

## NTIBAJYINAMA v. PROSECUTION

[Rwanda SUPREME COURT – RPAA0078/15/CS (Rugege, P.J., Gakwaya and Mukandamage, J.) June 01, 2018]

*Constitutional law – The core responsibility of the Government to promote good health – Government’s health promotion indicators – The fact that the Government constructed hospitals, recruited personnel and provided its citizens with affordable social medical scheme known as (mutuelle de santé) indicates that there is a significant achievement towards the promotion to good health by the government – The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 45.*

*Criminal procedure – Right to legal counsel – Right to legal counsel for those accused of offences punishable by life imprisonment – In the interest of justice and protecting the right to legal counsel as well as the right to due process of law in general, those who are accused of capital offences punishable by life imprisonment who cannot afford a legal counsel, the Government should assign advocates to them or get them other stakeholders who may provide them with advocates. In the meantime, before that is implemented, the Judicial Police and Prosecutors should request that service from Rwanda Bar association.*

*Criminal law – Mitigating circumstances – Admission of the offence at appellate level – The fact that the accused admitted the offence on the first and second appeal requesting for pardon and considering the hard life that she went through which depressed her and led her to commit infanticide should be considered as a mitigating circumstances – Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 71, 76, 77and 78.*

*Law determining the jurisdiction of courts – Jurisdiction of the Supreme Court – Advisory opinion – Advisory opinionof the Supreme Court to the concerned government institutions to review the provisions of the law regarding the offence of infanticide – Law N°01/2012/OL of 02/05/2012 instituting the penal code does not differentiatethe offence of infanticide from the ordinary murder because they are all punished with life imprisonment, it does not also provide for the maximum age of the child killed – The nature of the offence of infanticide, particularly committed by the girls and women who have just delivered, is different from the ordinary murder because it is often committed due to depression, stress and lack of means to raise the child, which depression may cause her mental trauma. Whilst murder is often committed with some motives on the part of the offenders such as, interests in its commission, extreme hatred, racism, and other motives. Due to these reasons, infanticide committed by a parent, who had just given birth should not be considered as a felony which is punishable by life imprisonment, rather the penalty should be proportional, considering the period when the offence was committed and the offender. The Court requests the concerned government institutions to review the provisions of the Law regarding the offence of infanticide; it is definition and its sentencing.*

**Facts:** Ntibajyinama was prosecuted for the offence of infanticide in the intermediate Court of Nyagatare, after when she was pregnant went to the hospital and the doctor informed her that the unborn baby was in good condition but instead of waiting and give birth in the hospital she went back home, and gave birth in basin and threw the baby in the pit latrines, she was convicted and sentenced to life imprisonment.

She appealed in the High Court chamber of Rwamagana requesting for a penalty reduction on the ground that she pleaded guilty and asked for forgiveness. That Court held that she can get a penalty

reduction because her guilty plea was not sincere and doubtful and not complete as she does not admit that she intentionally committed infanticide. In all these lower Courts she was tried without a legal counsel.

She appealed again to the Supreme Court arguing that she was sentenced to life imprisonment in disregard that she pleaded guilty and asked for forgiveness, thus she prays to this Court to reduce her penalty sentence.

During the hearing a non-governmental organisation which advocates for women and girls rights called “Women’s Link Worldwide” filed “amicus curiae” submissions to the Supreme Court so that it could give explanations regarding the case and submit before it the doctrines of the law scholars and regional and international jurisprudence on the similar issue.

Before the Supreme Court she had a legal counsel , in her defence, Ntibajimana, she argued that at the first instance she pleaded not guilty but later on the appellate level she pleaded guilty and requested for a reduction of the penalty which she was given by lower Courts and she argues that it was due to the fact that when she got pregnant she faced hardship as an orphan, she was expelled where she worked and had no means neither to upkeep nor for medical bills led to committing infanticide when she threw the baby she had just given birth in pit latrines.

Her legal counsel explained that her client pleaded innocent because she did not have a legal counsel but after she got an advocate who advised her, she admitted the offence and explained in details its commission. Basing on the mitigating circumstances related to the hardship encountered by her client, he requests for reduction of the sentence from life imprisonment to 10years.

Women’s Link (amicus curiae) stated that the concomitance of problems women and girls face influence them in taking wrong decisions, some of those problems, is teenage pregnancy they do not have knowledge on their surroundings, they cannot get health and medical treatment aids, being expelled from their family and rape. It requested the Court to particularly consider the standard of living of the accused because she lived in rural area, uneducated and she did not get the sexual and reproductive health education and especially that she did not have a legal counsel in the previous courts, so that it reduces the sentence she was given by the previous courts.

