

Re KABASINGA

[Rwanda URUKIKO RW'IKIRENGA – RS/INCONST/SPEC 00003/2020/SC (Ntezilyayo, P.J., Cyanzayire, Muhumuza, Rukundakuvuga, Hitiyaremye, J.) 27 Ugushyingo 2020]

Itegeko Nshinga – Ihame ry'uko abantu bareshya imbere y'amategeko – Gudatandukanya abantu – Abantu bafatwa kimwe imbere y'itegeko, nta busumbane cyangwa ivangura ndetse n'itegeko rigiyeho rigafata kimwe abo rireba – Iri hame rishobora kugira irengayobora (exception) igihe hari impamvu zumvikana zishingiye ku ntego ifite ireme bigatuma abantu bafatwa kimwe ariko hitawe ku miterere yabo, bikaba atari ivangura.

Amategeko agenga ibyaha n'ibihano – icyaha cyo kwica uwo wibiyariye – Ni icyaha cyihariye kidashobora gukorwa n'umugabo bitewe n'imiterere ye nk'umuntu udashobora gutwita ngo abyare, ngo noneho nyuma yo kubyara abe yagira ingaruka ziturutse kuri uko kubyara cyangwa se konsa nk'uko biba ku mugore – Ni umugore ugikora abitewe n'ingaruka zo kubyara.

Itegeko Inshinga – Ubutabera buboneye – Uburyo butandukanye bugize ubutabera buboneye – Ubutabera buboneye bushingiye ku iyubahirizwa ry'imihango ya ngombwa n'uruhererekane rw'ibigomba kubahirizwa hashingiwe ku mahame ateganywa n'amategeko naho Ubutabera buboneye bushingiye ku biteganywa n'itegeko bwo bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage.

Amategeko agenga ibyaha n'ibihano – Ibikorwa bigize icyaha cyo kwica uwo wibiyariye – Ni ibikorwa umugore yakoze abishaka cyangwa akanga gukora ikigomba gukorwa nabwo abishaka, agamije kwica umwana yibiyariye, ariko ibyo akabikora abitewe n'ihungabana rituruka kuri uko kubyara cyangwa se konsa. Uko guhungabana gutandukanye no guta ubwenge gushobora gutuma umuntu adashobora kumenya ibyo yakoze.

Incamake y'ikibazo: Kabasinga yatanze ikirego mu Rukiko rw'Ikirenga asaba kwemeza ko ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange, inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavugururwe mu 2015, mu ngingo zaryo za 15 na 16, bitewe n'uko asanga igaragaramo ivangura rishingiye ku gitsina kuko ireba umugore gusa. Avuga kandi ko iyo ngingo ibangamiye uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga, kuko ihana umugore wakoze icyaha kandi ubwenge bwe budakora neza, bityo agasaba ko yakurwaho hashingiwe ku biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

Leta y'u Rwanda yo ivuga ko iyo ngingo nta vangura rishingiye ku gitsina riyigaragaramo, ko ndetse ntaho ibangamiye uburenganzira ku butabera buboneye, igasanga rero itagomba gukurwaho kuko itanyuranyije n'Itegeko Nshinga.

Mu iburanisha mu ruhame, Urega avuga ko ingingo ya 108 y'itegeko ryavuzwe haruguru inyuranyije n'ingingo ya 15 na 16 z'Itegeko Nshinga kuko igaragaramo ivangura rishingiye ku gitsina, aho umugore ari we wenyine ushobora gukurikiranwa kuri iki cyaha, nta na rimwe icyaha giteganywa n'iyi ngingo gishobora guhama umugabo kuko atonsa kandi atajya atwita. Ikindi ni uko ingaruka za nyuma yo kubyara zatuma habaho kwica umwana atabishaka ntizireba umugore gusa, ahubwo zireba ababyeyi bombi harimo n'umugabo kuko nk'igihe umugore apfuye abyara, inshingano zo kwita ku mwana zigasigarana umugabo, icyo gihe nawe akaba ashobora kwica

umwana atabishaka biturutse ku ngaruka zo kumwitaho nko kurara amajoro bikaba byatuma ubwenge bwe budakora neza. Aha umugabo we yakurikiranwa hashingiwe ku ngingo ya 111 y'itegeko ryavuzwe haruguru iteganya icyaha cy'ubwicanyi bidaturutse ku bushake bitandukanye no kuba umugore yarashyiriweho igihano kihariye kandi nawe azaba yishe umwana we atabishaka.

Leta y'u Rwanda ivuga ko abagabo n'abagore bose bishe abana babo bibyariye bakurikiranwa kimwe ku cyaha cyo kwica ku bushake ariko imiterere yihariye y'umugore ituma ariwe ushobora kugira inkurikizi zituruka ku kubyara cyangwa guhembera iyo yiyiciye umwana bikomotse kuri izo nkurikizi, ntabwo ahanirwa icyaha cyo kwica ku bushake, ahubwo ahanirwa icyo kwica umwana yibyariye bikomotse kuri izo nkurikizi. Bivuze ko ahabwa ibihano bitoya ugereranyije n'abagore cyangwa abagabo biyiciye abana bidaturutse kuri izo mpamvu.

Leta y'u Rwanda isobanura ko impamvu zatumye hajyaho iyi ngingo ari mu rwego rwo kurengera uburenganzira bw'umwana, aho mu gihe cyashize habagaho kwica umwana ukivuka bitewe n'uko yavutse ababyeyi be ntibamwishimire. Ibi bigaragaza ko nta vangura rigaragara muri iyi ngingo, kubera ko umugabo wishe umwana yibyariye nawe ahanwa kimwe n'umugore nawe wakwiyicira umwana abishaka; ko n'ubwo byagaragara nk'aho muri iyi ngingo harimo ivangura rikorerwa abagore, ryaba ari ivangura ryiza (*discrimination positive*) ryemewe mu mategeko.

Umuryango uharanira iterambere ry'ubuzima (HDI) nk'inshuti y'Urukiko, uvuga ko guhana icyaha cyo kwihekura atari ubwa mbere bibaye mu mategeko y'u Rwanda, ko uko amategeko yagendaga asimburana yabaga afite ingingo ihana icyo cyaha, aho umugabo n'umugore bahanwa kimwe igihe babaga bakoze icyaha cyo kwihekura. Umwihariko w'ingingo ya 108 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018, ni uko ihana umugore wenyine, kandi igashimangira ko umugore ahanwa igihe bigaragaye ko yishe umwana we ubwenge bwe budakora neza bitewe n'inkurikizi zavuzwe haruguru, nawo ukaba wemeza ko iyi ngingo igaragaramo ivangura.

Umuryango "*Women's Link Worldwide*" uvuga ko na wo usanga ingingo ya 108 y'Itegeko ryavuzwe haruguru igaragaramo ivangura rishingiye ku gitsina kubera ko iteganya icyaha cyo kwihekura gishobora gukorwa n'abagore gusa.

Ku kibazo kindi kijyanye no kuba ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ibangamiye uburenganzira ku butabera buboneye, ikaba inyuranyije n'ingingo ya 29 y'Itegeko Nshinga, Urega abisobanura avuga ko iyi ngingo ihana umuntu wakoze igikorwa kitujuje ibisabwa byose kugira ngo cyitwe icyaha kuko nta bushake bwo kugikora buba bwabayeho, nyamara ubusanzwe umenya ko icyaha cyabayeho iyo ingingo zikigize zuzuye. Bityo, uretse no kuba idatanga ubutabera buboneye, iyi ngingo nta n'ubwo yubahirije amahame rusange y'amategeko ahana.

Akomeza asobanura ko iyo ugereranyije imihanire y'iki cyaha mu Rwanda no mu bindi bihugu aho ubona ko itegeko ryacu risa nk'aho ryakomotse, bigaragara ko umushingamategeko hari ibyo atasobanuye cyane, bityo bikaba bishobora gukomeza kurenganya abagore bashobora guhura n'ibibazo nk'ibi bya nyuma yo kubyara, maze aho gufashwa mu guhabwa ubutabera, ahubwo bigasa nko gufashwa guhungabana. Hakurikijwe amahame y'amategeko ahana, ntawakabayeho ahanirwa igikorwa yakoze nta bushake, kabone n'icyo gikorwa cyaba cyateye urupfu kubera ko iyo nta bushake buhari nta cyaha kiba cyabayeho ko rero niba nta cyaha cyabayeho nta no guhanwa biba bikwiriye kubaho. Asanga ahubwo iyi ngingo ya 108 ikwiye kuvugururwa mu rwego rwo kuyisobanura neza igatandukanya igihe uwaba akurikiranyweho icyaha yafatwa nk'aho yagikoze ku bushake, icyo gihe akaba yabihanirwa, n'igihe yaba yagikoze nta bushake, icyo gihe ntabe yabihanirwa. Bityo ibi byazafasha Inkiko kuba zatanga ubutabera buboneye.

Leta y'u Rwanda ivuga ko ku kijyanye no kuvuga ko iyi ngingo ya 108 y'itegeko ihana udakwiye kuba ahanwa ataribyho. Isobanura ko iyi ngingo mu kinyarwanda izanamo ijamba ubwenge bwe budakora neza, ari ikibazo cy'imyandikire gusa iri jambo ridakwiye kubamo, ahubwo bigasobanuka nk'uko mu cyongereza no mu gifaransa byanditse, bikumvikana ko ari umugore wese, abishaka ukora cyangwa ntakore ikigomba gukorwa, wica umwana yabyaye utarengeje amezi cumi n'abiri (12) ariko mu gihe cyo gukora icyaha akaba afite inkurikizi zituruka ku kubyara cyangwa guhembera k'umubyeyi aba akoze icyaha.... Ibi ibishingira ku kuba ubusanzwe abahanga mu by'ubuvuzi bagaragaza ko inkurikizi zo kubyara cyangwa guhembera zidashobora gutuma umugore ata ubwenge (*mental capacity*) nk'aho ari umurwayi wo mu mutwe. Ibi bikaba bivuze ko nubwo yaba afite ibyo bibazo, aba afite ubwenge bwo kumenya icyaha n'ikitari icyaha, yewe n'ingaruka z'ibikorwa yakora, bitandukanye n'umuntu uba afite uburwayi bwo mu mutwe udashobora kumenya icyaha n'ikitari icyaha ndetse n'ingaruka z'ibikorwa yakora ko ari mbi cyangwa atari mbi. Bityo, akwiye kuryozwa igikorwa yakozwe abizi neza kandi ku bushake, icyakora igihano kikaba gitoya kubera ko icyaha cyo kwiyicira umwana aba yagikoze atagambiriye kwica umwana ahubwo aba yabitewe n'izo ngaruka zitamuturutseho. Niyo mpamvu buri mugore wese wabyaye cyangwa se ufite ihungabana atica umwana yabyaye, bityo umwica aba agomba guhanwa.

Umuryango uharanira iterambere ry'ubuzima (HDI) nk'inshuti y'Urukiko, usesengura ingingo ya 108 y'Itegeko ryavuzwe haruguru, uvuga ko iyi ngingo inyuranyije n'uburenganzira bw'umugore ku buzima bw'imyororokere nk'uko biteganywa mu masezerano mpuzamahanga hamwe n'ayandi mategeko akoresheya imbere mu gihugu n'Ihame rituma umuntu aryoza icyaha. Uvuga kandi ko usanga iyi ngingo ya 108 inyuranyije n'ingingo ya 95 y'Itegeko Nshinga, aho iyo ngingo iteganya ko amasezerano mpuzamahanga yashyizweho umukono asumba amategeko asanzwe. Bityo ko kuba Itegeko N° 68/2018 ryo ku wa 30/08/2018 ari itegeko risanzwe, riza inyuma y'amasezerano Mpuzamahanga, yemejwe n'u Rwanda, ateganya ku byerekeye uburenganzira bw'umugore ku buzima muri rusange, no ku buzima bw'imyororokere mu buryo bwihariye. Inyuranyije kandi n'ibiteganywa n'ingingo ya 3, iya 12 n'ya 16 z'Itegeko N° 21/05/2016 ryo ku wa 20/05/2016 ryerekeye ubuzima bw'imyororokere y'abantu, kuko izi ngingo ziramutse zubahirijwe umugore atakora icyaha cyo kwihekura adafite ikibazo cy'ihungabana. Iyi ngingo ndetse inyuranyije n'ingingo ya 85 (2) y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 ryavuzwe haruguru, iteganya ko nta buryozwacyaha bubaho iyo ushinjwa yari afite uburwayi bwo mu mutwe mu gihe yakoraga icyaha.

