Judgement RPA 11.698: Prosecutor against accused Makiese Nzukulu Héritier

In his unnumbered letter of the 26th May 2010, received at the Registry of the Court of First Instance of Kinshasa/Kalamu, on the 27th May 2010, the accused MAKIESE NZUKULU Héritier appealed the judgement pronounced on the 10th May 2010 by the Court of First Instance of Kinshasa/Kalamu under R.P. 10.062, which after having declared established, both in fact and in law, the offense of rape awarded to the accused MAKIESE, sentenced him to 10 years of imprisonment and to a fine of 100.00 Congolese Francs to be payed within the legal deadline or face 30 days of detention; Sentenced him to pay the victim the amount of 2000.000 Congolese Francs in damages-interests and lastly it sentenced him to the payment of the proceedings' fee;

Raised within the legal rules and deadlines, the present appeal is in conformity and admissible;

In the public hearing of the 29th April 2011in which this case was taken and deliberated, the accused MAKIESE appeared voluntarily whereas the plaintiff did not appear, nor any representative despite being notified of the audience's date by the bailiff BAKUBELA;

The procedure taken is thus in conformity;
It follows from the elements on file to which the Court had access that the one called LITAMBALA ELEMBO Sephora declared being a victim of rape committed by her uncle, the accused MAKIESE, on three separate occasions: once in Matete in their living room and twice in the Commune of Bumbu; Questioned before both the Official of the Judiciary Police and the Prosecutor, both the first Judge and the Court, the accused denies all the facts held against him;

IN LAW

The accused MAKIESE NZIKULU Héritier is indicted by the legal branch for having, during the month of December 2009, period not yet covered by the prescription of the public action, by the simple fact of carnal approximation of the sexes committed rape with resort to violence upon the person of Miss Sephora LITAMNBALA, aged 11; Facts provided for and punished by articles 167-170 of the law number 09/001 of the 10th January 2009 regarding the protection of children.

The offense of rape of minors supposes the consummate conjunction of the sexes, the underage status of the victim and guilty intention; the crime of rape of a child younger than 14 years involves, like the rape of someone older, the consummate sexual intercourse and not just the contact of the genitals, the latter being punishable as indecent assault; Only the other conditions are not demanded, the law presuming that the young age of the victim does not allow her to give her consent to the sexual act (cass. 24th July 196, Paris, 1917, p.72 Quoted by A.MARCHAL and JP JASPAR, Criminal law. Theoretical and Practical Treatise, Tome 1, Brussels 1952, p.260);

Nothing in the file allows the Court to be convinced that there was effectively a sexual conjunction between the accused MAKIESE Héritier and the victim, in the absence of a medical report on file or of serious indications of guilt; The first Judge was wrong in considering that the fact that the accused and the victim's statements agree about them having spent the night in the living room constitutes grave, precise, and agreeing presumption against the accused; In fact, the two parties being members of the same family and living in the same houses could not but have the same descriptions of the grounds and their habits; Such resemblances cannot be taken as grave presumptions, agreeing elements and lead to a conviction; Invited both before the first Judge and the Court, Madame Mamie MASSAMBA did not responded positively to the Court's invitation to clarify the facts awarded to the accused;

It was found that when a Court does not find itself in the presence of a fact that has been sufficiently proven in law, it shall declare that the accusation lack material grounds (1st Instance Elis, 19th July II, jur.Congo 1912, p.213); It was equally found that since there is no evidence, the Judge had the obligation to rule according to the law, or to acquit, he cannot substitute himself to the evidence by virtue of the personal knowledge that he might have of the case and he cannot adjourn the proceedings subject to the appearance of ulterior proof (Elis, 31st March 1924, 1st Inst. Elis, 19th July 1911, jur. And law of the Congo, 192, p. 213); the material element of sexual conjunction not established, the Court finds the analysis of the other constitutive elements superfluous;

The Court shall thus find not established the offense of rape such as it formulated and awarded to the accused and shall acquit him after the previous judgement; the fees shall be placed under the responsibility of the Public Treasury;

THEREFORE;
The Court, judiciary section;
Ruling After a public and due hearing of both parties regarding the accused;
Having heard the Prosecution;
Receives the appeal of the accused and declares it founded;
Consequently nullifies the previous judgement in all its dispositions;

Ruling again and doing what the first Judge should have done, declares not-established both in fact and in law the accusation of rape such as it was formulated and awarded to the accused MAKIESE Hèritier, acquits him and releases him from all charges without costs; places the fees under the responsibility of the Public Treasury;

Thus gathered and pronounced by the Appeals Court of Kinshasa/Gombe, in its public hearing of the 20th May 2011, in which were seated the Magistrates LIAM BI MOPEPE, President of the Chamber, ODIO NON DE and ILUNGA TSHAMAKEJI, Advisors, in the presence of the Prosecution represented by the magistrate MASSIALA KHAZA and with the assistance of Mr. MAKENGELE, the Court's Clerk.

The Clerk The Advisors The President