The *amicus curiae* further argues that the right to medical care means that girls and women get necessary services during their pregnancy and at the time of giving birth, if these services are not available, it should be considered as discrimination because pregnancy is their sole particularity, and, their needs are basically not the same as those of men, it finds that the right to medical care of the accused was violated as her financial situation could not allow her to get medical services when she got contractions and this put her and her unborn baby in danger. It further argued that there is a link between the right to health of the women and girls and the crimes related to the sex and reproductive health which they are accused of, the offences they usually commit of infanticide and abortion are most likely a result of the father of the child not recognizing the child or refuses to give her alimony, the pregnancy from rape, living in extreme poverty, thinking that she will be expelled from school or at work and the segregation of single mother in the family.

The prosecution argues that some of the statements of amicus curiae are misleading because Rwandan laws and culture recognize the value of human being in general and they recognize child’s life in particular. It states also that infanticide or abortion in case of pregnancy of non-desirable sex of the child, child born with disability or albino, pregnancy and birth of twins, or a child born with health problems, are not in Rwandan culture, somewhere else infanticide and abortion are allowed based on the

policy of the state which is aimed at family planning, to the extent that, these acts are not considered as a crime, but it is not the case in Rwanda. It rests its case by stating that even though previously the accused pleaded not guilty but her guilty plea before the Supreme Court should be considered and be sentenced to not less than twenty (20) years of imprisonment as it is provided by the laws

**Held:** 1. The fact that the Government constructed hospitals, recruited personnel and provided its citizens with affordable social medical scheme known as (*mutuelle de santé*) indicates that there is a significant achievement towards the promotion to good health by the government, therefore Ntibajyinama as a citizen, her obligation towards the realisation of a good health, was to go to the hospital and get the services that are provided there but since she left the hospital without being discharged, it cannot be considered as if the State fell short in its obligation.

2. In the interest of justice and protecting the right to legal counsel as well as the right to due process of law in general, those who are accused of capital offences punishable by life imprisonment who cannot afford a legal counsel, the Government should assign advocates to them or get them other stakeholders who may provide them with advocates. In the meantime, before that is implemented, the Judicial Police and Prosecutors should request that service from Rwanda Bar association.

3. The fact that the accused was tried before the previous courts for a capital offence punishable by life imprisonment without a legal representation, implies that she was not guided on the consequences of the crime she is accused of, the benefits of a sincere confession, the fact of not having a legal counsel hindered the accused from knowing how to conduct her pleading for the court to appreciate the facts and the legal issues for it to take the appropriate decision.

4. The fact that the accused admitted the offence on the first and second appeal requesting for pardon and considering the hard life that she went through which depressed her and led her to commit infanticide should be considered as a mitigating circumstances, thus, her penalty is reduced to ten (10) years of imprisonment.

5. Advisory opinion of the Supreme Court to the concerned government institutions to review the provisions of the law regarding the offence of infanticide, Law N°01/2012/OL of 02/05/2012 instituting the penal code does not differentiate the offence of infanticide from the ordinary murder because they are all punished with life imprisonment, it does not also provide for the maximum age of the child killed and moreover, the nature of the offence of infanticide, particularly committed by the girls and women who have just delivered, is different from the ordinary murder because it is often committed due to depression, stress and lack of means to raise the child, which depression may cause her mental trauma. Whilst murder is often committed with some motives on the part of the offenders such as, interests in its commission, extreme hatred, racism, and other motives. Due to these reasons, infanticide committed by a parent, who had just given birth should not be considered as a felony which is punishable by life imprisonment, rather the penalty should be proportional, considering the period when the offence was committed and the offender. The Court requests the concerned government institutions to review the provisions of the Law regarding the offence of infanticide; its definition and its sentencing.

**The appeal has merit;**

**The decision of the judgment RPA0001/2015/HC/RWG is overturned in regard to the sentencing;**

**Sentences the accused to 10 years of imprisonment;**

**The court fees on public treasury.**

**Statutes and statutory instruments referred to:**

The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 45.  
Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 71, 76, 77 and 78.  
Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure, article 39.

**Case laws referred to:**

Uwamahoro v. The Prosecution, RPA0087/12/CS decided by the Supreme Court on 11/03/2017;  
Batumuliza v. The Prosecution, RPA0207/12/CS, decided by the Supreme Court on 17/06/2016;  
The Prosecution vs Muhindakazi, Wambui Kariuki vs Republic, S vs Muhungu HB11/2005, R. vs Lisa Gore.