Umuryango *Women's Link Worldwide* (WLW) nk'indi nshuti y'urukiko, uvuga ko Urukiko rw'Ikirenga rwakwita ku bibazo bijyanye no guhana icyaha cyo kwihekura birimo gukoresha nabi amategeko ahana icyo cyaha, aho abagore bahanwa kubera ko badashobora kubona serivisi zihagije z'ubuzima bw'imyororokere, n'ihohoterwa ry'uburenganzira bw'umugore ku mibereho, ubuzima ndetse n'ubuzima bwite no gukoresha nabi icyaha cyo kwihekura ku bagore n'abakobwa bakuyemo inda cyangwa bahuye n'ibibazo bikomeye byo kubyara bigize igihano kirimo ubugome kandi kidasanzwe. Uyu muryango usobanura ko mu bihugu byinshi iki cyaha gifatwa nk'icyaha gito ugeranyijwe n'ubundi bwoko bw'ubwicanyi, ko impamvu ari uko harebwa impamvu ziba zatumye icyo cyaha gikorwa.

Usoza uvuga ko gushinja icyaha abagore n'abakobwa bafite ibibazo bikomeye byo kubyara cyangwa gukuramo inda mu buryo budatekanye, ari ukurenga bikomeye ku burenganzira bw'abagore bwo kugira imibereho n'ubuzima birengerwa n'amategeko mpuzamahanga nk'uburenganzira bw'ikiremwa muntu. Ahubwo ko umuti mwiza w'iki kibazo waba guharanira ko

abagore bagira umutekano bakabona serivisi z'imyororokere, harimo gukuramo inda no kwitabwaho nyuma yo gukuramo inda, kwigishwa iby'imibonano mpuzabitsina no kwirinda gusama.

Incamake y'icyemezo: 1. Abantu bafatwa kimwe imbere y'itegeko, nta busumbane cyangwa ivangura ndetse n'itegeko rigiyeho rigafata kimwe abo rireba. Iri hame rishobora kugira irengayobora (exception) igihe hari impamvu zumvikana zishingiye ku ntego ifite ireme bigatuma abantu bafatwa kimwe ariko hitawe ku miterere yabo, bikaba atari ivangura. Bityo, ingingo ya 108 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange nta kutareshya imbere y'amategeko cyangwa ivangura rishingiye ku gitsina biyigaragaramo kubera ko icyaha cyo kwica uwo wibyariye kidashobora gukorwa n'umugabo bitewe n'imiterere ye itandukanye n'iy'umugore, ikaba itanyuranyije n'ingingo ya 15 n'ya 16 z'Itegeko Nshinga rya Repubulika y'u Rwanda.

2. Icyaha cyo kwica uwo wibyariye ni icyaha cyihariye kidashobora gukorwa n'umugabo bitewe n'imiterere ye nk'umuntu udashobora gutwita ngo abyare, ngo noneho nyuma yo kubyara abe yagira ingaruka ziturutse kuri uko kubyara cyangwa se konsa nk'uko biba ku mugore. Bityo, ni umugore ugikora abitewe n'ingaruka zo kubyara.

3. Ubutabera buboneye bugizwe n'uruhererekane rw'ibigomba kubahirizwa mu migendekere y'urubanza hashingiwe ku mahame ateganywa n'amategeko (*procedural due process*) n'ubutabera bunogeye bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage (*substantive due process*).

4. Ibikorwa bigize icyaha cyo kwica uwo wibyariye ni ibikorwa umugore yakoze abishaka cyangwa akanga gukora ikigomba gukorwa nabwo abishaka, agamije kwica umwana yibyariye, ariko ibyo akabikora abitewe n'ihungabana rituruka kuri uko kubyara cyangwa se konsa. Uko guhungabana gutandukanye no guta ubwenge gushobora gutuma umuntu adashobora kumenya ibyo yakoze. Bityo, iyo ingingo ya 108 ikaba ntaho ibangamiye ubutabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga.

Ikirego nta shingiro gifite.

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 3, 15, 16, 21, 29 n'ya 95.

Itegeko Ngenga N° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana, ingingo ya 143.

Itegeko-teka N° 21/77 ryo ku wa 18 Kanama 1977 rishyiraho Igitabo cy'Amategeko ahana, ingingo ya 314.

Amasezerano y'inyongera ku masezerano Nyafurika yerekeye uburenganzira bwa muntu n'ubwa abaturage yerekeye uburenganzira bw'umugore yashyiriweho umukono I Maputo ku wa 11 Nyakanga 2003, yemejwe burundu n'Iteka rya Perezida N° 11/01 ryo ku wa 24/06/2004, ingingo ya 8.

Amasezerano Nyafurika yerekeye Uburenganzira bwa muntu n'ubw'abaturage (African Charter on Human and Peoples Rights), U Rwanda rwayemeje n'iteka rya Perezida N° 10/1983 ryo ku wa 17/05/1985, ingingo ya 16.

Amasezerano mpuzamahanga agamije gukumira ivangura iryo ariryo ryose rikorerwa abagore, U Rwanda rwayemeje n'Iteka rya Perezida N°431/16 ryo ku wa 10 Ugushyingo 1980, rwayashyizeho umukono ku itariki ya 02/03/1981, ingingo ya 1 n'ya 12.

Amasezerano Mpuzamahanga yerekeye uburenganzira mu by'ubukungu, imibereho myiza n'umuco (International Covenant on Economic, social and Cultural Rights), U Rwanda rwayemeje n'Itegeko-teka N° 8/75 ryo ku wa 12/02/1975, ingingo ya 12.

Amasezerano Mpuzamahanga ku burenganzira Mbenezamubano n'ubwa Politiki (International Covenant on Civil and Political Rights), 1966, ingingo ya 26.

Itangazo ry'Umuryango w'Abibumbye ku burenganzira bwa muntu (Universal Declaration of Human Rights), ryo mu mwaka wa 1948, ingingo ya 7.

Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange, ingingo ya 85, 107, 108 n'ya 111.

Itegeko N° 21/05/2016 ryo ku wa 20/05/2016 ryerekeye ubuzima bw'imyorokere y'abantu, ingingo ya 3, 12 n'ya 16.

Amategeko yo hanze yashingiweho:

Itegeko riteganyaga ibyaha n'ibihano (criminal code) ryo muri Canada, ingingo ya 233.

Igitabo mpanabyaha cy'Ubwongereza (UK), ingingo ya 16.

Itegeko rya Canada ryo mu 1948 ku cyaha cyo kwica umwana wibyariye, ingingo ya 262.

Imanza zifashishijwe:

RS/INCONST/SPEC 00003/2019/SC; Re Kabasinga rwaciwe n'Urukiko rw'Ikirenga ku itariki ya 04/12/2019, para. 13.

RS/INCONST/SPEC 00001/ 2019/SC, Re Murangwa rwaciwe n'Urukiko rw'Ikirenga ku itariki ya 29/11/2019.

RS/SPEC/0001/16/CS Re Akagera Business Group rwaciwe n'URukiko rw'Ikirenga ku itariki ya 23/09/2016. icyegeranyo cy'ibyemezo by'inkiko, V. 2, 2017, P.1.

S.C.C. No.: 36585, Her Majesty the Queen and Meredith Katharine Borowiec, para. 2.

R. v. Parks, [1992] 2 S.C.R. 871, at p. 896.

Inyandiko z'Abahanga zifashishijwe:

Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 MICH. L. REV. 575, 578 n.17 (1983).

Eric Vallillee, Western Journal of Legal Studies, Vol 5, Issue 4, article 1. I. Elements of the offence (Infanticide).

R v. Smith (1976) 32 C.C.C.(2d)224(Nfdl Dist Ct), cited by Winifred H. Holland.

Winifred H. Holland, Murder and related Issues: An Analysis of the law in Canada, Report for the Law Commission, July 27th, 2005, p. 26.

Michele Connell, The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women.

I. IMITERERE Y'IKIREGO

[1] Kabasinga Florida yatanze ikirego mu Rukiko rw'Ikirenga asaba kwemeza ko ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange,

inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, mu ngingo zaryo za 15 na 16, bitewe n'uko asanga igaragaramo ivangura rishingiye ku gitsina kuko ireba umugore gusa. Avuga kandi ko iyo ngingo ibangamiye uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga, kuko ihana umugore wakoze icyaha kandi ubwenge bwe budakora neza, bityo agasaba ko yakurwaho hashingiwe ku biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

[2] Ingingo ya 108 y'Itegeko N° 68/2018 ryavuzwe haruguru, iteganya ko umugore wese, abishaka cyangwa biturutse ku kudakora ikigomba gukorwa, wica umwana yabyaye utarengeje amezi cumi n'abiri (12) ariko mu gihe cyo gukora icyaha ubwenge bwe bukaba budakora neza bitewe n'inkurikizi zituruka ku kubyara cyangwa guhembera k'umubyeyi aba akoze icyaha. Iyo abihamijwe n'urukiko ahanishwa igifungo kitari muni y'imyaka itanu (5) ariko kitarenze imyaka irindwi (7).

[3] Leta y'u Rwanda yo ivuga ko iyo ngingo nta vangura rishingiye ku gitsina riyigaragaramo, ko ndetse ntaho ibangamiye uburenganzira ku butabera buboneye, igasanga rero itagomba gukurwaho kuko itanyuranyije n'Itegeko Nshinga.

[4] Urubanza rwaburanishijwe mu ruhamwe ku itariki ya 03/11/2020, Kabasinga Florida watanze ikirego yunganiwe na Me Rwagitare Fred Fiston afatanyije na Me Mugabonabandi Jean Maurice, hari Leta y'u Rwanda ihagarariwe na Me Umwari M. Claire afatanyije na Me Kabibi Spéciose. Hari kandi n'inshuti z'Urukiko: Umuryango uharanira iterambere ry'ubuzima (*Health Development Initiative*, HDI) uhagarariwe na Me Garura Christian, n'Umuryango "Women's Link Worldwide" uhagarariwe n'Umuyobozi wawo mu Rwanda yunganiwe na Me Cyiza Consolée.

[5] Muri uru rubanza hasuzumwe ibibazo bikurikira:

- Kumenya niba ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange igaragaramo ivangura rishingiye ku gitsina ku buryo inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015 mu ngingo zaryo za 15 na 16;
- Kumenya niba iyi ngingo ibangamiye uburenganzira ku butabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga.

I. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

- 1. Kumenya niba ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange igaragaramo ivangura rishingiye ku gitsina ku buryo inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015 mu ngingo zaryo za 15 na 16.**

[6] Kabasinga Florida n'abamwunganira bavuga ko ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, igaragaramo ivangura rishingiye ku gitsina, bityo ko inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, mu ngingo zaryo za 15 na 16. Iyo ngingo iteganya ko umugore wese, abishaka cyangwa biturutse ku kudakora ikigomba gukorwa, wica umwana yabyaye utarengeje

amezi cumi n'abiri (12) ariko mu gihe cyo gukora icyaha ubwenge bwe bukaba budakora neza bitewe n'inkurikizi zituruka ku kubyara cyangwa guhembera k'umubyeyi aba akoze icyaha, ko iyo abihamijwe n'urukiko ahanishwa igifungo kitari muni y'imyaka itanu (5) ariko kitarenze imyaka irindwi (7). Bavuga ko byumvikana neza ko iyi ngingo ikorera abagore ivangura ku mpamvu zikurikira:

- a. umugore ni we wenyine ushobora gukurikiranwa kuri iki cyaha, nta na rimwe icyaha giteganywa n'iyi ngingo gishobora guhama umugabo kuko atonsa kandi atajya atwita. Kuba umugore ariwe wenyine urebwa n'iyi ngingo, babirebera muri bimwe mu bigize iki cyaha byihariye (*éléments constitutifs spéciaux de l'infraction*), aribyo kuba umubyeyi yica umwana biturutse ku nkurikizi za nyuma yo kubyara cyangwa guhembera kw'ababyeyi.
- b. ingaruka za nyuma yo kubyara zatuma habaho kwica umwana utabishaka ntizireba umugore gusa, ahubwo zireba ababyeyi bombi harimo n'umugabo kuko nk'igihe umugore apfuye abyara, inshingano zo kwita ku mwana zigasigarana umugabo, icyo gihe nawe akaba ashobora kwica umwana atabishaka biturutse ku ngaruka zo kumwitaho nko kurara amajoro bikaba byatuma ubwenge bwe budakora neza.
- c. Umugabo aramutse ahuye n'ikibazo cyo kwica umwana atabishaka, we yakurikiranwa hashingiwe ku ngingo ya 111 iteganya icyaha cy'ubwicanyi bidaturutse ku bushake, akaba yahanishwa igifungo kitari muni y'amezi atandatu (6) ariko kitarenze imyaka ibiri (2) n'ihazabu y'amafaranga atari muni y'ibihumbi magana atanu (500.000 Frw) ariko atarenze miliyoni ebyiri (2.000.000 Frw) cyangwa kimwe gusa muri ibyo bihano, icyo akaba ari igihano cyoroheje cyane ugereranyije n'icyateganyirijwe umugore wakoze icyaha kimwe n'icy'umugabo.
- d. Iyo umushingamategeko aba yarashakaga gutanga igihano harebwe icyaha cyakozwe, ntiyari kuvangura umugore ngo amushyirireho igihano cyihariye. Umugore wishe umwana we atabishaka yari guhanwa nk'undi wese ukoze icyaha cyo kwica umuntu atabishaka (homicide involontaire) giteganywa n'ingingo ya 111 y'Itegeko ryavuzwe, yaba yabikoze abishaka agahanwa nk'abandi ku cyaha cy'ubwicanyi giteganywa n'ingingo ya 107 y'iryo tegeko, bitabaye ngombwa gutandukanya umugabo n'umugore.

[7] Barangiza bavuga ko iyo ngingo inyuranye n'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015 mu ngingo ya 15 n'ya 16 ribuza ivangura iryo ariryo ryose, ndetse ikaba inanyuranye n'amategeko mpuzamahanga arwanya ivangura iryo ariryo ryose u Rwanda rwayashyizeho umukono. Batanga urugero rw'Amasezerano ya Maputo yo mu mwaka wa 2003, yemejwe muri 2004, nk'uko bigaragara mu iteka rya Perezida N° 11/01 ryo ku itariki ya 24/06/2004, bityo bagasaba Urukiko rw'Ikirenga gushingira ku ngingo ya 3 y'Itegeko Nshinga rya Repubulika y'u Rwanda rukayikuraho.

[8] Kuri iyi mpamvu, abahagarariye Leta y'u Rwanda bavuga ko batemeranya n'uwatanze ikirego ko ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 rimaze kuvugwa igaragaramo ivangura, ibyo bakabishingira ku mpamvu zikurira:

5. Abagabo kimwe n'abagore bese bishe abana babo bibyariye bakurikiranwa kimwe ku cyaha cyo kwica ku bushake, kuko kwica umwana wibyariye ari icyaha cy'ubwicanyi;

6. Imiterere yihariye y’umugore ituma ariwe ushobora kugira inkurikizi zituruka ku kubyara cyangwa guhembera. Ariko iyo yiyiciye umwana bikomotse kuri izo nkurikizi, ntabwo ahanirwa icyaha cyo kwica ku bushake, ahubwo ahanirwa icyo kwica umwana wibyariye bikomotse ku nkurikizi zo kubyara no guhembera. Bivuze ko bahabwa ibihano bitoya ugereranyije n’abagore cyangwa abagabo biyiciye abana bidaturutse kuri izo mpamvu.

[9] Abahagarariye Leta bakomeza basobanura ko imiterere karemano y’umugore wabyaye itandukanye n’iy’umugabo, ko iyo miterere ariyo yitaweho mu guhana ibikorwa bigize icyaha giteganywa mu ngingo ya 108 y’Itegeko N° 68/2018. Bavuga ko ibikorwa bivugwa muri iyi ngingo ari ukwica umwana ukimara kubyara (*après accouchement*) kandi ingaruka zishobora kuvuka cya gihe cya nyuma yo kubyara zikaba zidashobora kureba umugabo. Bavuga ko rero izo ngaruka arizo zitaweho muri iri tegeko, bitandukanye n’uko byari bimeze mu mategeko ya mbere, aho umugabo n’umugore bahanwaga kimwe mu gihe babaga bahamwe n’icyaha cyo kwica abo bibyariye. Umwihariko w’iyi ngingo akaba ari uko umugore wishe umwana we biturutse ku ngaruka zo kubyara ahanwa, ariko mu buryo bugereranyije.

[10] Bavuga ko impamvu zatumye hajyaho iyi ngingo ari mu rwego rwo kurengera uburenganzira bw’umwana, aho mu gihe cyashize habagaho kwica umwana ukivuka bitewe n’uko yavutse ababyeyi be ntibamwishimire. Aha batanze urugero rw’umubyeyi washoboraga kwica umwana we bitewe n’uko yavukanye ubumuga, cyangwa se akaba yamwica kubera ko yavutse ari umukobwa kandi yifuzaga umuhungu.

[11] Barangiza bavuga ko babona nta vangura rigaragara muri iyi ngingo, kubera ko umugabo wishe umwana yibyariye nawe ahanwa kimwe n’umugore nawe wakwiyicira umwana abishaka; ko n’ubwo byagaragara nk’aho muri iyi ngingo harimo ivangura rikorerwa abagore, ryaba ari ivangura ryiza (*Discrimination Positive*) ryemewe mu mategeko kuko, nk’uko n’inkiko z’u Rwanda zabisobanuye, iyo ivangura rifite impamvu nziza kandi zishingiye ku mwihariko runaka riba ryemewe. Batanga urugero rw’itegeko rishyiraho sitati rusange igenga abakozi ba Leta aho iteganya ikiruhuko kirekire ku mugore wabyaye kuruta igihabwa umugabo kandi ibyo ntibifatwe nk’ivangura.

[12] Kuri iyi ngingo, uhagarariye Umuryango uharanira iterambere ry’ubuzima (HDI) nk’inshuti y’Urukiko, avuga ko guhana icyaha cyo kwihekura atari ubwa mbere bibaye mu mategeko y’u Rwanda, ko uko amategeko yagendaga asimburana yabaga afite ingingo ihana icyo cyaha. Atanga urugero rw’ingingo ya 143 y’Itegeko Ngenga N° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy’amategeko ahana ndetse n’ingingo ya 314 y’Itegeko-teka N° 21/77 ryo ku wa 18 Kanama 1977 rishyiraho Igitabo cy’Amategeko ahana.

[13] Avuga ko ayo mategeko yavuzwe haruguru, yahanaga kimwe umugabo n’umugore igihe babaga bakoze icyaha cyo kwihekura. Umwihariko w’ingingo ya 108 y’Itegeko N° 68/2018 ryo ku wa 30/08/2018, ni uko ihana umugore wenyine, kandi igashimangira ko umugore ahanwa igihe bigaragaye ko yishe umwana we ubwenge bwe budakora neza bitewe n’inkurikizi zituruka ku kubyara cyangwa guhembera k’umubyeyi, nabo bagasanga iyi ngingo igaragaramo ivangura.

[14] Uhagarariye Umuryango “*Women’s Link Worldwide*” avuga ko na we asanga ingingo ya 108 y’Itegeko ryavuzwe haruguru igaragaramo ivangura rishingiye ku gitsina kubera ko iteganya icyaha cyo kwihekura gishobora gukorwa n’abagore gusa.

UKO URUKIKO RUBIBONA

[15] Ingingo ya 15 y’Itegeko Nshinga rya Repubulika y’u Rwanda ryo mu 2003 ryavuguruwe mu 2015, iteganya ko abantu bose bareshya imbere y’amategeko, itegeko ribarengera ku buryo bumwe. Naho iya 16 y’Itegeko Nshinga na none, igateganya ko ivangura iryo ariryo ryose cyangwa kurikwirakwiza byaba bishingiye ku bwoko, ku muryango cyangwa ku gisekuru, ku nzu, ku ibara ry’umubiri, ku gitsina, ku karere, ku byiciro by’ubukungu, ku idini cyangwa ukwemera, ku bitekerezo, ku mutungo, ku itandukaniro ry’umuco, ku rurimi, ku bukungu, ku bumuga bw’umubiri cyangwa ubwo mu mutwe no ku rindi vangura iryo ari ryo ryose, bibujijwe kandi bihanwa n’amategeko.

[16] Ingingo isabirwa gukurwaho uwatanze ikirego avuga ko inyuranye n’ingingo z’Itegeko Nshinga rya Repubulika y’u Rwanda zimaze kuvugwa, ni ingingo ya 108 y’Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n’ibihano muri rusange, iteganya ko umugore wese, abishaka cyangwa biturutse ku kudakora ikigomba gukorwa, wica umwana yabyaye utarengeje amezi cumi n’abiri (12) ariko mu gihe cyo gukora icyaha ubwenge bwe bukaba budakora neza bitewe n’inkurikizi zituruka ku kubyara cyangwa guhembera k’umubyeyi aba akoze icyaha. Iyo abihamijwe n’urukiko, ahanishwa igifungo kitari muni y’imyaka itanu (5) ariko kitarenze imyaka irindwi (7).

[17] Kugira ngo bimenyekane niba muri iyi ngingo hagaragamo kutareshya imbere y’amategeko n’ivangura rishingiye ku gitsina, bityo ikaba inyuranyije n’ingingo ya 15 kimwe n’iya 16 z’Itegeko Nshinga rya Repubulika y’u Rwanda nk’uko uwatanze ikirego abivuga, ni ngombwa kubanza gusobanura uburyo izo ngingo zumvikana. Nk’uko byasobanuwe mu rubanza RS/SPEC/0001/16/CS¹ rwaciwe n’uru Rukiko ku itariki ya 23/09/2016, ingingo ya 15 n’iya 16 z’Itegeko Nshinga zifitanye isano ku buryo gusobanura icyo zishatse kuvuga uzitandukanyije, bigoye. Nk’uko byasobanuwe kandi muri urwo rubanza, ingingo ya 15 ivuga ko abantu bose bareshya imbere y’amategeko kandi bakarengerwa n’amategeko mu buryo bumwe. Ni ukuvuga ko hatagomba kubaho ivangura rituma abantu batarengerwa mu buryo bumwe cyangwa kutagira uburenganzira aho bakabugize. Naho ingingo ya 16 ikomerezaho ivuga uburyo gutandukanya abantu bifatwa nk’ivangura kandi ko bitemewe n’Itegeko Nshinga. Izi ngingo zombi zafatwa nk’izikubiyemo ihame rimwe ryo kudasumbanya abantu mu byo bemerewe cyangwa babujijwe ugamije kugira abo uheza ku burenganzira bemerwa n’amategeko.

[18] Ihame ryo kureshya imbere y’amategeko no kudakorerwa ivangura, si mu Itegeko Nshinga ry’u Rwanda turisanga gusa, rigaragara no mu Masezerano Mpuzahanga u Rwanda rwashyizeho umukono. Twavugaga nk’ingingo ya 7 y’Itangazo ry’Umuryango w’Abibumbye ku burenganzira bwa muntu (*Universal Declaration of Human Rights*), ryo mu mwaka wa 1948, igira iti: “*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination*”.

¹ Icyegeranyo cy’ibyemezo by’inkiko, V. 2, 2017, P.1.

[19] Hari kandi n'ingingo ya 26 y'Amasezerano Mpuzamahanga ku burenganzira Mbenezamubano n'ubwa Politiki (*International Covenant on Civil and Political Rights*, 1966) igira iti: "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status". By'umwihariko ku birebana no kureshya hagati y'umugabo n'umugore, ingingo ya 8 (f) ya Maputo Protocol, iteganya ko abagore n'abagabo bareshya imbere y'amategeko kandi bagomba kurindwa ku buryo bungana kandi amategeko akabarengera kimwe. Ivuga ko Ibihugu byemera aya masezerano bifite inshingano yo kuvugurura amategeko n'imigirire bisanzweho bigaragaramo ivangura mu rwego rwo guteza imbere no kurinda uburenganzira bw'umugore ("Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure (f): reform of existing discriminatory laws and practices in order to promote and protect the rights of women")².

