

Re BYANSI (ADD)

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00003/2021/SC– (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye and Karimunda, J.) December 10, 2021]

Constitution – Petition seeking to declare unconstitutionality of a law – Interest to initiate a petition for unconstitutionality – Such an interest must be broadly understood, and based on the conviction that the law is unconstitutional on grounds that it violates the rights of the petitioners, or that the purpose of the Constitution is not achieved, and that such purpose must be protected.

Constitution – Petition seeking to declare unconstitutionality of a law – Interest of the petitioner – The petitioner must prove his/her personal interest or direct interests he/she can be deprived of by the law of which he/she requesting for the repeal.

Facts: Byansi petitioned the Supreme Court praying it to declare that Article 71, paragraph 5, of Law n° 22/2018 of 29/04/2018 relating to civil, commercial, labor and Administrative procedure, is inconsistent with Article 38 of the Constitution of the Republic of Rwanda of 2003 revised in 2015. He argues that the impugned provision is detrimental to journalists since it sets a deadline for them to apply for authorization to make audio and video recordings in the courtroom, which is a mechanism to deny access to information for the press, hence depriving the press of its freedom. He further adds that it is not appropriate for journalists to be required to apply for an authorization to do their job, while they present their press cards. He concludes by adding that setting the deadline for the application for the authorization to make audio and video recording in the courtroom can be construed as a disregard to nowadays' mobile journalism.

The State Attorney in the instant case elucidates that the Constitution does in no way provide that the press must have access to any kind of information, the reason why the impugned article is in no way inconsistent with the Constitution as alleged by the Petitioner. He further states that the fact that the law requires the press to apply for making audio and video recordings in the courtroom does not violate the principle that the hearing is conducted in public as provided for under Article 71 of the aforementioned Law n° 22/2018 of 29/04/2018.

Prior to the hearing of the case in merit, the Court analyzed whether the Petitioner had an interest to initiate the instant petition since he did it in the quality of journalist on 04/06/2021 while his service card had expired on 12/05/2021.

On this issue, the petitioner states that his service card had expired by the time he initiated a petition, and that he had applied for its renewal before it expired, an application which was delayed by the fact that many services were suspended due to the COVID-19 outbreak, but later, his card has been extended from 20/09/2021 to 20/09/2022. He states his petition should have been admitted even if he had initiated it while he was waiting for his card (licence) to be renewed, given that even at the time of the trial he had been given a new card and thus, he should not be considered as lacking interest to initiate a petition.

The State Attorney argues that the fact that the Petitioner initiated a petition at the time when his service card as a Journalist had expired, he should have not done it in the quality of a journalist, rather as an individual.

Held: 1. The interest to initiate a petition must be broadly understood, and based on the conviction that the law is unconstitutional because it violates the rights of the petitioners, or that the purpose of the Constitution is not achieved, and that such purpose must be protected.

2. The petitioner must prove his/her personal interest or direct interests he/she can be deprived of by the law of which he/she requesting for the repeal.

The Petitioner has interest to initiate a petition seeking to declare unconstitutionality of a law.

The hearing will resume.

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 revised in 2015, article 38;

The Law n° 68/2018 of 30/08/2018 determining offences and penalties in general;

The Law n° 30/2018 of 02/06/2018 determining jurisdiction of the courts, article 72;

Law n° 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure, articles 70 and 71;

Law n° 02/2013 of 08/02/2013 regulating media, article 3, 4 and 5.

Cases referred to:

Re Mugisha Richard, RS/INCONST/SPEC 0002/2018/SC rendered by the Supreme Court on 18/01/2019;

Areva NP Vs Eskom Holdings Soc Limited and Another [2016] Zacc 51 rendered by the Constitutional Court in South Africa.

Judgment

I. BACKGROUND OF THE CASE

[1] On 04/06/2021, Byansi Samuel Baker petitioned the Supreme Court seeking declaration that Article 71, paragraph 5, of Law n° 22/2018 of 29/04/2018 relating to civil, commercial, labor and administrative procedure providing that authorization to make audio and video recordings in the courtroom is applied for in writing at least forty-eight (48) hours before the hearing, is inconsistent with Article 38 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, which provides that freedom of press, of expression and of access to information are recognized and guaranteed by the State.

[2] He argues that, as a journalist with service card number 17/726-1¹ and who mainly focuses on investigative journalism in Rwanda and abroad, he finds that Paragraph 5, article 71, of the aforementioned Law is detrimental to journalists since it sets a deadline for them to apply for authorization to make audio and video recordings in the courtroom, which is a mechanism to deny access to information for the press, hence depriving it of its freedom, while Article 70 of the Law n° 22/2018 of 29/04/2018 relating to Civil, commercial, labor and administrative procedure

¹ This card was issued by the Rwanda Media Commission on 12/05/2020 and it was due to expire on 12/05/2021, and it was later renewed on 20/09/2021 to expire on 20/09/22.

provides that a hearing is conducted in public. He elucidates that informing the public of what is going on in courts is within the scope of the right to freedom of the press and of access to information, which must be complied with by the courts as an administrative body.

