

PROSECUTION v. KWITONDA

[Rwanda SUPREME COURT – RPAA0305/11/CS (Hatangimbabazi, P.J., Kalimunda and Gakwaya, J.) November 27, 2015].

Criminal Law – Applicable law in case of conflict of two criminal laws – In case of conflict of two criminal laws, including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty – Organic Law N^o01/2012/OL of 02/05/2012 instituting the penal code, article 8.

Criminal Law – Criminal liability – Doubt on the day and month on which the accused was born – In criminal cases, any doubt favours the accused, thus in case the day and month on which the accused was born is unknown, the last day of the last month of the year in which he was born is considered – Organic Law N^o01/2012/OL of 02/05/2012 instituting the penal code, article 72.

Facts: The accused was prosecuted before the Intermediate Court of Gasabo for child defilement. He started pleading not guilty but the court convicted him and sentenced him to twelve years of imprisonment and a fine of 100,000Frw. Not pleased with the decision, he lodged an appeal before the High Court which sustained the appealed judgment. He appealed again in the Supreme Court, stating that he pleaded guilty while he was under torture and that the court found him guilty basing on the statement of the Judicial Police and the one made by the prosecution. However, during the hearing, he changed his pleading into guilty plea, but also said that he was under fourteen years old when he committed the offence.

The Prosecution argued that the accused himself said that he was fourteen years old, and that then there was no need to look for his birth certificate. He kept on stating that in case the day and the month of his birth are unknown, it should have been presumed that he was born on 1st January 1991, and then as he was 14 years old, he is criminally liable.

Held: 1. In case of conflict of two criminal laws including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty.

2. Considering the principle that in case of doubt in criminal cases, the things turn in favour of the accused, although the date and the month in which the accused was born are unknown, it is emphasized that he/she was born on the last day of the last month of the known year of his/her birth (31/ December). Thus, it must be decided that the accused was born on 31 December 1991 instead of 1 January 1991 as the Prosecution contends. Therefore, the accused is not criminally liable of having defiled U.L and he must be immediately released, as he committed the offence when he was aged thirteen years and six months old.

**Appeal has merit.
Accused not criminally liable.
Appealed judgment overturned.
Accused must be immediately released.
Court fees should be paid by the State.**

Statutes and statutory instruments referred to:

Decree – Law N^o21/77 of 18/8/1977 instituting the penal code, article 77.

Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, articles 8 and 72.

No case referred to.

Author cited:

Vade-mecum, *Le crime de génocide et les crimes contre l'humanité devant les juridictions ordinaires du Rwanda*, Avocats sans frontières, 2004, pp.194-195.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The case started before the Intermediate Court of Gasabo, where the prosecution was alleging against Kwitonda Jean Damascene for child defilement committed against a four year old child named U.L. The prosecution was pretending that the accused had admitted to the offence before the Judicial Police and the Prosecution but Kwitonda Jean Damascène pleaded not guilty.

[2] The court rendered the verdict of the case RP/Min0003/06/TGI/GSBO on 29 September 2006, finding Kwitonda Jean Damascene guilty and sentenced him to 12 years of imprisonment with the fine of 100,000Frw and court fees.

[3] Not pleased with the decision, Kwitonda Jean Damascene lodged an appeal before the High Court. The High Court decided upon the case RPA956/08/HC/KIG on 28 October 2011 and sustained the appealed judgment.

[4] Kwitonda Jean Damascene was not satisfied with the decision and appealed against it before the Supreme Court, stating that he pleaded guilty while under torture, and that the court found him guilty basing only on the statements of the Judicial Police and the prosecution.

[5] The hearing was held in public on 19 October 2015, where Kwitonda Jean Damascene was assisted by Counsel Rwigema Vincent, while the prosecution was represented by Nkusi Faustin, the National Prosecutor. During the hearing, Kwitonda Jean Damascene communicated to the court that he is changing his pleadings, with pleading guilty but then he added that pursuant to article 23 of the Decree - Law N°21/77 of 18/8/1977 instituting the penal code that was in force at the time the offence was committed, he could not be held criminally liable as he committed it while he was under fourteen years old.

II. ANALYSIS OF THE LEGAL ISSUES

To determine whether Kwitonda Jean Damascene should not be held criminally liable.

[6] Kwitonda Jean Damascene states that on 16 July 2005, around 11h00 a.m, he was at his grandmother Mukasinamenye Xaviere's place, the mother of U.L, and that he saw the victim urinating and when she removed her underwear, he felt the need to sex her but when she later joined him in bed, he intended to defile her though he never succeeded.

[7] Kwitonda Jean Damascene explained that his grandmother Mukasinamenye Xaviere came back and then U.L told her what happened to her. He does explained that he kept on pleading not guilty due to people who kept on telling him that if he pleads guilty, he will be punished severely.