[20] Nk'uko bimaze kugaragazwa mu ngingo z'amategeko ndetse n'iz'amasezerano mpuzamahanga zavuzwe haruguru, ihame ry'uko abantu bareshya imbere y'amategeko rivuze ko abantu bafatwa kimwe imbere y'itegeko, nta busumbane cyangwa ivangura, ndetse n'itegeko rigiyeho rigafata kimwe abo rireba. Iryo hame ariko rishobora kugira irengayobora (exception) igihe hari impamvu zumvikana zishingiye ku ntego ifite ireme (*legitimate or rational purpose*), ibi bikaba byaremejwe n'uru Rukiko mu rubanza RS/INCONST/SPEC 00001/ 2019/SC rwaciwe ku itariki ya 29/11/2019³. Muri urwo rubanza, urukiko rwasobanuye kandi ko ibigomba gufatwa kimwe ari ibimeze kimwe, naho ibintu bitandukanye bigafatwa ku buryo butandukanye hakurikijwe itandukaniro ryabyo (*Things that are alike should be treated alike, and things that are unlike should be treated unlike in proportion to their unalikehood*)⁴. Mu yandi magambo, abantu bagomba gufatwa kimwe, ariko hitawe ku miterere yabo.

[21] Nyuma yo gusobanura icyo kureshya imbere y'amategeko bivuze, kugira ngo ikibazo kiri muri uru rubanza kigamijwe kumenya niba ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange igaragaramo ivangura gisobanuke, ni ngombwa kandi gusobanura icyo ivangura ari cyo. Mu rubanza RS/SPEC/0001/16/CS⁵ rwaciwe ku itariki ya 23/09/2016, uru Rukiko rwasobanuye ko muri rusange ivangura ari ugutandukanya abantu hagamijwe kuvutsa amahirwe bamwe no gutonesha abandi, bigakorwa hashingiwe ku mpamvu zitumvikana. Ku birebana n'ivangura rishingiye ku gitsina, amasezerano mpuzamahanga agamije gukumira ivangura iryo ariryo ryose rikorerwa abagore, mu ngingo yayo ya mbere ivuga ko iryo vangura ari irishingiye ku gutandukanya umugore n'umugabo hagamijwe kuburizamo uburenganzira mu bya politike, ubukungu, umuco n'ibindi (*For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*)⁶.

² U Rwanda rwashyize umukono kuri aya masezerano ku itariki ya 25/06/2004.

³ Urubanza RS/INCONST/SPEC 00001/ 2019/SC rwaciwe ku wa 29/11/2019, p.12, para. 35

⁴ Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 Mich. L. REv. 575, 578 n.17 (1983).

⁵ icyegeranyo cy'ibyemezo by'inkiko, V. 2, 2017, P.16, Para. 22.

⁶ U Rwanda rwashyize umukono kuri aya masezerano ku itariki ya 02/03/1981.

[22] Nyuma y'ibisobanuro rusange bimaze gutangwa, igisigaye ni ukureba niba, kuba ingingo ya 108 y'Itegeko N° 68/2018 ryavuzwe haruguru iteganya ko umugore wese, abishaka cyangwa biturutse ku kudakora ikigomba gukorwa, wica umwana yabyaye utarengeje amezi cumi n'abiri (12) ariko mu gihe cyo gukora icyaha ubwenge bwe bukaba budakora neza bitewe n'inkurikizi zituruka ku kubyara cyangwa guhembera k'umubyeyi aba akoze icyaha, igaragaramo ivangura kubera ko itavugwamo umugabo. Kugira ngo iki kibazo gishobore kubonerwa igisubizo, ni ngombwa kureba ibigize icyaha cyo kwica uwo wibyariye (*infanticide*).

[23] Uru Rukiko rusanga ibiteganyijwe mu ngingo ya 108 imaze kuvugwa, atari hano mu Rwanda honyine biba, ndetse akaba atari n'ubwa mbere impaka zishingiye ku biyivugwamo zivuka hirya no hino ku isi, ariko iteka amategeko, ibyemezo by'inkiko mu kuzikemura ndetse n'abahanga mu mategeko bikagusha ku mwihariko umugore afite kubera imiterere karemano ye. Nko muri Canada, ingingo ya 233 y'Itegeko riteganya ibyaha n'ibihano (*criminal code*), iteganya ko “*A female person commits infanticide when by a wilful act or omission she causes the death of her newborn child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed*”. Mu gitabo mpanabyaha cy'Ubwongereza (UK), ingingo ya 160 iteganya *infanticide: Where a woman by any wilful 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 [...]*.

[24] Ibiteganyijwe muri izo ngingo zaje gusobanurwa mu manza zinyuranye. Mu nyandiko ye kuri *infanticide*, uwitwa Julio Arboleda-Florez yagaragaje ko igihe umucamanza McRuer⁷ yasesenguraga ingingo ya 262, 2 y'itegeko rya Canada ryo mu 1948 ku cyaha cyo kwica umwana wibyariye (*infanticide*), yagaragaje ko kigizwe n'ibintu bikurikira :

- Uregwa agomba kuba ari umugore,
- Agomba kuba yishe umwana,
- Umwana agomba kuba akivuka,
- Umwana agomba kuba ari uw'uregwa,
- Urupfu rugomba kuba rwaturutse ku bushake bwo gukora icyaha cyangwa kudakora ikigomba gukorwa,
- Muri icyo gihe uregwa agomba kuba atarashobora guhembera bitewe n'inkurikizi zituruka ku kubyara,
- Bitewe n'impamvu yo kubyara, uregwa agomba kuba yahungabanye.

Yabivuze muri aya magambo y'icyongereza: «*In his analysis of the then Section 262, 2, Judge McRuer considered the elements of the offence of infanticide as: the accused must be a woman; she must have caused the death of a child; the child must have been newly born; the child must have been a child of the accused; the death must have been caused by a wilful act or omission of the accused; at the time of the wilful act or omission the accused*

⁷ James Chalmers McRuer, OC (August 23, 1890 – October 6, 1985) was a Canadian lawyer, judge, commissioner and author in Ontario.

must not have fully recovered from the effect of giving birth to the child; and by reason of giving birth to the child the balance of her mind must then have been disturbed (19) »⁸.

[25] Mu nyandiko ye yasohotse mu Kinyamakuru *Western Journal of Legal Studies*, iyo nyandiko akaba yarayise *Deconstructing Infanticide*, uwitwa Eric Vallillee, yasobanuye ibigize icyaha giteganywa mu ngingo ya 233 y'Itegeko rihana ryo muri Canada (*Infanticide*). Urubanza R v Smith yifashishije muri iyo nyandiko ye, rwerekanye ko icyaha cyo kwica uwo wibyariye kigizwe n'ibi bikurikira: a) uregwa ni igitsina gore, b) nyakwigendera yavutse ari muzima, c) uwo uregwa yishe ni umwana we, d) igikorwa cyateye urupfu uregwa yagikoze nkana, e) nyakwigendera ntiyari arengeje amezi cumi n'ibiri (12), f) uregwa yari atarakira neza ingaruka zo kubyara umwana yishe, g) ubwenge bw'uregwa bwarahungabanye kubera ingaruka zo kubyara cyangwa konsa⁹.

[26] Mu rubanza rwa *Her Majesty the Queen* (wajuriye) na Meredith Katharine Borowiec (uregwa), Urukiko rw'Ikirenga rwa Canada rwasobanuye ko icyaha cyo kwica umwana wibyariye ari icyaha gikorwa mu buryo bwihariye. Icyamba mbere, ni uko icyaha gikorwa n'umubyeyi w'umugore, abishaka, wica umwana we w'uruhinja rutaragera ku mezi cumi n'abiri (12). Icyamba kabiri, ni uko muri icyo gihe aba agifite ihungabana yatewe n'ingaruka zo kubyara cyangwa konsa. Rwabivuze rutya mu magambo y'icyongereza: «*Infanticide, which is defined in s. 233 of the Criminal Code, is a form of culpable homicide and applies in the narrow set of circumstances where (1) a mother, by a wilful act or omission, kills her newborn child (under one year of age, as defined by the Criminal Code, s. 2) and, (2) at the time of the act or omission, the mother's mind is "disturbed" either because she is not fully recovered from the effects of giving birth or by reason of the effect of lactation: L.B., at para. 58*»¹⁰.

[27] Hashingiwe ku bisobanuro bimaze gutangwa ku bijyanye n'imikorere y'icyaha cyo kwica uwo wibyariye, Urukiko rurasanga icyo cyaha ari icyaha cyihariye kidashobora gukorwa n'umugabo bitewe n'imiterere ye nk'umuntu udashobora gutwita ngo abyare, ngo noneho nyuma yo kubyara abe yagira ingaruka ziturutse kuri uko kubyara cyangwa se konsa nk'uko biba ku mugore. Kandi kugira ngo icyaha cyo kwica uwo wibyariye gishobokeye, ibyo bintu bikaba ari ngombwa nk'uko byagaragajwe haruguru. Urukiko rurasanga ahubwo icyaha cyo kwica uwo wibyariye (*infanticide*), ari umugore ugikora abitewe n'ingaruka zo kubyara, ikigamijwe mu itegeko akaba atari uko hagira utoneshwa cyangwa uvutswa uburenganzira ku mpamvu itumvikana.

[28] Kuba rero ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange iteganyaga ko icyaha cyo kwica uwo wibyariye kidashobora gukorwa n'umugabo bitewe n'imiterere ye itandukanye n'iy'umugore, Urukiko rurasanga nta kutareshya

⁸ Available at https://docksci.com/infanticide-some-medicolegal-considerations_5e58e908097c47f42d8b4578.html. Consulté le 26/11/2020.

⁹ Western Journal of Legal Studies, Vol 5, Issue 4, article 1. I. Elements of the offence (Infanticide) R v Smith⁵ clarified the seven elements of section 233: The accused is female; (b) The deceased was born alive; (c) The accused caused the death of her child; (d) The death of the child was caused by a wilful act or omission of the accused; (e) The child was newly-born (under 12 months of age); (f) The accused was not fully recovered from the effects of giving birth to the child; (g) By reason of childbirth or the consequent effects of lactation the accused's mind was disturbed. This article is available in Western Journal of Legal Studies: <http://ir.lib.uwo.ca/uwojls/vol5/iss4/1>.

¹⁰ File No.: 36585. 2016: January 20; 2016: March 24.

imbere y'amategeko cyangwa ivangura rishingiye ku gitsina biyigaragaramo, bityo ikaba itanyuranyije n'ingingo ya 15 n'ya 16 z'Itegeko Nshinga rya Repubulika y'u Rwanda.

2. Kumenya niba ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyanya ibyaha n'ibihano muri rusange inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, mu ngingo yaryo ya 29.

[29] Kabasinga Florida avuga ko ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyanya ibyaha n'ibihano muri rusange ibangamiye uburenganzira ku butabera buboneye, bityo ikaba inyuranyije n'ingingo ya 29 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015. Ibyo abisobanura mu buryo bukurikira:

- a. Iyi ngingo ihana umuntu wakoze igikorwa kitujuje ibisabwa byose kugira ngo cyitwe icyaha kuko iteganyanya ko ashobora guhanirwa icyaha kigaragazwa n'igikorwa cyakozwe nta bushake bwo kugikora, nyamara ubusanzwe, kugira ngo umenye ko icyaha cyabaye nk'uko bivugwa n'umwanditsi Robert Kint, ugomba kureba ko ingingo zikigize zuzuye: izo akaba ari ukuba igikorwa cyabaye (*élément matériel*), kuba itegeko riteganyanya nk'icyaha (*élément légal*), no kuba uwagikoze yari afite ubushake (*élément moral*). Bityo, uretse no kuba idatanga ubutabera buboneye, nta n'ubwo yubahirije amahame rusange y'amategeko ahana;
- b. N'ubwo ibiteganyijwe muri iyi ngingo ubisanga no mu bindi bihugu nk'Ubwami bw'Ubwongereza, Ireland cyangwa Canada, muri ibyo bihugu ho ubona iyo basanze umuntu yarishe umwana we nta bushake bwo gukora icyaha, ari nk'ibibazo byo mu mutwe adahanwa, ahubwo akurikiza gahunda z'abaganga baba bamukurikiranira hafi; mu gihe ingingo ya 108 y'Itegeko ryavuzwe yo, uretse no kumufasha mu buryo bwo kumuvura, imuteganyiriza ibihano binaremereye.
- c. Iyi ngingo ntitandukanya uwaba yishe umwana we ku bushake, cyangwa se akaba yabikoze nta bushake bwo gukora icyaha burimo.

