

## PROSECUTION v. NSENGIYUMVA ET AL

[Rwanda SUPREME COURT – RPA 0024/09/ (Mutashya, P.J., Kanyange and Hitiyaremye, J.) December 13, 2013]

*Criminal procedure – Appeal for damages resulting from an offence – In case of acquittal of the accused followed by the appeal of civil party, the case at stake is re-heard in its entirety on its merit – Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of Courts, articles 164 – Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure, article 187.*

*Criminal procedure – The appearance of the Prosecution in the civil action cases when the accused was acquitted at the first instance – Appeal against awarded damages resulting from an offence does not turn a criminal case into a civil case. Hence, the Prosecution should appear to give its opinion though it is not a requirement – Law n° 30/2013 of 24/05/2013 Relating to the code of criminal procedure, articles 9 and 187 and Organic Law n° 51/2008 of 09/09/2008 Determining organization, functioning and competence of courts, article 164.*

**Facts:** Nabahire, Nyaguhirwa, Nsengiyumva and Munyaneza were prosecuted in Intermediate Court of Ngoma accused of breach of trust with intent to rob the money of the Banque Populaire du Rwanda, Gahororo Branch. Both Nsengiyumva and Nabahire were found guilty of forgery. They were sentenced to two years of imprisonment and a fine of 50,000Frw for forgery and 6 months of imprisonment while both Nyaguhirwa Munyaneza were found to be accomplices in breach of trust which Nsengiyumva is guilty of. They were sentenced to six months. The Court further held that breach of trust committed by Nsengiyumva, Nabahire Nyaguhirwana and Munyaneza caused the loss of the bank totalling 80,107,800Frw. The Court in consequence ordered them to restate in solidum that money and ordered Nabahire to personally restate 9,400,000Frw and further ordered all the accused to pay procedural fees.

All the accused appealed to the High Court, the Chamber of Rwamagana and were all acquitted. The Bank appealed to the Supreme Court lamenting that the Court had disregarded all evidence as submitted as well as the statements of the accused acknowledging and clearly explaining the way they proceed in all their trickeries.

In *limine litis*, the Prosecution raised an objection disputing that there is no reason as to why it should be present in the case as it is not appellant but Banque Populaire du Rwanda appealed against damages only. It ended pleading that it should not be party in the case.

**Held:** 1. The acquittal of the accused does not hinder the civil party from filing an appeal against awarded damages and the case is heard on its merit and the onus of proof goes to the civil party using evidence in the case file or the new one. In this case, the court examines whether the civil party can be awarded the damages equivalent to the loss caused by the crime the accused was acquitted of.

2. In no case, a criminal trial can be conducted without the Prosecution being represented. Therefore, the fact that the accused was acquitted while the civil party had appealed against the awarded damages, it does not infer that the criminal case loses its nature to become civil case. Rather, the damages may be requested and the judge of criminal cases awards them at appeal level based on evidence submitted by the appellant of the damages after the examination and consideration of that evidence.

**Objection lacks merit.  
The hearing re-open.  
Court fees suspended.**

**Statutes and statutory instruments referred to:**

Organic Law n° 51/2008 of 09/09/2008 Governing Organization, functioning and competence of courts, article 164.

Law n° 30/2013 of 24/05/Relating to the code of criminal procedure, articles 9, 12 and 187.

**No cases referred to.**

**Authors cited:**

Henri-D. Bosly and Damien Vandermeersch, Droit de la Procédure Pénale, la charte, 4<sup>ème</sup> édition, 2005.

## **Judgment**

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

[1] Intermediate Court of Ngoma was seized of the jurisdiction by the Prosecution against Nabahire, Nyaguhirwa, Nsengiyumva and Munyaneza accused of forgery and breach of trust with intention of robbing the money of the Banque Poulair du Rwanda, Gahororo Branch, through various maneuvers and use the money for the ends differing from those of the bank.

[2] The Court found Nsengiyumva and Nabahire guilty of forgery and breach of trust and sentences them to 2 years of imprisonment and a fine of 50,000Frw for forgery and six months' imprisonment for breach of trust while Nyaguhirwa and Munyaneza were found guilty of accomplice in breach of trust which Nsengiyumva is found guilty and sentenced them to (6) six months' imprisonment each.

[3] The Court further decided that breach of trust committed by Nsengiyumva, Nabahire, Nyaguhirwa and Munyaneza caused the Banque Populaire du Rwanda, Gahororo Branch the loss amounting to 80,107,800Frw and ordered them to pay in solidum that amount. In addition, it decided that Nabahire had personally caused it the loss of 9,400,000Frw and had accordingly ordered her to pay the money back. The Court furthermore ordered Nabahire, Nyaguhirwa and Munyaneza to pay Banque Populaire du Rwanda 200,000Frw for procedural fees.

