved ahead a little bit to stop those who were trying to move away. Upon unknown reasons, he promptly loaded the gun preparing to shoot and when Munyurasi heard it, he prohibited but in vain. When they (Munyankumburwa and Munyurasi) approached, they realized that Nkunzimana was gunned down. They immediately took him to hospital but died short time after their arrival.

[2] Burera District as an employer of Munyankumburwa was forced to intervene in the case so as to be held liable for potential damages. The seized court decided the case on June 28, 2010 and held that Munyankumburwa and Burera District lost the case. It sentenced Munyankumburwa to 10 years of imprisonment and ordered the District in the name of its mayor to pay Manirarora Rosette and her children 7,450,000 Rwf.

[3] Not satisfied by the ruling of the case, both Munyankumburwa Valens and Burera District in the name of its Mayor appealed to the Supreme Court. Munyankumburwa Valens was stating that the High Court disregarded the explanations he provided and inflicted on him a heavy penalty of 10 years while he pleaded guilty and sought forgiveness.

[4] Karemera George, the State Attorney for Burera District states that they were ordered to pay damages totalling 7,450, 000 Rwf disregarding their pleading during the hearing and the content of their submissions. Another point of their dissatisfaction was the Judge's order against the District to pay damages basing on article 27 of the Law N° 25/2004 of 19/11/2004 establishing and determining organisation and functioning of the local service in charge of assisting in maintenance of security referred to as "Local Defense" but did not hold anything with regard to the second paragraph of the same article while it was of paramount importance in the defence of Burera District. The civil parties requested counsel fees in the cross appeal.

[5] The public hearing was conducted on July 7, 2014 Munyankumburwa Valens assisted by Counsels Nzabonimana John Peter, civil parties represented by Counsel Bizimana Jean de Dieu, while Burera District was represented by Umwali Claire, State Attorney.

II. ANALYSIS OF LEGAL ISSUES

a. To determine the qualification of the offence Munyankumburwa committed and whether he can benefit the penalty reduction.

[6] Munyankumburwa and Nzabonimana John Peter, his Counsel contend that their grounds of appeal are the fact that the Court sentenced him to the heavy penalty of 10 years of imprisonment despite his guilty plea of having murdered Nkunzimana by gunning him down. In addition, he adds that he had not had any *mens rea* since there was no dispute between them, but the Court disregarded it. They state that Munyankumburwa had no intention to kill Nkunzimana since they had never known each other so that some conflicts may have occurred for him to kill the deceased.

[7] They assert that when Munyankumburwa Valens and the policeman who gave him the gun reached the people who were carrying smuggled goods, the policeman ordered him to stop them and he loaded the gun. When he reached nearby them he heard the bullet out toward Nkunzimana but without his intention. They keep on arguing that if Munyankumburwa had intended to shoot, he would have shot all of those smugglers. The fact that he did not shoot all of them implies that his acts were not intentional since he only intended to arrest them as smuggling is unlawful.

[8] Nsanzimana John Peter, the Counsel, contends that there has been error in facts which resulted in a wrong qualification of the offence. He realizes that the offence Munyankumburwa committed would be qualified involuntary manslaughter provided for by article 145 of Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code since the constituent elements of homicide are not complete; intent to commit an offence is lacking. He argues that Munyankumburwa has forgotten to keep the safety of the gun closed and accidentally bullets went out. Those acts would be considered as those of the driver who recklessly knocks a pedestrian down on the street.

[9] The Representative of the Prosecution disputed that the explanations provided by Munyankumburwa Valens alongside his Counsel are unsubstantiated since, when Munyankumburwa was running to arrest the smugglers, he reached them and loaded the gun and when his fellow prohibited him from shooting, he disrespected and shot. Hence he should not plead the absence of intention before the Court while he did it deliberately.

[10] The Prosecutor contends that the defense statements made by Munyankumburwa Valens regarding the absence of disputes between him and the deceased is unsubstantiated as well, since the existence of conflict is not mandatory to have an intent to murder. He insisted that the fact that he loaded the gun and his fellow prohibited from him shooting but in vain implies that his act was not accidental. He ended stating that Munyankumburwa would not benefit another penalty reduction since it was granted at the first instance.