## **Judgment**

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

[1] This case started at the Intermediate court of Nyagatare, the prosecution indicted Ntibajyinama Esther of the offence of infanticide. On 28 November 2014, the Court rendered a judgment RP0231/014/TGI/NYG, convicted her and sentenced to life imprisonment.

[2] Ntibajyinama Esther appealed against that judgment at the High Court, Rwamagana chamber on the ground that she pleads guilty, therefore she requests for the penalty reduction. In the judgment RPA0001/2015/HC/RWG rendered on 30/04/2015, the appellate court and sustain the sentence.

[3] The High Court ruled that Ntibajyinama Esther could not get a penalty reduction basing on her confession because her guilty plea is not sincere and it is doubtful. It went further to motivated that she does not acknowledge that she intentionally killed the baby and however, the doctor told her that the baby is healthy and then, instead of staying at the hospital, she run-away from the hospital and went home, where she delivered in the basin and threw the baby in pit latrine.

[4] It further explained that her claims that she killed the child because the man who impregnated her disowned her and did not have financial means all those led her to commit the offence lacks merit, therefore, she should not get a penalty reduction because she is not remorseful.

[5] Ntibajyinama Esther was not satisfied with the rulings and on 25 May 2015, appealed the judgment rendered by the High Court, in the Supreme Court on the ground that she was sentenced to life imprisonment despite her guilty plea and being remorseful. The Court disregarded all that. She prays for a reduction of the penalty that she was given by High Court. That appeal was recorded on RPAA0078/15/CS.

[6] The hearing of the case on merit was conducted on 04 December 2017, Ntibajyinama Esther assisted by Counsel Mukiza Bizimana Silas while the prosecution represented by national Prosecutor Munyaneza Nkwaya Eric. On 11 December 2017, non-governmental organization which advocates for women and girl's right called "Women's Link Worldwide" filed *amicus curiae* submissions to the Supreme Court so that it could give explanations regarding the case and submit to the Court the doctrines of law scholars and international and regional jurisprudences on the similar issues.

[7] On 05 January 2018, the Court resumed the hearing, so that Ntibajyinama Esther and the prosecution present their submissions on the Women's Link Worldwide's *amicus curiae* application. On 22 January 2018 the court admitted the *amicus curiae* application of Women's Link Worldwide.

[8] The hearing was conducted on 30 April 2018, Ntibajyinama Esther assisted by Counsel Mukiza Bizimana Silas, Women's Link Worldwide represented by its CEO Viviana Waisman, assisted by counsel Lydia Munyiva Muthiani and Kabasinga Florida whereas the Prosecution was represented by National Prosecutor Munyaneza Nkwaya Eric.

## II. ANALYSIS OF THE LEGAL ISSUE

### a. Whether the prison sentence of Ntibajyinama Esther should be reduced

[9] Ntibajyinama Esther argues that although on the first instance, she pleaded innocent but on the appellate level she pleaded guilty and explained the commission of the offence and prays for the reduction of the sentence she was given by the previous Courts.

[10] She explained that the reason she committed the offence of infanticide was that she experienced difficult times when she got pregnant because as an orphan and after being dismissed she did not have money for her upkeep nor for treatment. She states that she went to the hospital for pregnancy consultation and they told her to go and buy medicine in the pharmacy but because she did not have money, she decided to go home, on arrival gave birth to a baby, and threw it in the pit latrine.

[11] The counsel for the appellant, Mukiza Bizimana Silas argue that in the previous Courts Ntibajyinama Esther denied the commission of the offence because she did not have a counsel but after consultation with her, she confessed the offence and also explained its commission.

[12] He furthermore adduces that they have other mitigation circumstances related to the hardship she endured as an orphan and when she got pregnant, she was traumatized with no one to counsel her because she lived alone and disowned by the man who impregnated her, this mentally destabilized her. In addition to this she did not get a proper medical treatment during the pregnancy due to lack of financial means He prays to the court that the prison sentence of her client be reduced to 10 years sentence basing on the provision of article 77, *litera* 3 and 78 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code.

[13] Viviana Waisman, the CEO for Women's Link Worldwide argues that in sentencing Ntibajyinama Esther, the Court should consider the concomitance of problems women and girls face which influence them in taking wrong decisions. Some of those problems are teenage pregnancy they do not have knowledge on their surrounding, they cannot get health and medical treatment aids, being expelled from their family and rape. She further states that the Court should particularly consider the standard of living of the accused because she lived in rural area, uneducated and she did not get the sexual and reproductive health education.