[30] Avuga ko ubushakashatsi bwakorewe ku manza zabaye kuri iki cyaha mu Bwami bw'Ubwongereza na Wales [*Pays des Galles* mu rurimi rw'Igifaransa] mu mwaka wa 2005, bwagaragaje ko mu bagore 49 bahamijwe icyaha cyo kwica abana babo hagati y'umwaka wa 1989 n'umwaka wa 2000 hashingiwe ku ngingo ifitanye isano n'iregerwa, abagore babiri (2) gusa aribo bahanishijwe igifungo, abasigaye bashyirwa aho bagomba kwitabwaho bubahiriza amabwiriza y'abaganga, ibi bikaba bitandukanye cyane n'ibibera mu Rwanda aho umubare munini ujyanwa muri gereza. Avuga ko, nk'uko ubwo bushakashatsi bubigaragaza, abahanwa hakurikijwe ingingo imeze nk'ya 108 y'Itegeko ry'u Rwanda ari bake cyane bigaragara ko bagize ubushake bwo kwica abo bibyariye, bitandukanye n'ibikubiye mu ngingo ya 108 y'Itegeko ry'u Rwanda aho iyi ngingo ihana umugore wishe umwana bidaturutse ku bushake bwe, kuko ubwenge bwe buba butakiri ku murongo bitewe n'inkurikizi zo kubyara cyangwa se ku mpamvu zo guhembera k'umubyeyi. Agasanga aho guhanwa ahubwo yakagombye gushyirwa kuri gahunda z'abaganga bakamukurikiranira hafi mu rwego rwo kumusubiza ku murongo.

[31] Akomeza avuga ko mu gihugu cya Canada, kimwe mu bihugu byateye imbere mu bijyanye n'uburenganzira bwa muntu muri rusange, n'ingingo ya 233 y'Itegeko rihana icyaha cyo kwica uwo wibyariye, iteganyanya ko umugore aba akoze icyo cyaha iyo ku bushake bwe akoze igikorwa

cyangwa yanze gukora icyo yagombaga gukora bigatera umwana we ukivuka urupfu, muri icyo gihe akaba atarakiranyuka neza n'ingaruka zikomoka ku kubyara cyangwa guhembera k'umubyeyi, bigatuma ubwenge bwe budakora neza (*A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed*).

[32] Avuga ko kuba iri tegeko ridafite ibisobanuro birambuye, ryateje impaka zihoshwa n'imanza zaciwe n'urukiko, izo manza akaba ari Veit J held in R v Effert ndetse na R v LB. Avuga ko izi manza zakemuye impaka, kandi zifasha gusobanura iyi ngingo muri icyo gihugu, inkiko zikaba zarabanje kumenya niba ukurikiranywe yarabikoze ku bushake cyangwa nta bushake bwo gukora icyaha, cyangwa hari impamvu zitamuturutseho zabimuteye.

[33] Yongeraho ko iyo ugereranyije imihanire y'iki cyaha mu Rwanda no mu bindi bihugu aho ubona ko itegeko ryacu risa nk'aho ryakomotse, bigaragara ko umushingamategeko hari ibyo atasobanuye cyane, bityo bikaba bishobora gukomeza kurenganya abagore bashobora guhura n'ibibazo nk'ibi bya nyuma yo kubyara, maze aho gufashwa mu guhabwa ubutabera, ahubwo bigasa nko gufashwa guhungabana.

[34] Avuga ko iyo urebye ingingo ya 108 y'Itegeko riteganyaga ibyaha n'ibihano muri rusange ryo mu Rwanda, usanga yivuguruza ubwayo ikavuga ibintu binyuranyije n'amategeko. Avuga ko kuba iyo ngingo ivuga ko iyo umugore yishe umwana we abishaka, ibyo nta kibazo icyaha kiba cyabaye kubera ko haba harimo ubushake. Ko ariko ikibazo gihari ari uko iyo ngingo ikomeza ivuga ngo "mu gihe cyo gukora icyaha ubwenge bwe bukaba budakora neza". Akavuga ko bitashoboka ko habaho ubushake bwo gukora icyaha kandi ubwenge budakora neza, ko kubiteganyaga gutyo, umushingamategeko yakuye inshingano ku bushinjacyaha yo kwerekana ingingo zigize icyaha harimo n'ubushake, ko icyo umushinjacyaha asabwa ari ukwerekana ko umugore yishe umwana we gusa.

[35] Akomeza asobanura ko hakurikijwe amahame y'amategeko yavuzwe haruguru, ntawakabaye ahanirwa igikorwa yakoze nta bushake, kabone n'icyo gikorwa cyaba cyateye urupfu. Avuga ko iyo nta bushake buhari nta cyaha kiba cyabayeho, ko rero niba nta cyaha cyabaye nta no guhanwa biba bikwiriye kubaho. Asanga ahubwo ikwiye kuvugururwa mu rwego rwo kuyisobanura neza igatandukanya igihe uwaba akurikiranyweho icyaha yafatwa nk'aho yagikoze ku bushake, icyo gihe akaba yabihanirwa, n'igihe yaba yagikoze nta bushake, icyo gihe ntabe yabihanirwa. Ko ibyo bizanafasha inkiko kuba zatanga ubutabera bubonye, nk'uko ingero zishingiye ku bushakashatsi bwakorewe mu bindi bihugu byavuzwe haruguru zibyerekanaga.

[36] Arangiza asaba ko Urukiko rukwiriye kubona ko ingingo 108 y'Itegeko riteganyaga ibyaha n'ibihano muri rusange, inyuranyije n'ingingo zose zavuzwe, arizo iya 15, 16, ndetse cyane cyane iya 29 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe muri 2015, bityo ikaba ikwiriye kuvaho nk'uko ingingo ya 3 y'Itegeko Nshinga rya Repubulika y'u Rwanda ibiteganyaga.

[37] Me Rwagitare Fred Fiston na Me Mugabonabandi Jean Maurice bunganira Kabasinga Florida, bavuga ko ingingo ya 108 y'Itegeko riteganyaga ibyaha n'ibihano muri rusange uburyo yanditse ubwayo yivuguruza harebwe ibiteganywa n'amategeko. Bavuga ko kuba iyo ngingo

itangira ivuga ngo umugore wese abishaka cyangwa biturutse ku kudakora ikigomba gukorwa [...], hanyuma ikarangiza ivuga ngo muri icyo gihe ubwenge bwe bukaba budakora neza [...], basanga ibyo bitashoboka ko habaho ubushake kandi ubwenge budakora neza. Bavuga ko iyo ngingo inyuranyije n'iya 85 y'iryo tegeko ubwaryo iteganya ko iyo umuntu akoze icyaha nta bushake adakurikiranwa.

[38] Me Umwari M. Claire na Me Kabibi Spéciose bahagarariye Leta y'u Rwanda, bavuga ko ku kijyanye no kuvuga ko iyi ngingo y'itegeko ihana udakwiye kuba ahanwa ataribyo. Icyamba mbere ngo n'ubwo iyi ngingo mu kinyarwanda izanamo ijamba “ubwenge bwe budakora neza”, babona ari ikibazo cy'imyandikire gusa iri jamba ridakwiye kubamo, ahubwo bigasobanuka nk'uko mu cyongereza no mu gifaransa byanditse, bikumvikana ko ari umugore wese, abishaka ukora cyangwa ntakore ikigomba gukorwa, wica umwana yabyaye utarengeje amezi cumi n'abiri (12) ariko mu gihe cyo gukora icyaha akaba afite inkurikizi zituruka ku kubyara cyangwa guhembera k'umubyeyi aba akoze icyaha.

[39] Bavuga ko ibyo bashishingira ku kuba ubusanzwe abahanga mu by'ubuvuzi bagaragaza ko inkurikizi zo kubyara cyangwa guhembera zidashobora gutuma umugore ata ubwenge (*mental capacity*) nk'aho ari umurwayi wo mu mutwe. Ibi bikaba bivuze ko nubwo yaba afite ibyo bibazo, aba afite ubwenge bwo kumenya icyaha n'ikitari icyaha, yewe n'ingaruka z'ibikorwa yakora, bitandukanye n'umuntu uba afite uburwayi bwo mu mutwe udashobora kumenya icyaha n'ikitari icyaha ndetse n'ingaruka z'ibikorwa yakora ko ari mbi cyangwa atari mbi. Bavuga ko kuba ubwenge bw'uwo mugore buba bukora neza, akwiye kuryozwa igikorwa yakoze abizi neza kandi ku bushake, icyakora igihano kikaba gitoya (*mitigated*) kubera ko icyaha cyo kwiyicira umwana aba yagikoze atagambiriye kwica umwana ahubwo aba yabitewe n'izo ngaruka zitamuturutseho.

[40] Bakomeza bavuga ko kuba iyi ngingo y'itegeko iteganya ibihano biruta ibyo “kwica bidaturutse ku bushake/*homicide involontaire/manslaughter*”, ari ko bigomba kugenda, kubera ko, n'ubwo umugore wiyicira umwana biturutse ku nkurikizi zo kubyara no guhembera aba atagambiriye kwica umwana we, ariko nanone ntabwo akwiye guhanwa nk'uwishe umuntu bidaturutse ku bushake kubera umwihariko afite wo kurengera umwana buri gihe. Ibyo babisobanura mu buryo bukurikira:

- Aba afite ubwenge bwuzuye, aba azi neza ibikorwa yakorera umwana bikamuvutsa ubuzima, bityo akaba afite inshingano zo kwirinda kubikora;
- Afite inshingano zo kwitwararika uko bishoboka kose kugira ngo arengere ubuzima bw'umwana w'uruhinja kuko buba buri mu maboko ye ijana ku ijana, akaba ari nawe murengezi we wa mbere;
- Kubera ko umugore wese wabyaye agira impinduka mu mubiri we harimo n'izagera ku bwenge bwe, akwiye kwitegura mbere y'igihe akanitwararika mu gihe yabyaye akakira izo ngaruka kugira ngo arengere ubuzima bw'umwana.

[41] Abahagarariye Leta y'u Rwanda barangiza bavuga ko buri mugore wese wabyaye cyangwa se ufite ihungabana atica umwana yabyaye, ko ariyo mpamvu umwica aba agomba guhanwa. Basaba ko Urukiko rubonye ari ngombwa rwazahamagaza impuguke mu bijyanye n'ubuzima bwo mu mutwe bw'umugore umaze kubyara akabisobanura.

[42] Kuri iyi ngingo, uhagarariye Umuryango uharanira iterambere ry'ubuzima (*Health Development Initiative*, HDI) nk'inshuti y'Urukiko, avuga ko ibitekerezo byabo byibanda ku bijyanye no gusobanura uko abahanga mu buvuzi bavuze ku bibazo by'umwihariko abagore bahura nabyo bijyanye n'ubuzima bw'imyororokere (*reproductive health/santé de la reproduction*) nk'uko biteganywa n'Itegeko Nshinga rya Repubilika y'u Rwanda, ayandi mategeko akoreshwa imbere mu gihugu hamwe n'Amasezerano Mpuzamahanga yerekeye uburenganzira bwa muntu.

[43] Ku birebana n'isano iri hagati y'abagore batwite, abamaze kubyara n'ubuzima bwo mu mutwe, avuga ko umuryango Mpuzamahanga wita ku Buzima (*World Health Organization/Organisation Mondiale de la Santé*) nk'uko wabigaragaje mu mibare, ku rwego rw'isi, hafi ya 13% by'abagore batwite bakunda guhura n'ikibazo cy'ihungabana (*mental disorder*), by'umwihariko kwiheba (*depression*), byagera mu bihugu bikiri mu nzira y'amajyambere, ari naho u Rwanda rubarizwa, umubare wabo ukazamuka ukagera ku kigero cya 19.8%.