[11] Article 311 of the Decree Law n° 21/1977 of 18/08/1977 instituting the penal code which was into effect when the offence was committed provides that voluntary manslaughter is murder; it is intentional killing of a person and shall be punishable by life imprisonment.

[12] As far as the case is concerned, even though before the Court, Munyankumburwa and his Counsel denied that Munyankumburwa had an intent to kill Nkunzimana and hence in their opinion he committed involuntary manslaughter, the Court finds that the qualification Munyankumburwa requests the Court to give to the offence he committed does not match the committed acts since the intent to kill is evidenced by the fact that he loaded the gun and when

Munyurasi Gakara heard that he prohibited him from to shoot but Munyankumburwa disrespected and it cost the life of Nkunzimana in consequence of three bullets.

[13] Rather, the Court finds that Munyankumburwa pleaded guilty in the High Court and the latter referred to that guilty plea to reduce the penalty. In addition, he was accused of homicide and pleaded on it; hence, he cannot request its reclassification, especially that his guilty plea coincides with the statements made by Munyurasi and all witnesses who were at the scene of the crime (The fellows of Nkunzimana), testified that he brutally killed him since he had not fought him.

[14] Basing on the explanations provided, the Court finds that Munyankumburwa Valens willingly shot Nkunzimana. Therefore, the offence he committed and of which he is found guilty is murder provided and punishable by article 311 of Decree Law n° 21/1977 of 18/08/1977 instituting the penal code as referred to above.

[15] Regarding another penalty reduction requested by Munyankumburwa and his Counsel, the ruling of the appealed case indicates that in the penalty determination, the High Court sufficiently reduced the penalty since it inflicted on him 10 years of imprisonment based on his guilty plea and the first offender status.

[16] In consequence, the Court finds that since Munyankumburwa Valens would have been sentenced to life imprisonment by virtue of article 311 of the law referred to above but inflicted 10 years in prison only, it implies that the High Court sufficiently reduced the penalty taking into account the gravity of the committed offence of shooting a citizen who had not fought him. Hence, his appeal lacks merit.

b. Whether Burera District should be held liable for the faults committed by Munyankumburwa Valens, Local Defense Member.

[17] Umwali, the State Attorney representing Burera District disputed that the Court ordered Burera District to pay damages while he admitted that the gun he used in shooting does not belong to him and used it while he was not entitled to. Furthermore, the policeman who gave him the gun prohibited him to shoot but denied.

[18] She states that another ground of denial of Burera District liability for the fault committed by Munyankumburwa is that the alleged offence was committed in Rulindo District and that he went there without the authorization of the District. Therefore, he should be responsible for his own fault especially that he deliberately shot a person while he knew it was unlawful.

[19] Another point of their dissatisfaction is that in holding them liable for damages originating from the offence committed by Munyankumburwa, the Court based on article 27 paragraph one of the Law n° 25/2004 of 19/11/2004 establishing and determining the organisation and functioning of the local service in charge of assisting in maintenance of security referred to as "Local Defense" but kept silent on paragraph two of the same article. This

paragraph provides that if he or she commits acts contrary to his or her duties, he or she shall be punished in accordance with the law¹.

[20] Munyankumburwa argues that if the policeman had not given him the gun, he would not have tasked himself especially that the gun he used was not his and that pursuing smugglers in Rulindo District does not constitute an offence since he could not disrespect the instructions of his superior.

[21] Bizimana, the Counsel for civil parties adduced that Munyankumburwa was an employee of Burera District as LDF. Therefore, basing on the provisions article 260 of Law of 30/07/1888 relating to contracts or obligations, damages resulting from the offence he committed should be paid by the District as he was its employee.

[22] He ended by filing a cross appeal requesting damages totalling 500,000 Rwf for procedural fees and 500,000 Rwf for advocate fees to be added to those awarded on the first instance.