[4] Nabahire, Nyaguhirwa, Nsengiyumva and Munyaneza appealed to the High Court, Rwamagana Chamber. The Chamber declared that their appeal has merit and acquits them.

[5] Banque Populaire du Rwanda, Gahororo Branch appealed to the Supreme Court lamenting that the Court had disregarded all evidence submitted and even overlooked the statements of the accused who admits and explains the way through which they committed all these offences and acquitted them.

[6] The hearing of the case was fixed on November 2, 2013. However at that very day the case was not tried since the court realized that there are some of litigants were not lawfully

summoned. The hearing of the case was postponed to November 13, 2013 and on this date all parties appeared. Both Nyaguhirwa Naurat and Munyaneza Robert were assisted by Rumenge Nkundimana Victor, the counsel, Nsengiyumva Prosper assisted by Gasasira Jean Claude, the counsel, while Nabahire Théophile was assisted by Adolphe Habimana.

[7] In *limine litis*, the Prosecutor contended that there is no ground as to why the Prosecution would be present in the case since it did not file appeal. Rather, the Prosecutor added, appeal was filed by Banque Populaire du Rwanda as civil party with regard to damages only. The Prosecutor then pleaded that it would not be summoned to appear in the case.

## **II. ANALYSIS OF LEGAL ISSUE**

### **Whether the Prosecution should be summoned to intervene in appeal filed by the civil party in case the accused was acquitted in the previous court.**

[8] As embodied in his submissions and as he explained it during the hearing, the Prosecutor laments that this case started in Intermediate Court of Ngoma which convicted the accused for the alleged crimes. He articulated that when dissatisfied with the decision of the judgment, the accused appealed to the High Court, Rwamagana Chamber and the latter found that they were not guilty of the alleged crimes due to lack of evidence, which is the ground of appeal of Banque Populaire du Rwanda. The Prosecutor stated that they did not appeal.

[9] He submitted that the object of litigation then was only damages. He disputed that, as evidence, the case screening judge received appeal of the bank because the damages at stake were over 20,000,000Frw. He went on lamenting that articles 175 and 187 of Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure clearly demonstrate that the civil party appeals against the decided judgment with regard to the awarded damages only and that the court of appeal only rules on the case only with regard to the grounds of appeal as provided for by article 189 of the same law.

[10] The representative of the Prosecution submits that in article 187 of the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure as well as articles 164 of Organic Law n° 51/2008 of 09/09/2008 governing Organization, Functioning and competence of Courts both invoke the same thing that the acquittal of the accused does not hinder the civil party to lodge an appeal. Those articles also provide that in case the civil party appeals, the objects of litigation only concern damages.

[11] He pleads further that, per provisions of article 187 of the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure, if the the civil party appeals, the whole judgment is re-heard in merit. He argues that, the examination on merit for the whole judgment means examination of the whole judgment with regard to the damages only. Therefore, he realizes, there is no ground to summon the prosecution to appear in the cases of this nature especially that during the judicial reform, the Prosecution was removed from civil cases while the case at hand is of civil cases nature.

[12] He ended contending that all he had already stated is the same view as various legal scholars like Henry –D. Bosly and Damien Vandermeersch in their book “Droit de la Procédure Pénale, la charte, 4ème édition, 2005, page 1419-1420” where they state that in case the civil party files an appeal, his/her appeal should only concern damages since the

criminal side of the case had already had the force of res judicata because the decision thereon had not been appealed against.

[13] Ngabire Solange, counsel for Banque Populaire du Rwanda states that they had appealed against criminal judgment which is also the basis of their appeal. Then, according to her, there is no ground as to why the Prosecution should be removed from in the case. She added that Banque Populaire du Rwanda had appealed against the points of its dissatisfaction in the judgment which acquitted the civil party of the crime which would have served as a basis of the award of the damages. She added that if Banque Populaire du Rwanda had appealed against damages only, it would have been changing the object of litigation while it is unlawful.

[14] Rumenge Nkundimana Victor, the counsel for Munyaneza and Nyiraguhirwa states that the objection raised by the Prosecution is founded that on the fact that there is no ground to be summoned in the trial since the object of litigation is only damages.

[15] Gasasira Jean Claude, counsel for Nsengiyumva Prosper states that there is no ground for summoning the Prosecution in such cases as there were two litigations but taking into account the progress of the case, only one case remains; damages. He adduced that based on article 12 of the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure which states that the civil action is heard in accordance with laws governing civil procedure; the Prosecution should be present in the case.

[16] Habimana Adolphe, counsel for Nabahire Théophile also states he does not understand the reason of the presence of the Prosecution in the case since the object of appeal is all about damages. He added that on invoked articles, should be added article 9(2°) of the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure the action of the civil party should solely be aiming damages. He insisted that the Prosecution should not be present since it requests nothing in the case especially that even the appeal of Banque Populaire du Rwanda could only target some of the accused and leave some others. Hence, the Prosecution was not needed in the case because the litigation is of civil case.