[44] Avuga kandi ko ubushakashatsi bwakozwe mu Muji wa Manchester, mu gihugu cy'Ubwongereza, bwagaragaje ko umubare w'abagore bajyanwa mu bitaro by'abarwayi bo mu mutwe kubera ihungabana nyuma yo kubyara (*post-partum depression*) uba wikubye inshuro umunani umubare w'abandi bagore baba bahuye n'ibindi bibazo byabateye kugira ihungabana.

[45] Akomeza avuga ko Minisiteri y'ubuzima y'u Rwanda nayo yemera ko umugore wahuye n'ikibazo cy'ihungabana amaze kubyara ashobora kwiyahura cyangwa kwihekura. Minisiteri ikaba ivuga ko uwo mugore aba agomba kuvurwa ndetse agahabwa imiti (*psychotherapy and medication*). Ikindi cyagaragajwe ni uko ihungabana ryo mu mutwe riturutse ku gutwita ari umwihariko w'abagore.

[46] Avuga ko ku byerekeye uburenganzira ku buzima muri rusange, ingingo ya 21 y'Itegeko Nshinga ry'u Rwanda iteganya ko abanyarwanda bose bafite uburenganzira bwo kugira ubuzima bwiza. Avuga ko abanyarwanda bose barebwa n'ubwo burenganzira kuko Itegeko Nshinga mu ngingo ya 16 (1) riteganya ko Abanyarwanda bose bavukana kandi bagakomeza kugira uburenganzira n'ubwisanzure bingana.

[47] Avuga kandi ko mu rwego mpuzamahanga, ingingo ya 12(1) y'Amasezerano Mpuzamahanga yerekeye uburenganzira mu by'ubukungu, imibereho myiza n'umuco (*International Covenant on Economic, social and Cultural Rights*)¹¹, hamwe n'ingingo ya 16(1) y'Amasezerano Nyafurika yerekeye Uburenganzira bwa muntu n'ubw'abaturage (*African Charter on Human and Peoples Rights*)¹² ziteganya ko buri muntu afite uburenganzira ku buzima. Aya masezerano akaba ateganya uburenganzira ku buzima mu buryo bukurikira mu rurimi rw'icyongereza: “*Every individual shall have the right to enjoy the best attainable state of physical and mental health*”.

[48] Akomeza avuga ko ku byerekeye ubuzima, Umuryango Mpuzamahanga wita ku buzima wasobanuye ko ubuzima atari ukutagira uburwayi gusa ahubwo ko ari no kumva umerewe neza: *Health is a state on complete physical, mental and social well-being and not merely the absence*

¹¹ U Rwanda rwemeje aya Masezerano n'Itegeko-teka n° 8/75 ryo ku wa 12/02/1975.

¹² U Rwanda rwemeje aya masezerano n'iteka rya Perezida n° 10/1983 ryo ku wa 17/05/1985.

of disease or infirmity”. Ibi bikaba bisobanuye ko ubuzima (*health/santé*) bureba n’ibyo twakwita *aspect mental* mu rurimi rw’igifaransa. Uburenganzira ku buzima ntabwo busobanuye kutarwara, ahubwo busobanura uburenganzira bwo kurindwa indwara no kuvurwa igihe umuntu yaba arwaye.

[49] Avuga ko ku bijyanye n’uburenganzira bw’umugore ku buzima mu buryo bwihariye, ingingo ya 14 (2)(b) y’Amasezerano Nyafurika y’inyongera yerekeye uburenganzira bwa muntu n’ubw’abaturage, yerekeye uburenganzira bw’umugore muri Afurika¹³ (*Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*) iteganya ko Ibihugu byashyize umukono ku masezerano bigomba gushyiraho uburyo bwo kwita ku buzima bw’abagore igihe bitegura kubyara, igihe babyaye, nyuma yo kubyara n’igihe barimo konsa (*States Parties shall establish and strengthen existing pre-natal, delivery and Post-natal health and nutritional services for women during pregnancy and while they are breast-feeding*).

[50] Avuga kandi ko ingingo ya 12(2) y’Amasezerano Mpuzamahanga yerekeye guca burundu ivangura iryo ariryo ryose rikorerwa abagore¹⁴ (*Convention on the Elimination of All Forms of Discrimination Against Women*) nayo aribyo igarukaho (*Notwithstanding the provisions of paragraph 1 of this article, states parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation*).

[51] Avuga nanone ko Komite y’impuguke ishinze kureba uko ibihugu byubahiriza Amasezerano Mpuzamahanga yerekeye guca burundu ivangura iryo ari ryo ryose rikorerwa abagore (CEDAW Committee) yasesenguye ingingo ya 12 y’aya masezerano muri aya magambo: “*States parties should include in their reports how they supply free services where necessary to ensure safe pregnancies, childbirth and post-partum periods for women. Many women are at risk of death or disability from pregnancy-related causes because they lack the funds to obtain or access the necessary services, which include antenatal, maternity and post-natal services.*”¹⁵ Mu yandi magambo, Komite yavuzwe haruguru isaba ibihugu byashyize umukono kuri aya masezerano birimo n’u Rwanda, kujya bigaragaza muri raporo bishyikiriza iyo komite, amakuru kuri serivisi zitishyurwa zijyanye no kubungabunga, igihe cyose bibaye ngombwa, ubuzima bw’abagore igihe batwite, bamaze kubyara na nyuma yaho.

[52] Mu gusesengura ingingo ya 108 y’Itegeko N° 68/2018 ryo ku wa 30/08/2018, avuga ko nk’uko babigaragaje haruguru, basanga iyi ngingo inyuranyije n’ibi bikurikira:

- Uburenganzira bw’umugore ku buzima bw’imyororokere nk’uko biteganywa mu masezerano mpuzamahanga hamwe n’ayandi mategeko akoreshwa imbere mu gihugu;
- Ihame rituma umuntu aryoza icyaha.

¹³ Amasezerano y’inyongera ku masezerano Nyafurika yerekeye uburenganzira bwa muntu n’ubwa abaturage yerekeye uburenganzira bw’umugore yashyiriweho umukono I Maputo ku wa 11 Nyakanga 2003, yemejwe burundu n’Iteka rya Perezida N° 11/01 ryo ku wa 24/06/2004.

¹⁴ U Rwanda rwemeje aya masezerano n’Iteka rya Perezida N°431/16 ryo ku wa 10 Ugushyungu 1980.

¹⁵ Office of the United Nations High Commission for Human Rights Committee on the Elimination of Discrimination against Women General recommendation N° 24: Article 12 of the Convention (women and health).

[53] Ku byerekeranye n'uburenganzira bw'umugore ku buzima bw'imyororokere, avuga ko basanga kwemeza ko umugore wihekuye kubera ko ubwenge bwe budakora neza bitewe n'inkurikizi zituruka ku kubyara cyangwa guhembera byonyine biba bihagije kwerekana ko uburenganzira bw'uwo mugore ku buzima bwiza bwavukijwe, kuko bigaragara neza ko ubuzima bw'umugore buba butifashe neza igihe icyaha gikorwa.

[54] Avuga kandi ko basanga ingingo ya 108 y'Itegeko ryavuzwe haruguru, inyuranyije n'ingingo ya 95 y'Itegeko Nshinga, aho iyo ngingo iteganya ko amasezerano mpuzamahanga yashyizweho umukono asumba amategeko asanzwe. Bityo ko kuba Itegeko N° 68/2018 ryo ku wa 30/08/2018 ari itegeko risanzwe, riza inyuma y'amasezerano Mpuzamahanga yemejwe n'u Rwanda bagaragaje haruguru, aho berekanye icyo aya masezerano ateganya ku byerekeye uburenganzira bw'umugore ku buzima muri rusange, no ku buzima bw'imyororokere mu buryo bwihariye.

[55] Avuga ko basesenguye ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, basanga nanone inyuranyije n'ibiteganywa n'ingingo ya 3, iya 12 n'ya 16 z'Itegeko N° 21/05/2016 ryo ku wa 20/05/2016 ryerekeye ubuzima bw'imyororokere y'abantu, kuko izi ngingo ziramutse zubahirijwe umugore atakora icyaha cyo kwihekura adafite ikibazo cy'ihungabana.

[56] Avuga ko mu byerekeye guhana umugore wihekuye abitewe n'uko yahuye n'ihungabana yatewe no kubyara, mu rubanza *State v. White*, Urukiko rw'Ikirenga rwa Leta ya Idaho ibarizwa muri Leta Zunze Ubumwe z'Amerika rwerekuye Jane White wari ukurikiranyweho icyaha cyo kwihekura yari yatewe n'uko nawe yari yagize ikibazo cyo mu mutwe nk'ingaruka yo kubyara.

[57] Akomeza avuga kandi ko umuntu ashobora kwibaza niba hari impamvu yatuma umugore ahanwa mu gihe bagaragaje ko amabwiriza ya Minisiteri y'ubuzima ubwayo ateganya ko umugore wahuye n'ikibazo cya *postpartum psychosis* aba akwiye gufashwa akavurwa, ndetse n'ingingo ya 85 (2) y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 iteganya ko *nta buryozwacyaha bubaho iyo ushinjwa yari afite uburwayi bwo mu mutwe mu gihe yakoraga icyaha*.

[58] Akomeza avuga ko Urukiko rw'Ikirenga rwa Idaho muri Leta Zunze Ubumwe z'Amerika rwemeje ko guhamya icyaha umuntu ufite uburwayi bwo mu mutwe bidafasha kugera ku kiba kigamijwe n'amategeko ahana, ko bitanamufasha kugororoka, ko ahubwo icyo bitanga ari ugusubiza muri sosiyete umuntu ufite uburwayi bwo mu mutwe nyuma yo guta igihe afunze (*the conviction of mentally ill persons does not serve the purpose of punishment in the criminal law, and it certainly does not serve the end of rehabilitation but rather may serve to release a mentally ill person to society after futile confinement*).

[59] Asoza avuga ko abahanga mu buvuzi bagaragaje ko "*postpartum non-psychotic depression*" ari kimwe mu bibazo abagore bakunda guhura nabyo bakanemeza ko ari ikibazo gikomeye kijyanye n'ubuzima rusange gikunda kwibasira abagore n'imiryango yabo. Umugore wahuye n'icyo kibazo cya *postpartum non-psychotic depression* aba akwiye gufashwa aho guhanirwa icyaha cyo kwihekura.

[60] Uhagarariye umuryango *Women's Link Worldwide* (WLW) nk'indi nshuti y'urukiko, avuga ko bamaze gusuzuma muri make imiterere y'icyaha cyo kwihekura mu Rwanda,

n'impungenge zavuzwe ku bijyanye no gukoresha nabi icyaha cyo kwihekura ku bagore n'abakobwa bashaka serivisi zo gukuramo inda, cyangwa bahuye n'ibibazo bikomeye byo kubyara, bifuzwa ko Urukiko rw'Ikirenga rwakwita ku bibazo bine bikurikira bijyanye no guhana icyaha cyo kwihekura:

Gukoresha nabi amategeko ahana kwihekura, aho abagore bahanwa kubera ko badashobora kubona serivisi zihagije z'ubuzima bw'imyororokere, ni ihohoterwa ry'uburenganzira bw'umugore ku mibereho, ubuzima ndetse n'ubuzima bwite, kandi rikagira ingaruka ku bagore n'abakobwa basanzwe barashyizwe mu kato, cyane cyane abagore b'abakene n'abagore bo mu cyaro;

Gukoresha nabi icyaha cyo kwihekura ku bagore n'abakobwa bakuyemo inda cyangwa bahuye n'ibibazo bikomeye byo kubyara, ni ukubangamira uburenganzira bw'umugore ku gucirirwa imanza zitabogamye;

Gukoresha nabi icyaha cyo kwihekura ku bagore n'abakobwa bakuyemo inda cyangwa bahuye n'ibibazo bikomeye byo kubyara bigize igihano kirimo ubugome kandi kidasanzwe.

[61] Basobanura ko mu bihugu byinshi icyaha cyo kwihekura gifatwa nk'icyaha gito ugeranyinyije n'ubundi bwoko bw'ubwicanyi, ko impamvu ari uko harebwa impamvu ziba zatumye icyo cyaha gikorwa. Aha bavuga nk'imibereho y'uregwa, kuba yarateshejwe agaciro igihe yari atwite ndetse no gutinya ababyeyi, ihungabana ryo mu mutwe yatewe no gutwita, kuba nta bimenyetso bidashidikanywaho ko yagambiriye gukora icyaha.