[14] She goes further to explain that the right to medical care means that girls and women get the necessary services during the pregnancy and when giving birth, if not it will be considered as discrimination because women are the ones who solely carry the pregnancy, their needs are basically not

the same to those of men. She requests that in deliberations the Court should consider the standard of living and the means of Ntibajyinama Esther and any others who have the similar problems.

[15] She further pray that while sentencing Ntibajyinama Esther, the Court should consider that she did not have a legal counsel in the previous Courts and also verify whether the accused did not have mental problem at time of commission of the offense due to trauma and depression. She rests her case arguing that for the sake of complying with the law, the Court examines whether the sentence of Ntibajyinama Esther was not harsh considering the problems encountered by girls and women.

[16] Lydia Munyiva Muthiani, the counsel for Women's Link argues that basing on the constitution of Rwanda and other various international treaties, finds that Ntibajyinama Esther's right to medical care was violated; her financial constraint prevented her to access medical service after having the contraction, which put her and the unborn baby in a dangerous situation because she gave birth in unfavorable situation without any help. She further submits that there is a link between the right to health of the women and girls and the crimes related to the sex and reproductive health which they are accused of, the offences they usually commit of infanticide and abortion are most likely a result of the father of the child not recognizing the child or refuses to give her alimony, the pregnancy from rape, living in extreme poverty, thinking that she will be expelled from school or at work and the segregation of single mother in the family.

[17] She continues stating that the right to welfare means also assistance and education in sexual and reproduction heath, assistance and education to family planning and also women being able to get food for children. She states also that, implementing these rights prevents women and girls from commission of crimes and reduce child mortality.

[18] She concludes her submission arguing that pursuant to international treaties and Rwandan Laws, the Court should consider that girls and women from rural area face problems during their pregnancy and at time of giving birth which may cause loss of life such as, high blood pressure pre-mature contractions which may occur when they are alone with no one to help. All those have consequences on the poor and illiterate women or those with just basic education and most of time are jobless.

[19] Counsel Kabasinga Florida states that Ntibajyinama Esther was sentenced in disregard of the principles of the right to due process of law because she did not get a legal representation, there was not even an investigation conducted to determine whether the accused has trauma related issues or depression. She further argues that, the Court should examine whether the judicial police and the prosecution fulfilled their duty of searching for evidence to charge or discharge the accused.

[20] She also states that previous Courts took decision without taking into account the circumstances surrounding the commission of the offence because in sentencing the Court must consider offender's background as provided by article 71 of the organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, also Ntibajyinama Esther was tried without a legal because she couldn't afford it while she was accused of serious crime.

[21] The Prosecution argue that some of the arguments of the Amicus curiae are unfounded, as Rwandan laws and culture recognize the value of human being in general and they recognize child's life in particular. It states also that infanticide or abortion in case of pregnancy of non-desirable sex of the child, child born with disability or albino, pregnancy and birth of twins, or a child born with health

problems, are not in Rwandan culture, somewhere else infanticide and abortion are allowed based on the policy of the state which is aimed at family planning, to the extent that, these acts are not considered as a crime, but it is not the case in Rwanda.

[22] The prosecution further argue that, there is no discrimination under Rwandan laws, that a girl or a woman who don't have financial means or other hardship due to her nature, they cannot be considered as discrimination because also men can commit infanticide. He claims that there are several government policies in place which are aimed at assisting girls and women to benefit health services, and reduce child mortality rate. He continues stating that, Ntibajyinama Esther premeditated the commission of the offence and she did not commit the offence due to lack of healthcare because she decided to escape from the hospital on her own. He further states that there is no gender based discrimination or other related issues such as poverty or illiteracy of Ntibajyinama Esther and the fact that she did not have assistance or she is poor are not motives for committing infanticide.

[23] The prosecution further more state that Ntibajyinama Esther was sentenced in accordance to principles of right to due process of law, the accused was notified of the offence she was prosecuted of, and was reminded of her right to defense. He finds that, if she was not tried without legal representation was her choice because during her examination in judicial polio legal representation and she replied that she is ready to answer and plead on her own.

[24] He rest his case stating that, though previously Ntibajyinama Esther had pleaded not guilty, her guilty plea before the Supreme Court should be considered and be sentenced to not less than 20 years of imprisonment as its provided for a person who makes a sincere confession and asks for forgiveness.