[3] He urges that it is not appropriate for journalists to be required to apply for an authorization to do their job, while they present their service cards as journalists. He concludes by adding that setting the deadline for the application for the authorization to make audio and video recording in the courtroom can be construed as a disregard to nowadays' mobile journalism.

[4] Counsel Habumuremyi Prosper, State Attorney in the instant case, urges that Article 71, paragraph 5, of Law n° 22/2018 of 29/04/2018 relating to Civil, Commercial, Labor and Administrative procedure is not inconsistent with Article 38 of the Constitution of the Republic of Rwanda.

[5] He elucidates that the Constitution does in no way provide that the press must have access to any kind of information. It is in that framework that such procedure has been provided for under paragraph 5, Article 71, of the aforementioned Law, wherein explanations for applying for such authorization is done within at least 48 hours before the hearing. He further added that the fact that the law requires the press to apply for making audio and video recordings in the courtroom does not violate the principle that the hearing is conducted in public as provided for under paragraph 6, Article 71 of the Law no 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure.² The case was heard in public on 15/11/2021, with Byansi Samuel Baker assisted by Counsel Ruramira Bizimana Zébédée and Counsel Musore Gakunzi Valéry, while the Government of Rwanda was represented by State Attorney Habumuremyi Prosper. Prior to the hearing of the case in merit, the Court analyzed the issue related to whether the Petitioner, Byansi Samuel Baker, had an interest in initiating a petition for unconstitutionality in accordance with paragraph one, Article 72, of the aforementioned Law n° 22/2018 of 02/06/2018 determining jurisdictions of courts.

II. ANALYSIS OF LEGAL ISSUE

1. Whether Byansi Samuel Baker has an interest in the instant case

[6] The court asked Byansi Samuel Baker if he initiated a petition as a journalist on 04/06/2021 while his service card had expired on 12/05/2021, and replied that though his service card had expired by the time he initiated a petition, he had applied for its renewal before it expired, that the fact that they delayed to answer him until his card expired, was due to the fact that many services were suspended due to the COVID-19 outbreak. He states that the said card was later extended from 20/09/2021 to 20/09/2022. He finds therefore that the fact that he initiated a petition by the time his service card was expired but still waiting to get a new one, which is in his possession now, it should not be a reason for the inadmissibility of his petition because he has been working as a

² Paragraph 6, Article 71 of the Law n°22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure reads that the president of the court decides in writing to grant or reject the application for making audio and video recordings after examining whether the granting of such application cannot adversely affect the interests of the administration of justice, national security, safety of parties and morals.

journalist since 2017, where he has worked for various media houses including Rwanda Broadcasting Agency (RBA) and TV 10.

[7] To defend him, Counsel Musakore Gakunzi Valéry based on Article 3 of Law n° 22/2018 of 29/04/2018 relating civil, commercial, labor and administrative procedure³ and Article 72, paragraph 1 of Law n° 30/2018 of 02/06/2018 determining the jurisdiction of the courts⁴, states that an individual may initiate a petition to the Supreme Court, and that even though Byansi Samuel Baker initiated a petition while his card as a journalist had expired, but he is already known as a journalist, in addition, by the time of the trial, he had got a new card. He therefore finds that this cannot be regarded as a reason for lacking interest in initiating a petition leading to inadmissibility of such petition.

[8] Counsel Ruramira Bizimana Zébédée, also representing Byansi Samuel Baker, based on Article 5 of Law n° 02/2013 of 08/02/2013 regulating Media, states that once the Court found that Byansi Samuel Baker was a journalist though he initiated a petition by the time his card was expired, it would rule that he had an interest to sue and thus admit his petition.

[9] Counsel Habumuremyi Prosper, representing the Attorney General, elucidated that it appears that Byansi Samuel Baker was given a press card on 12/05/2020 and expired on 12/05/2021, and he later initiated a petition as a journalist on 04/06/2021 after his card was expired; he expounds that he failed to comply with the provisions of the law because while he did not have a press card, he had no interest in suing as a journalist, but at that time he would have initiated a petition as an individual.

DETERMINATION OF THE COURT

[10] Paragraph one, Article 72 of the Law n° 30/2018 of 02/06/2018 determining jurisdiction of the courts reads that the Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare unconstitutional a law if they have any interest...

[11] Article 3 of the Law n° 02/2013 of 08/02/2013 regulating media reads that a Rwandan journalist, whether exercising the profession of journalism in a registered media company or a freelance, or a representative of a foreign media organ in Rwanda, shall be given accreditation by the Media Self-Regulatory Body. While paragraph 1, article 4 of the said Law reads that the daily functioning of media and the conduct of journalists shall be regulated by the Media Self-Regulatory Body (...)