[62] Mu kwanzura, umuryango *Women's Link Worldwide* (WLW), uvuga ko gushinja icyaha abagore n'abakobwa bafite ibibazo bikomeye byo kubyara cyangwa gukuramo inda mu buryo budatekanye, ari ukurenga bikomeye ku burenganzira bw'abagore bwo kugira imibereho n'ubuzima birengerwa n'amategeko mpuzamahanga nk'uburenganzira bw'ikiremhamuntu. Bavuga ko kuba abagore bakennye n'abagore bo mu cyaro badakunze kubona uburyo buhagije bwo kuboneza urubyaro na serivisi z'imyororokere, bashobora guhura n'ibibazo bikomeye byo kubyara cyangwa bagahatirwa gukuramo inda rwihishwa bikaba byabaviramo ibyago byo gushinjwa icyaha cyo kwihekura.

[63] Mu gusoza, uyu muryango wibajije niba mu gushyira icyaha cyo kwihekura mu gitabo cy'amategeko ahana, intego yari iyo kugabanya umubare w'abakora iki cyaha, ko bibaye ari byo, umuti mwiza w'iki kibazo waba guharanira ko abagore bagira umutekano bakanabona serivisi z'imyororokere, harimo gukuramo inda no kwitabwaho nyuma yo gukuramo inda, kwigishwa iby'imibonano mpuzabitsina no kwirinda gusama.

UKO URUKIKO RUBIBONA

[64] Ingingo ya 29 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavugururwe mu 2015, igaragaza bimwe mu bigize uburenganzira ku butabera buboneye. Nk'uko bigaragazwa n'imyandikire y'iyi ngingo, ntabwo ibigize uburenganzira ku butabera buboneye byarandowe byose. Hakoreshejwe ijamba burimo, mu cyongereza "*includes*". Ibi bivuze ko uretse ibivugwa muri iyi ngingo ya 29, hari n'ibindi bigize uburenganzira ku butabera buboneye.

[65] Nk'uko uru rukiko rwabigaragaje mu rubanza RS/INCONST/SPEC 00003/2019/SC rwaciwe ku itariki ya 04/12/2019, ubutabera buboneye busobanurwa mu buryo butandukanye, hari ubutabera buboneye bushingiye ku iyubahirizwa ry'imihango ya ngombwa¹⁶. Ni ukuvuga uruhererekane rw'ibigomba kubahirizwa hashingiwe ku mahame ateganywa n'amategeko. Hari n'Ubutabera buboneye bushingiye ku biteganywa n'itegeko¹⁷. Ubu bwo bubuza ishyingirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage. Ibi ni nabyo bijyanye n'ikibazo Urukiko rwashyikirijwe muri uru rubanza.

[66] Hashingiwe kuri ibi bisobanuro, hararebwa niba ibiteganyijwe mu ngingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyira ibyaha n'ibihano muri rusange, byafatwa nko kuvutsa umugore uburenganzira ku butabera buboneye. Uwatanze ikirego we asobanura ko ibikubiye muri iyo ngingo bibangamiye amahame ajyanye n'ubutabera buboneye kuko ihana umugore wishe umwana we nta bushake bwo gukora icyaha afite.

[67] Urukiko rwemeranya n'uwatanze ikirego ko kugira ngo icyaha cyo kwica umwana wibyariye kibeho, kimwe n'ibindi byaha, kigomba kuba cyujuje ibintu bitatu bya ngombwa: kuba igikorwa cyabaye (*élément matériel*), kuba itegeko rigiteganyira nk'icyaha (*élément légal*), no kuba uwagikoze yari afite ubushake (*élément moral*).

[68] Bimwe mu biteganywa n'ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyira ibyaha n'ibihano muri rusange, ni uko umugore wese, abishaka cyangwa biturutse ku kudakora ikigomba gukorwa, wica umwana yabyaye utarengeje amezi cumi n'abiri (12) ariko mu gihe cyo gukora icyaha ubwenge bwe bukaba budakora neza bitewe n'inkurikizi zituruka ku kubyara cyangwa guhembera k'umubyeyi aba akoze icyaha.

[69] Mu gusubiza ikibazo Urukiko rwashyikirijwe kijyanye no kumenya niba iyi ngingo ihana umugore wishe umwana we nta bushake bwo gukora icyaha, ni ngombwa kubanza kureba ibigize icyaha cyo kwica umwana wibyariye n'aho gitandukanira n'icyaha cy'ubwicanyi (*murder*) giteganywa n'ingingo ya 107 ndetse n'icy'ubwicanyi budaturutse ku bushake (*manslaughter*) giteganywa n'ingingo ya 111, zombi z'Itegeko N° 68/2018 rimaze kuvugwa.

[70] Icyaha cy'ubwicanyi gishobora gukorwa n'umuntu wese harimo n'umugore kandi kigakorerwa uwo ariwe wese harimo n'umwana wibyariye. Ni kimwe n'icyaha cy'ubwicanyi bidaturutse ku bushake bitewe n'amakosa cyangwa urubangare, ariko nta mugambi wo kwica wari uhari. Ibigize icyaha cy'ubwicanyi (*les éléments constitutifs*), ni umuntu wica undi (*actus reus*), kandi uwamwishe akaba yari yagambiriye kubikora (*mens rea*). Mu bigize icyaha cyo kwica utabigambiriye, nabyo harimo kwica umuntu, ariko muri uko kumwica hakaba harimo uburangare (*actus reus*), buturuka ku myitwarire yashoboraga kwirindwa icyaha ntikibe (*mens rea*).

[71] Ku birebana n'icyaha cyo kwica uwo wibyariye, abahanga basesenguye ibigize icyo cyaha bahereye ku mategeko agihana mu bihugu byabo, bagaragaza ko kugira ngo kibeho hagomba kubaho ubushake bwo kwica cyangwa ubushake bwo kudakora icyagombaga gukorwa bigatera

¹⁶ Procedural due process: a course of formal proceedings (such as legal proceedings) carried out regularly and in accordance with established rules and principles. RS/INCONST/SPEC 00003/2019/SC rwaciwe ku itariki ya 04/12/2019, Para. 13.

¹⁷ Substantive due process: protection against enactment of arbitrary and unreasonable legislation or other measures that would violate peoples' rights. Idem.

urupfu. Mu nyandiko yise *Deconstructing infanticide*, Eric Vallillee yasobanuye ibigize icyaha cyo kwica uwo wibyariye giteganywa mu ngingo ya 233 y'amategeko ahana ya Canada, agaragaza ko *actus reus (élément matériel)* y'icyo cyaha isaba ko igikorwa cyangwa kudakora icyagombaga gukorwa biba byateje urupfu rw'umwana, naho *mens rea (élément moral)* igasaba ko igikorwa cyangwa ikitakozwe kandi cyagombaga gukorwa biba byaturutse ku bushake bw'ukora icyaha. Abivuga muri aya magambo: *The actus reus of the offence requires that an act or omission causes the death of the infant, while the mens rea requires that this act or omission be intentional.*¹⁸

[72] Uwitwa Winifred H. Holland¹⁹, nawe yasobanuye ibigize icyaha cyo kwica uwo wibyariye ahereye ku isesengura ryakozwe n'inkiko, agaragaza ko hagomba kubaho ubushake bwo gukora cyangwa ubushake bwo kudakora icyagombaga gukorwa, hagamijwe kugira nabi. Abivuga muri aya magambo: *What is the mens rea of the the offence? While it is clear that the act or omission must be "willful", it is not clear whether the death must be caused willfully....According to Smith*²⁰ *the act must be done with a bad motive or purpose, or with intent.*²¹

[73] Ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 ryavuzwe haruguru, ifite igice cya mbere kigira kiti "umugore wese, abishaka cyangwa biturutse ku kudakora ikigomba gukorwa, wica umwana yabyaye utarengeje amezi cumi n'abiri (12) ...". Mu itegeko ryo muri Canada bavugaga ngo "A female person commits infanticide when by a wilful act or omission she causes the death of her newborn child...", naho mu itegeko ryo muri UK bakavugaga ngo "Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months...".

[74] Hashingiwe ku bisobanuro bimaze gutangwa, birumvikana ko kugira ngo icyaha cyo kwica uwo wibyariye kibeho, hagomba kuba habayeho ubushake, ni ukuvuga ubushake bwo gukora igikorwa gitera urupfu rw'umwana cyangwa ubushake bwo kudakora icyagombaga gukorwa bigatuma umwana apfa. Ikibazo kigaragara mu ngingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange, ni ikibazo cy'imyandikire yayo itagaragaza neza ubushake bwo kudakora icyagombaga gukorwa, ikanasobanura mu buryo buteye urujijo icyiswe mu rurimi rw'icyongereza n'igifaransa *postpartum depression/état de dépression postpartum*.

[75] Inkiko zasobanuye ko kimwe mu bigize *actus reus (élément matériel)* y'icyaha cyo kwica uwo wibyariye, kikanatandukanya icyo cyaha n'icy'ubwicanyi, ari uko kigomba kuba cyakozwe n'umubyeyi w'umugore wica umwana we ukivuka abitewe n'ihungabana rikomoka ku kuba akimara kubyara. Mu rubanza rwa Her Majesty the Queen v. Meredith Katharine Borowiec, Urukiko rw'Ikirenga rwa Canada rwabivuze muri aya magambo: *Infanticide convictions are rare, distinguishable from murder and manslaughter by their unique actus reus: causing the death of her newly-born child while the mother is not fully recovered from the effects of giving birth or lactation and by reason thereof her mind is then disturbed*²². Uko guhungabana gukomotse ku

¹⁸ Eric Vallillee, "Disconstructing infanticide", (2015)5:4 online: Uwojleg Stud/<https://ir.lib.uwo.ca/uwojls/vol5/iss4/1>

¹⁹ Professor, faculty of law, University of Western Ontario, London, Ontario, Canada

²⁰ R v. Smith (1976) 32 C.C.C.(2d)224(Nfdl Dist Ct), cited by Winifred H. Holland

²¹ Winifred H. Holland, Murder and related Issues: An Analysis of the law in Canada, Report for the Law Commission, July 27th, 2005, p. 26.

²² S.C.C. No.: 36585, Her Majesty the Queen and Meredith Katharine Borowiec, para. 2.

kubyara nibyo *postpartum depression/état de dépression postpartum* bivugwa mu ngingo ya 108 yavuzwe haruguru mu rurimi rw'icyongereza n'igifaransa, bikaba bitandukanye no kuba ubwenge budakora neza bivugwa mu rurimi rw'ikinyarwanda. Kuba ubwenge budakora neza byafatwa ahubwo nka *postpartum psychosis*.

[76] Nk'uko bisobanurwa n'abahanga, umugore ukimara kubyara cyangwa se wonsa, ashobora kugira ingaruka z'ubwoko bubiri zikurikira:

Ashobora guta ubwenge (*postpartum psychosis*), bityo ntamenye kuba yatandukanya ikibi n'icyiza. Muri icyo gihe, ibikorwa binyuranyije n'amategeko yakora harimo no kwica uwo yibyariye, ntiyabihanirwa kubera ko ubwenge bwe buba budakora neza.

Ashobora kugira ihungabana (*postpartum depression*), ariko bitavuze ko muri icyo gihe nta bwenge aba afite. Aba ashobora gutandukanya ikibi n'icyiza, bityo igikorwa kinyuranyije n'amategeko yakora akaba yagikurikiranwaho, ariko kubera ibihe aba arimo, mu kumuhana bikitabwaho.

[77] Uwitwa Michele Connell mu nyandiko ye yise: *The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women*, asobanura ko itandukaniro riri hagati ya *postpartum psychosis* na *postpartum depression* ari uko umugore umaze kubyara akagira *postpartum psychosis* ata ubwenge akamera nk'umusazi ku buryo agira uko afatwa mu rwego rw'amategeko, mu gihe ufite *postpartum depression* we adata ubwenge ku buryo yananirwa gutandukanya ikibi n'ikiza, uwo we mu rwego rw'amategeko akaba nta mwihariko agira. Yabivuze atya mu magambo y'icyongereza: *This distinction is crucial to understanding why postpartum psychosis can be singled out for different legal treatment while the other two illnesses cannot. Based on current medical research, postpartum psychosis is the only condition that should qualify for special legal treatment. "Baby blues" and postpartum depression, while medically recognized, would not meet the threshold of legal insanity in the majority of cases because they typically do not impair a mother's ability to tell right from wrong. It is also important to emphasize, as a rebuttal to those concerned with an overly broad insanity standard, that postpartum psychosis is a narrowly defined medical category that includes relatively few women*²³.