## **VIEW OF THE COURT**

[25] The case file indicates that Ntibajyinama Esther was convicted of infanticide in Intermediate Court of Nyagatare, and sentenced to life imprisonment, she appealed in High Court, Rwamagana chamber stating that she pleads guilty and requests for a penalty reduction but her penalty was not reduced because the Court found her confession not complete and sincere.

[26] Ntibajyinama Esther further appealed in Supreme Court again requesting for a reduction of the penalty on the ground that she pleaded guilty which is a mitigating circumstance. The Court finds that, there is no argument on the guilt of Ntibajyinama Esther of the offence of infanticide which is provided by article 143 of Organic Law N°01/2012/OL of 02/05/2012 aforementioned. As also provided, by that article the penalty of that offence is life imprisonment.

[27] Article 76 and 77 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, allow the Court to reduce the sentence based on well elaborated mitigating circumstances, whether those which proceeded, accompanied or which followed after the offence. Ntibajyinama Esther, her Counsel, representatives of Women's Link Worldwide who were allowed to be part of this case as *amicus curia*, they explain several grounds which should be considered in sentencing Ntibajyinama Esther.

[28] The High Court chamber of Rwamagana rejected the confessions of Ntibajyinama Esther basing on how she explained the commission of the offence, but it is clear that in her appeal submissions and minutes of the trial in that Court, Ntibajyinama Esther explained how she was asked to go to buy medicine in pharmacy, and when she realized that she has no money to buy it, and no one could help,

she was living in rental house and had no job, she had not clothes for the baby nor food to feed the baby, she felt helpless and confused, that is when she went back home and gave birth in a basin, and threw the baby in pit latrine. The High Court chamber of Rwamagana did not demonstrate what she could have said contrary to what she said about the commission of the offense. Considering the statement of Ntibajyinama Esther, The Supreme Court finds that she confessed the crime without the intention to mislead the Court or to conceal anything in order to prove her innocence, for her confession not to be accepted to serve as mitigating circumstances for her.

[29] The Case file also indicates that either in intermediate Court of Nyagatare or in High Court chamber of Rwamagana, Ntibajyinama Esther was tried without a legal representation. As someone accused of a capital offence of infanticide which is penalized by life imprisonment, did not get the chance to get a legal counsel to guide her on the consequences of the crime she is accused of, the benefits of confessions, and what entails a complete and sincere confession, its content so that if she chooses to confess she can collaborate it with legal provisions. The Supreme Court finds that because Ntibajyinama Esther was tried without legal representation hindered the accused from not knowing how she should plead before the court, so that it could help the Court to understand the facts and the issues and take an appropriate decision.

[30] The case file also contains the appeal submissions in Supreme Court, and the hearing of 04/12/2017 in this Court, both indicating that Ntibajyinama Esther confessed again and was remorseful, she explained that she went to the hospital for consultation then told that the foetus is healthy, then she went home at night she gave birth at home and threw the baby in pit latrine. She continues explaining that her motives of infanticide are due to many problems she had, notably being an orphan living alone, lack of hospital fee and lack of medical insurance, she was fired from where she was working this illustrate that she sincerely confess the commission of the offence, thus, her confession in appeal in Supreme Court is a mitigating circumstances for the offence of infanticide she is accused for.

[31] As it was also obvious in the pleadings in this Court, Ntibajyinama Esther recalled the hard life that she was living because of being an orphan, unplanned pregnancy and abandoned by the man who impregnated her, her employer dismissed her when he knew about her pregnancy and also living alone in the house, etc. The Court finds that, this situation was the source of depression which led her to commit infanticide; this also can be considered as mitigating circumstances for her. This is the position taken in the judgment case RPA0087/12/CS of prosecution and Uwamahoro Spéciose rendered on 11/03/2016 by the Supreme Court and RPA0207/12/CS between Prosecution and Batamuliza Clémence rendered on 17/06/2016. Regarding this, the Court concurs with the opinion of Women's Link Worldwide in this case that segregation and non-assistance of pregnant women and girls particularly those ones from humble families or living alone and without assistance can be a cause of depression to them and lead them to commit several offences like abortion and infanticide.

