

PROSECUTION v. MVUYEKURE

[Rwanda SUPREME COURT – RPAA 0133/10/CS (Nyirinkwaya, P.J. Kayitesi R. and Hitiyaremye, J.) November 7, 2014].

Law of Evidence – Statement of a child under 14 years old – Statement made by a child under 14 years old has to be supported by other evidences – Law n°15/2004 of 12/06/2004 relating to evidence and its production, article 63.

Criminal Law – Right to defence – Right to defence, a core principle in criminal procedure – Law n° 30/2013 of 24/5/2013 relating to the criminal procedure, article 150.

Facts: The accused was prosecuted for child defilement. In the Intermediate Court of Rubavu, where the case started, he denied the crime and requested that the child should be tested of HIV/AIDS so as to find if she was transmitted, since he is HIV positive and that he would have transmitted it in case he raped her, only medical report proving that the child was hurt and bore blood on her sex is not enough. The court convicted the accused of child defilement committed against U.D aged 3, arguing that the fact that this child was not tested to find out if she was transmitted HIV/AIDS cannot cancel other evidences produced against him, therefore, he was sentenced to 25 years of imprisonment and fined him with 100.000Frw. The court reduced his penalties due to the fact that he was HIV/AIDS positive.

The accused appealed to the High Court, the Chamber of Musanze, where he kept on denying the charges and requesting that the victim should be tested to confirm if she was transmitted HIV/AIDS. The Court rendered verdict, deciding that it was not necessary to test the victim since the subject matter was not about HIV/AIDS transmission rather the rape and that it is not mandatory that engaging in sexual intercourse with a HIV/AIDS positive results in HIV transmission, which means that though the victim would not be HIV positive it does not entail that she was not raped.

The accused appealed the case once again to the Supreme Court, stating that he was convicted not basing on tangible evidence and by ignoring the proof supporting his defence.

The Prosecutor states that the ground for appeal is only based on the fact that the denial to let the child be tested HIV/AIDS is baseless since as it was declared by the High Court, the charge against Mvuyekure Faustin is not about the HIV/AIDS transmission rather the child defilement and there are evidences to prove that he committed it and that it is not mandatory that engaging in sexual intercourse with an HIV/AIDS positive results in HIV transmission.

Held: 1. The fact that the convicting evidence is only based on the statement of U.D who was aged 3 when she was raped, since there is no any other fact which the Prosecution based on while prosecuting the accused apart from her statement and even the previous court's decision, based only on that in convicting him since all witnesses repeated what the victim told them, is inconsistent with the provisions of the Law which provides that a statement of a child under 14 years old has to be supported by other evidences.

2. The accused was convicted without tangible evidence, and violating the principle of the right to defence, which is a core principle in criminal procedure. Therefore he is acquitted.

**Appeal has merit.
Accused is acquitted, and must be immediately released.**

Court fees are to be charged to the public treasury.

Statutes and statutory instruments referred to:

Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, article 150.

Law n°15/2004 of 12/06/2004 relating to evidence and its production, article 63.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 10/12/2006, Nyirabageni Vestine filed a complaint with the Judicial Police stating that Mvuyekure Faustin sexually abused her daughter of three (3) years; named U.D.

[2] In the Intermediate Court of Rubavu where this case commenced, Mvuyekure Faustin pleaded not guilty, and requested that the child should be tested HIV in order to know if she was infected since he is HIV positive therefore, he would have transmitted it to her once he sexually abused her, considering the medical report which indicates that the child was hurt and bore blood on her sex.

[3] This Court ruled on the case on 6 August 2008 and convicted Mvuyekure Faustin of child defilement committed against U.D of three (3) years, motivating that even if the child was not medically tested so as to find out if she was infected with HIV this cannot annul other evidence produced against him. The court sentenced him to twenty five (25) years of imprisonment and a fine of One hundred thousand (100.000) Rwandan francs; the penalty was reduced because he is HIV positive.

[4] Mvuyekure Faustin appealed the case to the High Court, Chamber of Musanze. In that court he also pleaded not guilty and prayed that the child should be medically tested so as to know if she was infected with HIV. The Court ruled on the case on 8 April 2010, and decided that medical test was not necessary since the subject matter was not about HIV transmission rather child defilement. It is not mandatory that engaging in sexual intercourse with a HIV positive results in HIV transmission, which means that though the child would not be HIV positive, it does not entail that she was not sexually abused.

[5] The Court decided that the judgement of the first instance is not reversed basing on the statements of the witnesses interrogated when it was conducting investigation on the scene of the offence. Witnesses stated that they were called for by the mother of the child at the sunset of the day on which the offence was committed, they checked the child and she had blood on her sex, asking her about what happened she replied that it was Mvuyekure Faustin who entered something in her sex.

[6] Mvuyekure Faustin again appealed to the Supreme Court stating that he was convicted with no tangible evidence and by ignoring his defence evidence.

[7] The hearing was held in public on 24 February 2014, Mvuyekure Faustin assisted by Counsel Ndaruhutse, the Prosecution represented by Ntawangundi Beatrice, the parents of the

child namely Nyirabageni and Rwajekare were absent as they were not found at the address provided when Nyirabageni filed a complaint with the Judicial Police.