[12] With regard to interests over petitions seeking to repeal a law for being unconstitutional, the instant Court analyzed the same issue in the petition⁵ of Counsel Mugisha Richard that he had initiated seeking to declare unconstitutional certain provisions of Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general. In interpreting its decision, the Court analyzed the

³ Unless otherwise provided by law, a claim is admissible in court only if the claimant has standing, interest and capacity to sue.

⁴ The Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare unconstitutional a law if they have any interest.

⁵ See judgment RS/INCONST/SPEC 0002/2018/SC rendered on 18/01/2019.

current legislations in Rwanda in this regard, and referred to cases decided in foreign countries where such petitions have been initiated for a long time.

[13] In the instant case, the Court explained matters related to general interests and the reasons why it is important to present them for the petition to be admitted,⁶ but the same court stated that in the case of constitutional claims, such interests should be broadly understood, especially in a developing country like Rwanda where citizens do not yet understand the rights granted to them by the Constitution, and they need help to achieve this through the courts. The Court expounded that the nature of the cases seeking to declare unconstitutional a law, indicates that the interest in such cases is based on the conviction that that the law is unconstitutional because it violates the rights of the petitioners, or that the purpose of the Constitution is not achieved, and that such a purpose must be protected.⁷

[14] With regard to the fact that the petitioner seeking to declare unconstitutional a law must have personal interest, such issue has also been analyzed by legal experts and other courts. For instance, an expert named Sylvie Schmitt states that for a person's interest to sue to be recognized, it must include a specific element that distinguishes the holder from the rest of society, that individualizes him. In the absence of such an element, any person would be able to bring a case before the Constitutional Court, since any citizen and any Organisation can claim to have an interest in defending the Constitution. In that situation, the petition would become a popular action, which is not possible. Such an action would lead to an overabundance of claims in courts, with the risk of abusive claims.⁸ Within that direction, the Constitutional Court of South Africa, in the case of *Areva NP v Eskom Holdings Soc Limited and Another* [2016] ZACC 51, held that if a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. The own interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned.⁹

[15] With regard to the instant petition, Byansi Samuel Baker alleges that the fact that Paragraph 5, Article 71, of the Law n° 22/2018 of 29/04/2018 relating to Civil, Commercial, Labor and administrative procedure requires a journalist to apply for the authorization within 48 hours prior to the hearing is detrimental to his rights granted to him by the Constitution as a journalist, therefore it is in his interest if the Court considers this and accordingly repeals the impugned paragraph of the disputed article.

⁶ See paragraphs 19 and 20 of the judgment.

⁷ See paragraph 21 of the judgment.

⁸ Pour que l'intérêt à agir d'une personne soit reconnu, il doit inclure un élément propre qui distingue son titulaire du reste de la société, qui l'individualise. A défaut d'un tel élément, n'importe quelle personne aurait la possibilité de saisir le juge constitutionnel puisque tout citoyen et tout organisme peuvent prétendre avoir un intérêt à défendre la Constitution. Le recours se transformerait en une action populaire, ce qui n'est pas envisageable. L'action populaire provoquerait une surabondance des recours avec des risques de demandes abusives. Sylvie Schmitt, La nature objective du contentieux constitutionnel des normes. Les exemples français et italien, "Revue française de droit constitutionnel, 2007/4, n°72, <https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2007-4-page-719.htm> ⁹ (...) where a litigant act solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. ... The own interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned". ⁹*Areva NP Vs Eskom Holdings Soc Limited Limited and Another* [2016] ZACC 51, at para 32, <https://www.saflii.org/za/cases/ZACC/2016/51.pdf>.

[16] The Court finds that, pursuant to the provisions of Article 3 of the aforementioned Law n° 02/2013, there is no doubt that prior to the expiration of his card on 12/05/2021, Byansi Samuel Baker was authorized to perform the duties of a journalist because he met the requirements of Rwanda Media Commission. There is also no doubt that the time of initiating the petition, on 04/06/2021, he was not allowed to perform the duties of a journalist, but that at the time of the hearing, on 15/11/2021, he had such a right because his press card had been extended from 20/09/2021 to 20/09/2022.

[17] The Court finds that paragraph 5, Article 71 of the aforementioned Law n° 22/2018 concerns the authorization to record audio and video in a courtroom by the press. This means that in the event that the Court finds that the provision is inconsistent with Article 38 of the Constitution, as stated by Byansi Samuel Baker, the decision would be of interest to him, and the Court therefore finds that he has an interest to initiate a petition seeking to repeal a legal provision he alleges to be detrimental to the rights granted to him by the Constitution.

III. DECISION OF THE COURT

[18] Holds that Byansi Samuel Baker has an interest to initiate a petition seeking to declare unconstitutionality of law in the instant case;

[19] Holds that the hearing of the present case will resume on the date that will be communicated to the petitioner by the Court Registry.