[78] Ibimaze kuvugwa byagarutsweho mu rubanza Her Majesty the Queen v. L.B aho Urukiko rw'Uburundi rwa Ontario rwatanze igisobanuro cyo kwica uwo wibyariye (*Infanticide*). Rwavuze ko icyaha cyo kwica uwo wibyariye kigizwe n'ibintu bibiri. icya mbere ni isano iri hagati y'uregwa n'umwana wishwe, icya kabiri ni uko ubwenge bw'uregwa ugomba kuba bari nyina wa nyakwigendera buba bwahungabanye kubera ingaruka zo kubyara cyangwa konsa. Bitandukanye n'irindi hungabana rishobora koroshya uburyozwacyaha, ku birebana n'icyaha cyo kwica uwo wibyariye si ngombwa ko habaho isano hagati y'iryo hungabana n'igikorwa cyateye urupfu rw'umwana, kubera ko iryo hungabana ntaho rihuriye n'icyemezo cyo kwica. Iryo hungabana rifatwa nk'igice cya *actus reus* aho kuba mu bigize *mens rea*²⁴.

²³ Michele Connell, *The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women*. Case Western Reserve Law Review. Available at: <https://scholarlycommons.law.case.edu/caselrev/vol53/iss1/5>

²⁴ The definition of Infanticide focuses on two things. First, it requires a mother-child relationship between the perpetrator and the victim. Second, the mental state of the perpetrator/mother must be disturbed and that disturbance must be connected to the effects of giving birth or lactation. Unlike other mental states that may mitigate criminal responsibility, infanticide does not require any causal connection between the disturbance of the mother's mind and the decision to do the thing that caused her child's death: R. v. Guimont (1999), 141 C.C.C (3d) 314 (Q.C.A), at p.

[79] Tugarutse kuri uru rubanza, urega avuga ko ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganyaye ibyaha n'ibihano muri rusange, idatanga ubutabera buboneye, ashaka kumvikanisha ko ihana n'umuntu udafite ubwenge, udashobora gutandukanya ikibi n'icyiza. Hashingiwe ku bisobanuro bimaze gutangwa haruguru, umugore uvugwa muri iyo ngingo si wa wundi ufite ikibazo cya postpartum psychosis, kuko uyu nk'uko twabibonye adashobora gutandukanya ikibi n'icyiza, bityo akaba atahanirwa ibikorwa bibi yakoze, ahubwo ni wawundi ufite ikibazo cya *postpartum depression* uba yahungabanye gusa. Uyu rero, kubera ko ashobora gutandukanya ikibi n'icyiza, iyo akoze ibinyuranyije n'amategeko harimo no kwica uwo yibyariye, arabihanirwa.

[80] Uwatanze ikirego, avuga ko iyi ngingo idatanga ubutabera buboneye, mu gice cyayo kivuga ngo "...ariko mu gihe cyo gukora icyaha ubwenge bwe bukaba budakora neza bitewe n'inkurikizi zituruka ku kubyara cyangwa guhembera k'umubyeyi...". Mu cyongereza ni "...*but during the commission of the offense she was in postpartum depression or by effect of lactation commits an offense*". Akavuga rero ko niba umuntu ubwenge bwe budakora neza, nta n'ubushake bwo gukora icyaha yagira. Nk'uko twabibonye haruguru, iyi ngingo no mu bindi bihugu irahaba. Urugero rwatanzwe n'urwa Canada n'Ubwongereza. Ingingo ya 233 y'Itegeko rihana ryo muri Canada, ku birebana n'uko umugore agomba kuba ameze mu gihe cyo gukora icyaha cyo kwica uwo yibyariye, ivuga ngo "... *if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed*".

[81] Mu ngingo ya 160 (1) y'itegeko rihana ry'Ubwongereza (UK), bavugaga ngo "...*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*". Muri aya mategeko uko ari atatu, uretse kuba harakoreshejwe amagambo atandukanye, igitekerezo gikubiyemo ni kimwe cy'uko mu gihe umugore yica umwana we aba afite ihungabana rituruka ku kubyara cyangwa konsa. Iki gice cy'ingingo kimaze kugaragazwa, ni cyo uwatanze ikirego aboneramo ko ibigize icyaha bituzuye, ko kuba ubwenge budakora neza, nta bushake bushoboka (*mens rea*), ko rero nta no guhanwa biba bikwiye kubaho.

[82] Mu gusesengura ibigize icyaha cyo kwica uwo wibyariye (*infanticide*) hagamijwe kureba ibigize icyo cyaha (*éléments constitutifs*), ariko cyane cyane kumenya icyo amagambo *her mind is then disturbed* ashatse kuvuga, mu rubanza rwa Her Majesty the Queen (wajuriye) v. Meredith Katharine Borowiec (uregwa), Urukiko rw'Ikirenga rwa Canada rwasobanuye ko umushingamategeko akoresha aya magambo atashakaga kuvuga umuntu wataye ubwenge udashobora gutandukanya ikibi n'icyiza urebwa n'ingingo ya 16²⁵, ahubwo yavugaga ko umugore agomba kuba yahungabanyijwe n'ingaruka zo kubyara no konsa, uko guhungabana kukaba ari ko

317, E. Cunliffe, "infanticide: Legislative History and Current Questions" (2009) 55 Crim. L.Q. 94, at pp. 112-113; I; Grant, D. Chunn & C. Boyle, *The Law of Homicide*, loose-leaf (Scarborough: Carswell, 1995), at p. 4-91. Because the mother's "mental disturbance" is not connected to the decision to kill, that "disturbance" is better considered as part of the actus reus and not a mens rea component of the crime of infanticide. Docket: C49467-C49468, Date: 20110302, Court of Appeal for Ontario, Doharty, Moldaver and Cronk JJ.A. Between Her Majesty and L.B., Para. 59.

²⁵ Article 16 (1) of Criminal code states: No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

kugize igikorwa cyo kwica uwo wibyariye (*actus reus*), aho kuba umugambi wo kwica (*mens rea*). Urukiko rwabivuze muri aya magambo mu rurimi rw'icyongereza. *“The question of the meaning of the phrase “her mind is then disturbed” is one of statutory interpretation. The grammatical and ordinary sense of the words, their place within the Criminal Code, the provision’s legislative history and evolution, and the jurisprudence interpreting the phrase “her mind is then disturbed” do not support the conclusion that Parliament intended to restrict the concept of a disturbed mind to those who have “a substantial psychological problem”. Rather, the phrase “mind is then disturbed” should be applied as follows: (a) the word “disturbed” is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense; (b) in the context of whether a mind is disturbed, the term can mean “mentally agitated”, “mentally unstable” or “mental discomposure”; (c) the disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder under s. 16 of the Criminal Code or amount to a significant impairment of the accused’s reasoning faculties; (d) the disturbance must be present at the time of the act or omission causing the “newly-born” child’s death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation; (e) there is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the actus reus of infanticide, not the mens rea; (f) the disturbance must be “by reason of” the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child”*²⁶.

[83] Urwo Rukiko rukomeza ruvuga ko umuntu uregwa icyaha cyo kwica uwo wibyariye atakwireguza ko ubwenge bwe budakora neza kubera ko aba atataye ubwenge ku buryo atashobora kumenya ko ibyo ari gukora ari ibintu bibi. Rwabivuze muri aya magambo y'icyongereza: *The concept of a “disturbed” mind is unique to infanticide and does not appear elsewhere in the Criminal Code. Conceptually, a “disturbed” mind must be different from a “mental disorder”, a term used in s. 16 of the Criminal Code, and, when proved on a balance of probabilities, can lead to a verdict of not criminally responsible. It must also be different from non-insane automatism, which makes the act committed by the accused involuntary: R. v. Parks, [1992] 2 S.C.R. 871, at p. 896.*

[84] Nanone mu rwego rwo kumenya niba mu gihe umugore yica umwana wibyariye ubwenge bwe buba bwahungabanye (*the accused’s mind was disturbed*) bimukuraho icyaha, Urukiko rw'Ikirenga rwa Canada mu rubanza Her Majesty The Queen v. Meredith Katharine Borowiec, rwasobanuye ko ubwo hakemurwaga ikibazo nk'iki mu mwaka wa 1976, umucamanza yemeje ko ubushake bwo kwica uwo wibyariye bugaragarira mu bushake bwo gukora igikorwa kinyuranyije n'amategeko, bikerekanwa n'umugambi wo gukora nabi. Ko kuba ubwenge bw'uregwa bwari bwahungabanye igihe yicaga umwana we bikaba ntacyo bihindura ku bushake bwe. Urukiko rwabivuze muri aya magambo mu rurimi rw'icyongereza, *“An early case relative to this issue is the 1976 trial decision of R v Smith. The judge determined that the mens rea of infanticide is a willful unlawful act consisting of intentional wrongdoing. The finding that the accused’s mind was disturbed when she caused the death of her newborn baby in that case did not alter the mens rea”*.²⁷

²⁶ 2016 SCC 11, File No 36585, 2016: January 20; 2016: March 24.

²⁷ Idem, para. 49.

[85] Hashingiwe ku bisobanuro byose byatanzwe haruguru, Urukiko rurasanga, ibikorwa umugore ahanirwa bivugwa mu ngingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange, ari ibikorwa yakoze abishaka cyangwa akanga gukora ikigomba gukorwa nabwo abishaka, agamije kwica umwana yibyariye, ariko ibyo akabikora abitewe n'ihungabana rituruka kuri uko kubara cyangwa se konsa. Nk'uko byasobanuwe, uko guhungabana kukaba gutandukanye no guta ubwenge gushobora gutuma umuntu adashobora kumenya ibyo yakoze. Kubera iyo mpamvu, iyo ngingo ikaba ntaho ibangamiye ubutabera buboneye buteganywa n'ingingo ya 29 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavugururwe muri 2015.

[86] Urukiko rurasanga ariko, nk'uko byasobanuwe haruguru, uburyo ingingo ya 108 imaze kuvugwa yanditse mu kinyarwanda, ishobora gutera urujijo ikaba yakumvikanisha ko umugore uyivugwamo aba yataye ubwenge ku buryo atandukanya ikibi n'icyiza kandi atari ko igomba kumvikana, rukaba rugira inama inzego zibishinzwe kuyandika neza ku buryo byumvikana neza ko umugore uvugwa muri iyi ngingo ari ufite ihungabana yatewe no kubara cyangwa se konsa, ko ariko aba atataye ubwenge ku buryo atahanirwa ibikorwa binyuranyije n'amategeko yakora.

[87] Ku birebana n'ubushake buvugwa muri iyo ngingo, Urukiko nanone rurasanga yakwandikwa neza ku buryo ubwo bushake bugaragarira ku mugore ugira icyo akora akica umwana (*a wilful act*), bunagaragarira ku mugore wanga kugira icyo akora agamije kwica umwana yabyaye (*a wilful omission*). Uburyo yanditse, ubwo bushake bugaragarira k'ugira icyo akora akica umwana, naho udakora ikigomba gukorwa bikaba byakumvikana nk'aho nta mugambi mubi aba afite akaba yahanirwa kwica umwana biturutse ku burangare (*manslaughter*) kandi atariko bimeze.

III. ICYEMEZO CY'URUKIKO

[88] Rwemeje ko ikirego cyatanzwe na Kabasinga Florida nta shingiro gifite.

[89] Rwemeje ko ingingo ya 108 y'Itegeko N° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange, ntaho inyuranyije n'ingingo za 15 na 16 z'Itegeko Nshinga ryo muri 2003 ryavugururwe muri 2015.

[90] Rwemeje kandi ko iyo ngingo itanyuranyije n'ingingo 29 y'Itegeko Nshinga ryo muri 2003 ryavugururwe muri 2015, ko ahubwo ikeneye gukosorwa mu buryo bw'imyandikire.