[8] Counsel Rwigema Vincent states that explanations given by Kwitonda Jean Damascene in this court meet the statements he made in the Judicial Police and Prosecution, but that pursuant to article 77 of the Decree Law N°21/77 of 18/8/1977 above mentioned, he finds that, in case there is no relevant evidence proving the real age of Kwitonda Jean Damascene and U.L at the time the offence was committed, therefore, Kwitonda Jean Damascene should not be criminally liable because he was under fourteen years old (14 years) as proven by the Judicial Police and the Prosecution although there was no supporting document.

[9] The Prosecution argues that Kwitonda Jean Damascene himself said that he was fourteen years old, and then there was no need to look for his birth certificate. He keeps on stating that in case the day and month of his birth are unknown, it should be presumed that he was born on 1st January 1991. Therefore, given that he is 14 years old, he must be criminally liable. The prosecution concluded by requesting that the appealed judgment be sustained.

OPINION OF THE COURT

[10] Article 77 of the Decree- Law N°21/77 of 18/8/1977 instituting the penal code that was in force at the time of commission of the crime, stipulates that “When an offender or an accomplice is aged at least fourteen (14) but less than eighteen (18) years at the time of commission of an offence and if the sentencing appears necessary, the following penalties shall apply: if he/she would be subjected to a life imprisonment or life imprisonment with special provisions, he/she shall be liable to a term of imprisonment of ten (10) years to fifteen (20) years [...]”.

[11] Article 72(1°) of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code provides that “When an offender or an accomplice is aged at least fourteen (14) but less than eighteen (18) years at the time of commission of an offence and if the sentencing appears necessary, the following penalties shall apply: if he/she would be subjected to a life imprisonment or life imprisonment with special provisions, he/she shall be liable to a term of imprisonment of ten (10) years to fifteen (15) years”.

[12] Pursuant to article 8 of the Organic Law N°01/2012/OL of 02/05/2012 above mentioned states that “In case of conflict of two criminal laws including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty”. The Supreme Court finds that article 77 of the Decree Law N°21/77 of 18/8/1977 as mentioned above and article 72 of the above mentioned Decree Law N°01/2012/OL of 02/05/2012, prove that article 72 of the Organic Law N°01/2012/OL of 02/05/2012 shall be referred to as it provides for the lesser penalty.

[13] Furthermore, the Supreme Court finds that the analysis of article 72 of the above mentioned Organic Law N°01/2012/OL of 02/05/2012, emphasizes that the offender aged of least fourteen (14) years cannot be criminally liable.

[14] The court finds that, although in the case file there is no birth certificate of Kwitonda Jean Damascène, but as long as he stated without any doubt that he was born in 1991, especially that even the prosecution agreed on that, the year must be considered as the one in which he was born.

[15] The Supreme Court finds that although the date and month in which Kwitonda Jean Damascene was born are unknown; considering the principle that in case of doubt in criminal cases, the things turn in favour of the accused, it is emphasized that in case the day and month in which the accused was born are unknown, what must be considered is the last day of the last month of the

known year of his/her birth (31/ December). Therefore, it must be decided that Kwitonda Jean Damascene was born on 31st December 1991¹ instead of 1st January 1991 as the Prosecution argued.

[16] The Supreme Court finds that when Kwitonda Jean Damascene committed the offence on 16 July 2005 as included in the statements made by the Judicial Police made on 22 July 2005, he was aged thirteen years and six months (13 years and 6 months), therefore, he is not criminally liable of having defiled U.L and he must be immediately released.

[17] Based on what was mentioned in the previous paragraph, there is no reason to why other grounds of appeal of Kwitonda Jean Damascene should be examined.

III. THE DECISION OF THE COURT

[18] Finds the appeal of Kwitonda Jean Damascene with merit.

[19] Decides that Kwitonda Jean Damascene is not criminally liable.

[20] Decides that the judgment RPA956/08/HC/KIG rendered on 28 October 2011 is overturned.

[21] Orders for the immediate release of Kwitonda Jean Damascene from the prison.

[22] Orders that the court fees be paid by the State.

¹ Il peut également arriver que le mineur ne dispose pas du tout de document de l'état civil ou alors dispose d'un document ne mentionnant que son année de naissance (...). Les exemples les plus pertinents en l'espèce sont celui dans lequel l'on dispose d'un document qui indique que le prevenu est né en 1980, et donc qu'il a eu son 14^{ème} anniversaire dans le courant de l'année 1994, sans précision de jour ou de mois (...). En l'absence d'indications précises, le mineur doit se voir appliquer l'hypothèse la plus favorable, c'est à dire que l'on devra agir comme s'il était né le 31 Décembre 1980 (...). Le raisonnement doit amener à considérer, que le prevenu n'avait pas atteint l'âge de quatorze ans lors des événements qui se sont déroulés d'avril à juillet, et qu'il ne peut être poursuivi ni sanctionné", in Vade-mecum, Le crime de genocide et les crimes contre l'humanité devant les juridictions ordinaires du Rwanda, Avocats sans frontières, 2004, pp.194-195.