[17] With regard to article 187(2°) of the Law 30/2013 of 24/05/2013 relating to the code of criminal procedure, Habimana Adolphe, the counsel, submits that it is not quite clear. He adds that the whole judgment as referred to in this article means that the civil party must start where the court ended and submits evidence justifying the role of the acquitted and once he/she is successful, he/she is awarded the requested damages. He added that though article states that the case is re-heard on merit, the onus of proof falls on the civil party so as to be awarded with damages. Therefore, there is no need for the Prosecution to be present in the case.

## **THE VIEW OF THE COURT**

[18] Article 9 of the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure provides that a civil action is an action filed to seek compensation for damages caused by the offence. It is solely aimed at seeking damages. Analysis of this article infers that the requested damages depend on the committed crime and should be the compensation of the incurred damages caused by the crime at issue. Additionally, the judge views, this action is filed before the criminal court but with intention of seeking damages and not the sentence imposed for the committed crime.

[19] Article 164 of Organic Law n° 51/2008 of 09/09/2008 determining Organization, functioning and competence of the court as well as article 187 of the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure provide that the civil party appeals only for the awarded damages. However, they also provide that the acquittal of the accused does not hinder the civil party from appealing against the awarded damages and that in this case, the judgment at hand is re-heard on merit.

[20] The court notes that the acquittal of the accused does not stop the victim of the crime to file an appeal and the judgment in whole, be re-heard on merit. In this case, the court notes, the onus of proof falls on the civil party either through evidence contained in the case file or other new evidence he had got after, and the court examine that evidence with intention to assess whether the victim of the crime can be compensated with damages caused by the crime the accused was acquitted of.

[21] Regarding whether the Prosecution should be present in in the case of appeal of the civil party seeking damages while the accused was acquitted by the previous court, the court finds that the fundamental principle is that the no criminal case can be tried without the prosecution being represented.

[22] The court notes that the fact that the accused was acquitted but followed by the sole appeal of civil party, it cannot make the case lose its criminal nature to become civil case, since application for civil damages, is addressed to the judge of criminal cases and should award them based on evidence submitted to him by the civil party after examination and consideration of that evidence. In addition, though the case is heard following the rules of civil procedure, as provided for by article 12 of the Law n° 30/2013 24/05/2013 relating to the code of criminal procedure, it does not make lose its criminal nature because, as it has been highlighted above, its nature at the beginning is criminal till the appeal level, the judge is supposed to examine the role of the accused based on inculpatory evidence submitted to him/her by the appellant to constitute the basis for the award of the damages.

[23] The court finds that based on the principles invoked above, no criminal case can be tried without the Prosecution being represented and that the case at appeal level keeps its criminal nature; the presence of the Prosecution as a party is necessary because it is a rule in other criminal cases. This must be done so that in case it is deemed necessary it gives its opinion to the court during the submission of evidence by the civil party.

[24] The Court finds further that both Organic Law n° 51/2008 of 09/09/2008 determining organization, functioning and jurisdiction of courts in its article 164 and the Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure in its article 187 stress that in case of the accused's acquittal followed by the appeal of the civil party, the whole judgment is re-heard on merit.

[25] The court finds that the provisions of these articles infer the representation of the Prosecution in such cases since they are re-heard in their entirety either with regard to the commission of the crime or the award of damages. The court in this case examines the role of the acquitted so as to constitute the basis of the award of the damages when such a role is established.

[26] The Court therefore finds that based on these holdings, the judgments that the civil part appealed against while the accused has been acquitted at the previous instance, the Prosecution should be present to give its opinion if need be.

[27] On this issue, legal scholars including Henri-D. Bosly and Damien Vandermeersch in their book “*Droit de la Procédure Pénale, la charte, 4ème édition, 2005, page 1425*” had a comment. They state that in criminal cases, when appeal concerns civil action only, the Prosecution is not required to give its opinion vis-a-vis the case. (*Lorsque l’appel ne porte que sur l’action civile, le ministère public n’est pas tenu de donner un avis sur cette action*).

[28] The Court finds out that these scholars teach that, in the case originating from appeal of the civil party while the accused had been acquitted in the previous instances, the Prosecution is straightly present even though it is not a requirement to give its opinion; however, doing so is not unlawful.

[29] Based on the above mentioned holdings, the Court finds that that there is no ground as to why the Prosecution would not be present in the cases examining appeal of the civil party in case the accused was acquitted at the first instance.

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

[30] Holds that objection raised by the Prosecution lacks merit.

[31] The hearing of the case on merit is adjourned to February 10, 2014.

[32] Orders the court fees to be charged to public fund.