[32] Regarding to the respect of the right to good health raised by amicus curiae the Court finds that, this is not an issue of this case. Article 21 of the Constitution of the Republic of Rwanda of 2003 as revised in 2015 states that, all Rwandans have the right to good health. While article 45 states that The State has the duty to mobilize the population for activities aimed at good health and to assist them in the realisation of those activities. Every Rwandan has the duty to take part in activities aimed at good health. Article 14 of Maputo protocol to the African Charter on Human and People's Rights on the



Rights of Women in Africa of 11 July 2003<sup>1</sup> and Provides that the States Parties shall ensure that the right to health of women provided in that article, including sexual and reproductive health is respected and promoted.<sup>2</sup>

[33] The provisions of the Constitution as well as International Conventions ratified by Rwanda mentioned in previous paragraph, proves that Rwanda as a state has a will to promote and to protect rights to life of girls and women including sexual and reproduction health. The government's obligation is to sensitise its citizens to engage in health activities and to access them, whereas for the citizens their duty is to participate in those welfare activities. With regard to the Government's obligation to sensitise its citizens and to help them access such activities, the Court cannot determine extent to which the Government has implemented it, because it is of no importance to the case at hand. What is certain is that there are some achievements depending on available means of the country such as building hospitals, recruiting personnel and equipping them with necessary tools and to sensitize pregnant women to consult health centres for their health care as well as giving birth at hospitals.

[34] In regards to this case, the documents in the case file indicate that Ntibajyimana Esther went to hospital for antenatal care, the first step towards implementation of the right to good health was made when the government constructed hospitals, recruited personnel and affordable health care using the social medical scheme known as *mutuelle de santé*. As a citizen, Ntibajyinama Esther to enjoy her right to good health, she was required to visit health centre in order to access medical services. The Court finds no proof that the Government failed to carry out its primary duty of providing good health to its citizens.

[35] The documents contained in the case file also indicate that Ntibajyinama Esther went alone to the health centre and returned at around past 23h 30 PM, without being discharged ( Cote 26). The Court cannot declare that her statement stating that she had no money to pay for medicine and for labour as false because she might have feared that she may not be able to get the money to pay once she gives birth, as she had no health insurance. On other hand, nothing proves that she did not get medicine and medical services due to lack of money and health insurance, the Court can therefore not confirm that the Government failed in its duty of providing to the needy people with access to health care, so that it induced Ntibajyinama Esther to commit infanticide.

[36] With regard to the statements of Women's Link Worldwide representatives stating that the fact of not satisfying the needs of women during period of pregnancy and at the moment of giving birth, that it would be considered as discrimination based on their natural physiology, the Court finds, it would be considered as discrimination when the women are denied some rights due to their sexual physiology. In Ntibajyinama's trial, the representatives for Women's Link Worldwide do not prove that what they contend she had missed, was based on the fact of being a woman. The Court finds no evidence to be considered in deciding that she committed the offence of infanticide due to discrimination or that she was denied some rights because of that discrimination.

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<sup>1</sup>Ratified by presidential order N° 11/1/ of 24 June 2004.

<sup>2</sup> 1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

a) the right to control their fertility;  
b) the right to decide whether to have children, the number of children and the spacing of children; c) the right to choose any method of contraception;

[37] The case file further demonstrates that Ntibajyinama Esther at the health centre was scanned and told that the foetus heartbeat was normal. This means that by deciding to leave the health care and go back home to give birth there she had put her health in danger which could result into death due to lack of assistance from the skilled personnel. The Court finds that the attitude of Ntibajyinama Esther of escaping from the health centre was due to not being aware of probable consequences or she might have been aware of them but the reason behind her escape might have been heavier than giving birth at home. This cannot be disregarded by the Court, and consider she committed the offence in the usual circumstances, rather there is something which pushed her to commit the offence which is beyond the will to commit an offence even though that does not exonerate her from criminal liability.

[38] With regard to the issue of Ntibajyinama Esther's right to due process of law raised by Counsel Kabasinga Florida, the case file demonstrates that except before the Supreme Court, she was tried without legal representation. In her interrogatory before judicial police (cote 10), there is a question she was asked which is always asked to those apprehended that *according to article 39 of Law N°30/2013 of 24/5/2013 relating to the code of criminal procedure gives the right to be interrogated in the presence of your legal counsel. Do you have a legal counsel or are you legal to be interrogated without legal counsel* and she replied that she will responds by herself . Whereas nothing proves that she was informed that if she cannot afford a lawyer, the Bar association would find a lawyer for her by request of judicial Police Officer or Prosecutor as provided by article 39. Even before the Prosecution, Ntibajyinama Esther was also informed of her right to legal representation and asked if she accepts to be interrogated without legal counsel (Cote 24), she was however not informed of the possibility to get her a lawyer. In previous instances, the issue of legal representation was not discussed. It is possible that Ntibajyinama Esther and others like her have right to legal representation but because of lack of means to afford a lawyer, they don't exercise that right. This has grave consequences the accused fails to defend himself/herself in proper manner as the one with a legal counsel.