THE VIEW OF THE COURT

[23] Article 260 paragraph of the 3 Law of 30/07/1888 relating to contracts or obligations, provides that the employer is held liable for tortuous acts of his employees when they are on duties.

[24] Regarding the pleading of State Attorney for Burera District who considers being at fault the fact of ordering the District to pay damages to the deceased's family members who were under the deceased's charge, Nkunzimana who was killed by Munyankumburwa, because he did it out of the territorial jurisdiction of the District in which he was supposed to execute his duties, the Court finds that the Police and Local Defense main obligation is to maintain territorial integrity and security of citizens and their property. Even though Local Defense Member actually has a jurisdiction in which he/she should execute his duties, he/she could not keep his arms crossed or remain indifferent for any acts threatening the national security. Furthermore, he could not deny executing an order issued by Sergeant Munyurasi Gakara while it is well known that in his attributions, Local Defense should cooperate with other agencies to maintain the security.

[25] As far as this case is concerned, the Court finds that the fact that the Police in Burera District was informed that there were smuggling activities from their District toward Rulindo District, two districts bordering each other and when he called his fellows in Rulindo district he got no answer, it proves the necessity, in the context of executing their attributions of maintaining the national security including preventing smuggling which deteriorates national development, to pursue those wrong doers regardless of District borders in which they normally carry out their activities. Therefore, this ground of appeal has no merit.

¹ Article 27 states that when a member of the service of Local Defence, is in the course of performing his or her duties, the District, Town or Municipality in which he or she operates shall be liable for the acts he or she commits. However, if he or she commits acts contrary to his or her duties, he or she shall be punished in accordance with the law.

[26] Umwali Claire, State Attorney representing Burera District, states that the holdings of the judgment n° RPA 0074/07/CS decided on July 25, 2007 in which the prosecution seized the Court against Pte Niyoyita for murder where Gakosi Nkuriza and his siblings applied for damages would be applied in this case so that Burera District cannot not pay damages because Munyankumburwa used the gun which did not belong to him and was not even on the mission of the District.

[27] The Court finds that these judgments are different taking into consideration circumstances under which the offences were committed because the legal scholars including Viney, Joudrday and Starck² state that in deciding the cases, Courts should assess whether the act performed by an employee was related to his tasks or duties. It implies that the employer cannot be held liable for the consequences triggered by the tortuous acts of his/ her employee in case those acts had no link with his/her actual tasks or duties and were performed (those acts) beyond the employer's control. These are the provisions of article 260 of law relating to the contract or obligation as above mentioned.

[28] Regarding the working hours, the Court notices that, Munyankumburwa has gunned down Nkunzimana towards 10 p.m when he was on duties as ordered by Sergeant Munyurasi Gakara who was his supervisor in his daily activities, while Pte Niyoyita has gunned down Mukagatana and her child when he had abandoned the service and the offence was committed at the place where he was not commissioned. With respect to the place of the commission of the offence, as explained above, pursuing the smugglers in Rulindo District bordering Burera which is their jurisdiction, while it is obvious that those wrong doers were crossing from Burera, it is not service fault that Burera District can pretend to deny its liability as an employer, as long as they (Munyankumburwa and Munyurasi Gakara) went to Rulindo only for the purpose of their attributions.

[29] With regards to Burera District pleadings denying to pay damages basing on the fact that the gun used by Munyankumburwa to shoot does not belong to him, the Court finds that the gun used in the commission of the crime, whether belonged to Munyankumburwa or someone else, is not sufficient to order Burera District, as an employer of Munyankumburwa, to repair the damage caused by using the gun. But rather, the reason for which he used it should be assessed. In this case, it is very obvious that Munyankumburwa and his fellow were holding the gun with them to defend themselves in the case they were threatened on their duties of maintaining the security. However, as it is manifested, the Court notes that Munyankumburwa had misused the gun even though it occurred while he was on duties. This is the core of his fault based on to order Burera District to pay damages resulting from the fault committed by its employee.