[8] The hearing was once again held in public on 29 September 2014, Mvuyekure Faustin assisted by Counsel Janvier Ndaruhutse, the Prosecution represented by Ntawangundi Beatrice, the parents of the child namely Nyirabageni and Rwajekare were absent due to their absence at the address provided when Nyirabageni filed a complaint with the Judicial Police.

II. ANALYSIS OF THE LEGAL ISSUES

To determine whether Mvuyekure Faustin was convicted by ignoring unequivocal evidence.

[9] Mvuyekure Faustin states that he was convicted without tangible evidences since he presents the medical papers certifying that he is HIV positive and he requested that the child be tested to confirm if she was infected with HIV, as he could not have failed to transmit it to her in case he sexually abused her considering the medial report which proves that the child was hurt and had blood on her sex.

[10] Mvuyekure Faustin also states that the witnesses he suggested in the High Court namely Ziragora, Sebahinzi, Mama Mukayisenga and Nsigayehe to exculpate him were not interviewed.

[11] Counsel Ndaruhutse Janvier, who assists Mvuyekure, states that they do not deny that the child, was sexually abused but the Prosecution failed to prove the link with Mvuyekure Faustin. The Prosecution only determines the scene of the offence and time on which the offence was committed. Giving “biscuits” to the victim is not enough evidence to prove that he committed the offence he is alleged to, based on the fact that he even gave biscuits to all children who were present including his own children.

[12] The Prosecution states that the ground for the appeal is only that the child was not tested HIV and this has no merit as it was cleared by the High Court that the charge against Mvuyekure Faustin is not about the HIV transmission rather the child defilement, and there is evidence that incriminate him. Furthermore, it is not mandatory that engaging in sexual intercourse with an HIV positive results in HIV transmission.

[13] The Prosecution states that the ground for the appeal basing on witnesses who were not summoned has no merit since the Court does not consider the number of witnesses. The Prosecution conducted thorough investigation on the request of Mvuyekure Faustin and interrogated necessary persons residing at the scene of the offence and they all charged him instead of exculpating him. Regarding the witnesses he mentioned, the Court found them unnecessary to ascertain the truth.

III. THE OPINION OF THE COURT

[14] The medical doctor who conducted medical test of Uwimana Dina proved through the report, that she had traumatic lesions (lésions traumatiques) and her hymen was completely destroyed (déchirure totale de l’hymen), the medical report confirms that she was sexually

abused, but the matter is to know if there are unequivocal evidences proving that the offence was committed by Mvuyekure Faustin.

[15] Regarding the offender, when Nyirabageni Vestine mother of the child filed a complaint with the Judicial Police, she stated that the child told her that it was Mvuyekure Faustin who sexually abused her. When her neighbours were interrogated during the investigation conducted by the High Court, they confirmed that they were called for by the child's mother, arriving there they asked the child what happened and she replied that it was Mvuyekure Faustin who entered something into her sex.

[16] The court finds that the case file prepared by competent authorities and the investigation carried out by the Court both failed to indicate anyone who has seen the child entering the house of Mvuyekure Faustin or anywhere else he would have seen him sexually abused her or where were other children at that time, since right from the Judicial Police Nyirabageni stated that Dina was together with his brother named Niyobuhungiro. Mvuyekure Faustin stated that he saw the victim with other children including his own children, therefore she requested to know, circumstances by which the child left Mvuyekure Faustin's house if it is where she was sexually abused, witness of anyone having seen or heard her crying and other facts which could help to ascertain the truth.

[17] The court finds that the evidence incriminating Mvuyekure Faustin is only based on the statement of U.D who was three (3) years old when she was sexually abused and there is no other evidence that the Prosecution considered in prosecuting Mvuyekure Faustin and even the previous courts only based on her statements and convicted Mvuyekure of child defilement since all witnesses repeated what the victim told them. This is violating the Article 63 of the Law n°15/2004 of 12/06/2004 relating to evidence and its production which stipulates that a statement of a child under 14 years old has to be supported by other corroborative evidence.

[18] The case file also proves that from the Judicial Police it was stated that Mvuyekure Faustin is HIV positive, and this was supported by evidence. The Court finds incomprehensible the reason why Uwimana Dina has not been tested HIV even if it is not mandatory that engaging in sexual intercourse with a HIV positive results in HIV transmission, she was at high risk to be infected considering the way she was hurt by the one who sexually abused her. Therefore, it is not enough to decide that the offence of voluntary HIV transmission is not the one prosecuted though the child being sexually abused has to be supported to find justice by punishing the offences committed against her. Furthermore, once the medical test would come proving that she was not infected with HIV it could have helped Mvuyekure Faustin in his defence.

[19] The Court finds that convicting Mvuyekure Faustin without considering the HIV test (which is now impossible to be carried out as the victim and her parents disappeared) violated his right to defence whereas it is a core principle in criminal procedure as it is defined in Article 150 of the Law n° 30/2013 of 24/5/2013 relating to code of criminal procedure.

[20] Based on the above statements, this Court finds that Mvuyekure Faustin was convicted ignoring unequivocal evidence and violating the principles governing criminal procedure, therefore he must be acquitted.

III. THE DECISION OF THE COURT:

- [21] Decides that the appeal of Mvuyekure Faustin has merit;
- [22] Decides that the case ruled by the High Court, Chamber of Musanze is overturned;
- [23] Decides that Mvuyekure Faustin is acquitted and orders his immediate release;
- [24] Orders that the court fees are charged to the public treasury.