[39] It would be better that every suspect on trial to have a legal counsel, in case the accused can't afford one, the Government pays for her/him. It's obvious that due to limited resources, the Government cannot afford it to all that are in need of the legal representation. However, the Court finds that in the interest of justice and protecting the right to legal representation as well as the right to due process of law in general, those who are accused of capital offences punishable by life imprisonment, who cannot afford a legal counsel, the Government should assign advocates to them or get them other stakeholders who may provide them with advocates. In the meantime, before that is implemented, the Judicial Police and Prosecutors should apply the aforementioned article 39, so that the Rwanda Bar association give assistance to indigents who are accused from the moment of their arrest.

[40] In conclusion, the Court finds that Ntibajyinama Esther should be sentenced putting into consideration the mitigating circumstances explained in previous paragraphs and the accused's motive in relation to the commission of the offence. This concurs with the provisions of article 71 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which stipulates that the judge shall determine a penalty according to the gravity of the offence taking into account offender's motives, history and background, circumstances surrounding the commission of the offence and individual circumstances. For the penalty reduction, article 78 of that code has to be applied; it provides that if there are mitigating circumstances, the reduction of penalties shall be as follows: 1° life imprisonment or life imprisonment with special provisions is replaced by a penalty of imprisonment of not less than ten (10) years. In application of this article and considering the mitigating circumstances as explained above, the Court finds Ntibajyinama Esther' sentence has to be reduced to 10 years of imprisonment.

## **b. The law provision relating to the offence of infanticide**

[41] Before concluding, the Court finds it necessary to provide an advisory opinion on the provisions of the article that relates to the offence of infanticide. Article 143 of Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code provides that a person who kills his/her biological or adopted child shall commit infanticide. Infanticide shall be punishable by life imprisonment. In french that article states : *L'infanticide est le meurtre commis par une personne sur son enfant biologique ou adoptif. L'infanticide est punissable d'unemprisonnement à perpétuité.* The Law does not provide the age bracket of the child. This means that a parent either a man or a woman kills her or his offspring who is fifty years old commits the offence of infanticide. These were the facts in the case Prosecution v. Muhindakazi Didacienne who was convicted of the infanticide because she murdered her 28 years old offspring<sup>3</sup>. In other countries such as European countries where the term infanticide originates, the law provides the maximum age of the killed child such as twelve months or two years, in addition that offence is committed by a mother who kills a child and not a father. In United Kingdom, to be convicted of infanticide, the child must not be above the age of twelve (12) months.<sup>4</sup> This is also what is provided in the laws of Canada<sup>5</sup>, Kenya<sup>6</sup> and Uganda<sup>7</sup>.

[42] The Court finds, the sentence of life imprisonment to woman who committed infanticide to be severe considering the circumstances in which the offence was committed, If you consider in other countries, the penalties for the offence of infanticide are more lighter in comparison to that provided by the Law instituting the penal code in Rwanda. In the case of *Wambui Kariuki vs Republic*<sup>8</sup>, the Court of Appeal of Kenya reduced the sentence to one and half year term for a woman who killed her child who was below 12 months on the ground that the previous Court had failed to examine the accused's difficult conditions of life she lived in which included lack of means to take care of other children she had as single mother. In Zimbabwe, in the case of *S vs Mhungu HB 11/2005*<sup>9</sup>, the accused pleaded guilty to killing her baby she had just given birth, on the first instance, she was sentenced to two years(2) of imprisonment. On appeal level, the judge made emphasis on her life conditions and other mitigating circumstances such as she was only twenty (20) years of age, abandoned by the one who impregnated her, unemployed with no alternative sources of income, having other two children and also being a first offender. The previously sentenced penalty of two (2) years was suspended for twenty (20) months in three years (3). Obviously, sentencing this mother with severe penalties does not help traumatised women or to deter others from committing such offence.

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<sup>3</sup> Case RP00090/16/TGI/NGOMA, Prosecution Vs Muhindakazi Didacienne

<sup>4</sup> Infanticide act, 1938 (United Kingdom) Sections 1(1) to (3)

“(1) Where a woman by any willfully act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, if the circumstances were such that but for this Act the offence would have amounted to murder or manslaughter, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.”

<sup>5</sup> Criminal Code of Canada, 1948 as amended in 1955, Section 233.

<sup>6</sup> Section 210, Kenya Penal Code

<sup>7</sup> Section 213, Uganda Penal Code, Cap. 120,1950.