[30] Regarding whether Munyankumburwa was ordered to gun down Nkunzimana, the statement made by Sergeant Munyurasi Gakara indicates that after hearing that he was loading the gun, he prohibited him twice from shooting but he disrespected and fired three bullets which killed the deceased. He performed this act personally, which obliges him to be held criminally liable since he infringed the provisions of articles 15 and 16 of Law n° 25/2004 of 19/11/2004 establishing and determining the organisation and functioning of the local service in charge of

²F. BENAC-SCHMIDT, *Responsabilité du fait d'autrui*, Répertoire de droit civil, Dalloz, TIX, 1999, p.17, n° 135.

assisting in maintenance of security referred to as “Local Defense”³ which determine cases in which he/she can resort to the use of weapon including a gun.

[31] Basing on the above explanations, the Court notes that Burera District should pay damages as ordered by the High Court because, even though Munyankumburwa gunned down Nkunzimana for his personal grounds for which he did not provide explanations, it occurred while he was on duties of maintaining security through the fight against smuggling. It happened in the context of complying with the provisions of articles 7⁴ and 4 of the Law n° 25/2004 of 19/11/2004 establishing and determining the organisation and functioning of the local service in charge of assisting in maintenance of security referred to as “Local Defense” whereby he collaborated with Police Agencies to arrest individuals who were caught red-handed smuggling.

[32] Therefore, Burera District as an employer should pay damages because Munyankumburwa committed the offence being on duties. Again, as explained, he was executing his duties though he did it in a wrong way. This corresponds with the writings of law scholars⁵ that to hold an employer liable for tortuous acts of his employee, it is enough to establish whether his tortuous act was linked to his duties at least. They give an example of a driver of the car of his employer who makes an accident because of a high speed. As far as this case is concerned, it is considered that Munyankumburwa committed the offence when he was on duties though he performed them in a wrong way.

[33] Regarding 500,000 Rwf for counsel fees that Bizimana the Counsel requests on behalf of civil parties on this instance, the Court notes that Burera District should pay it taking into account the necessity to hire an advocate and the fact that the amount is moderate.

THE DECISION OF THE COURT

[34] Appeal filed by Munyankumburwa lacks merit.

[35] Appeal filed by Burera District lacks merit as well.

[36] Holds that cross appeal filed by Manirarora Rosette and her children, Mukandengo, Hategekimana and Nsengiyumve Fidèle is admitted and has merit.

³ Article 15 states that security equipment such as guns shall only be used during appropriate circumstances. If one of the members of the Local Defence service uses them in disrupting security, he or she shall be punished in accordance with Rwandan penal provisions while article 16 states that:

1. If they are attacked or other people are attacked by armed persons and where there is no other alternatives;
2. they are set out to arrest notorious criminals or armed persons who cause insecurity

⁴ Article 7 states that 1° collaborate with the residents, in maintenance of security of people and their property; 2° informing the nearest administrative organs anything that he or she may find as a threat to security; 3° assist, if considered necessary, other organs responsible for security of the people and their property; 4° arrest any person caught red handed disrupting security and handing him or her to the administration or to the nearest police station.

⁵ CH. LARROUMET, note sous cass. Com.12 oct.1993, Dalloz.1994.124, séc.p.125 cité par Françoise BENAC-SCHMIDT, *op. cit.*, p.11, n° 74. “On peut se contenter d’un simple lien de connexité entre l’acte dommageable du préposé et ses fonctions, pour pouvoir engager la responsabilité du commettant. L’auteur continue en disant que “lorsque l’acte du préposé consiste en un exercice défectueux de ses fonctions, le rattachement est manifeste: tel est le cas du chauffeur livreur qui commet un accident de la circulation du fait d’une vitesse excessive....”

[37] Orders Burera District to pay to Manirarora Rosette Mukandengo, Hategekimana and Nsengiyumva 500,000 Rwf for advocate fees as awarded on this instance and should be added to damages amounting 7,450,000 Rwf awarded by the High Court in Kigali to total 7,950, 000. Rwf.

[38] The court orders the court fees to be charged to public treasury.