<sup>8</sup> Beatrice Wambui Kariuki vs Republic [2005] e KLR

<sup>9</sup> This case is mentioned in article of Mary Clausina OUNDO: “A critical analysis of the judicial Response to the crime of Infanticide”, on page 37-38; found at <https://searowl.ac.zw/index.php>

[43] Considering the current Law, there is no difference between the offence of infanticide in Rwanda and murder punished by the aforementioned Organic Law N°01/2012/OL of 02/05/2012 because life imprisonment is also provided for murder and other homicides. This means that the gravity is considered as the same. The particularity of the offence of infanticide is that the homicide is committed to the biological or adopted child. However, the nature of the offence of infanticide, particularly on the girls and women who have just delivered, is different from murder which is often committed with some motives on the part of the offenders such as, extreme hatred, racism, and other motives. In many countries the offence of infanticide is not considered as a capital felony as murder. When we take an example of England, in the case of *R. v. Lisa Gore*, the Court of appeal of that country, motivated that the offence of infanticide is different from murder, because it is not necessary to establish premeditation. And it is considered as a minor offence compared to others homicides because of the motives behind its commission and the timing.<sup>10</sup>

[44] The Court finds that, a woman who has carried the pregnancy for nine months, and after birth she kills the born baby, most often within 48 hours after birth (qualified as neonaticide by scholars) it is not due to hatred rather it is due to depression, stress and lack of means to raise the child, or that depression may cause her mental trauma. Due to these reasons, infanticide committed by a parent, who had just given birth should not be considered as a felony which is punishable by life imprisonment, rather the penalty should be proportional putting into consideration the period when the offence was committed and the offender. In brief, there should be proportionality between the penalty and the nature of the offence of infanticide. The Court requests the concerned government institutions to review the provisions of the Law regarding the offence of infanticide, how it is defined and its sentencing. The Law punishing the offence of infanticide in Zimbabwe may be referred to in reviewing the Rwandan Law. It provides that:

- “48(1) Any woman who, within six months of the birth of her child, causes its death intentionally; or
- by conduct which she realizes involves a real risk to the child’s life; at a time when the balance of her mind is disturbed as a result of giving birth to the child, shall be guilty of infanticide and liable to imprisonment for a period not exceeding five years.
- 48(2) Where a woman is charged with the murder of her child committed within six months of the child’s birth and it is proved that she caused the child’s death at a time when the balance of her mind was disturbed as a result of giving birth to the child, she shall not be found guilty of murder but may be found guilty of infanticide if the evidence establishes that she committed that crime.
- 48(3) For the purposes of this section, in determining whether or not the balance of a woman’s mind was disturbed as a result of giving birth to a child, regard shall be taken to any pressure or stress from which she suffered arising out of any one or more of the following circumstances or considerations.

(a) the effects which the birth had, or which she believed it would have, on her social, financial or marital situation;

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<sup>10</sup> *R. v. Lisa Gore (Deceased)* [2007] EWCA Crim 2789. Lady Justice Hallet stated that is: “We are satisfied that Parliament intended to create a new offence of infanticide...If the criteria in sub-section (1) are fulfilled, the mother who kills her child does not have to face an indictment of murder. She faces a lower grade criminal charge, namely infanticide.”

(b) the difficulties which were created, or which she believed would be created, in caring for the child in the social, financial or marital situation in which the child was born;

(c) the difficulties which she had, or which she believed she would have, in caring for the child due to her inexperience or incapacity;

(d) any other relevant circumstance or consideration, whether based on the psychological effects on the woman's mind arising from the birth itself, or otherwise.

- 48(4) For the avoidance of doubt it is declared that nothing in this section precludes: (a) a woman from being charged with the murder of her child and, subject to subsection (2), from being convicted of and punished for that crime; or (b) a court from returning a special verdict in terms of section 29 of the Mental Health Act [Chapter 15:12] (No. 15 of 1996) in respect of a woman charged with causing the death of her child.”<sup>11</sup>

The Court finds this law includes the reasons why mothers often commit infanticide which is similar to those in Rwanda; therefore it can be a reference when amending ours.

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

[45] It holds that the appeal of Ntibajyinama Esther has merit.

[46] Overturns that the rulings of the appealed Judgment RPA0001/2015/HC/RWG rendered on 30/04/2015 by the High Court, Rwamagana chamber in regard to the sentencing of Ntibajyinama Esther.

[47] Sentences Ntibajyinama Esther to 10 years of imprisonment.

[48] Orders that the court fees be on public treasury because the accused is in prison.

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<sup>11</sup> Section 48 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Zimbabwe 2004).