

THE SUPREME COURT SITTING IN KIGALI, HEARING CRIMINAL CASES ON 18 FEBRUARY 2011, PUBLICLY DECIDES ON CASE No RPAA0127 / 08 / CS AS FOLLOWS:

PARTIES:

- **APPELLANT:** TUYISENGE Emmanuel alias Nyagasaza, son of Uwimana and Vuguziga, born in 1986, born and living in Rushasho cell, Kanzenze sector, Rubavu, Western Province, Student, Single, first time offender.

And

- PUBLIC PROSECUTION
- Civil Party: MUKESHIMANA Gentile son of Kiromba and Mukarwego

SUBJECT

Appeal against Judgment No. RP 0051/08 / HC / MUS issued by the High Court, Musanze Chamber on 16/09/2008.

I. FACTS AND PROCEDURE

1. On 18/01/2004 Mukeshimana Gentile was told by his three-year-old girl Niyonsaba Mutoni that Tuyisenge Emmanuel had raped her. The investigation started immediately. After Tuyisenge Emmanuel was questioned by the judicial police the case was referred to the Prosecution in Rubavu. The Prosecution filed the complaint to the Rubavu High Court which ruled on 30/11/2007 that Tuyisenge Emmanuel was guilty of rape, provided for and punishable by Articles 33 and 34 of Law No. 27/2001 of 2001 Relating to Rights and Protection of the Child Against Violence. The Court sentenced him to life imprisonment and ordered him to pay Mukeshimana Gentile a reparation of 100,000 francs.
2. Unhappy with the outcome of the case, Tuyisenge Emmanuel appealed to the High Court, Musanze Chamber, which ruled on the appeal on 16/09/2008, sentencing Tuyisenge Emmanuel to 10 years in prison and ordered him to pay compensation totaling 165,000FRW. Tuyisenge Emmanuel and Mukeshimana Gentile appealed the judgment to the Supreme Court. In a preliminary hearing, the trial judge ruled that Tuyisenge Emmanuel's appeal was admissible because it was legal and within the jurisdiction of the Supreme Court, but declared inadmissible Mukeshimana Gentile's appeal because it was not within the

jurisdiction of the Supreme Court. The reasons given by Tuyisenge Emmanuel's appeal are twofold. First he submits that he was punished while the charges against him were not proven beyond doubt; second he submits that he was punished as an adult whereas he was a child at time of the crime. The hearing in the Supreme Court took place on 17/02/2011, with the appellant defending himself and the Prosecution represented by Prosecutor Bunyoye Grace. After the hearing, the Court announced that the judgment will be read on 18/02/2011.

II. ISSUES RAISED IN THE CASE AND ANALYSIS THEREOF.

A. Whether the Tuyisenge Emmanuel's guilt was not sufficiently proven

3. In his appeal, Tuyisenge Emmanuel submits that his guilt was not proved beyond doubt. The doubt results from a medical report stating that Niyonsaba Mutoni's virginity was still intact. In this regard, the prosecutor argued that sexual penetration is not required for the crime of rape to occur. A medical report dated 19/01/2004 shows that the child Niyonsaba Mutoni was sexually abused, and that there was sexual contact without vaginal penetration. As provided in Article 33 of Law No. 27/2001 of 2001 Relating to Rights and Protection of the Child Against Violence, any sexual relations with an under 18 - year - child, whatever the means or methods used, are considered as rape, meaning that any sexual intercourse with a child, with penetration or nor, amounts to rape.
4. Tuyisenge Emmanuel alleges that he is accused by Niyonsenga Mutoni's parents because of a property dispute. The Court finds that the reason given by Tuyisenge Emmanuel is not convincing as he does not substantiate his claim of animosity between him and Mutoni Niyonsaba's parents. In addition, when asked by the police if he had conflict with Niyonsaba Mutoni's parents, he replied that he does not. Another indication that there is no animosity between Tuyisenge Emmanuel and Niyonsaba Mutoni's parents is that on 30/01/2004 the parents signed an agreement with Tuyisenge Emmanuel's mother, which was intended to allow Tuyisenge Emmanuel to be prosecuted while staying home because he could be subject to harm by people responsible for Tuyisenge's father death who were in jail in the Gisenyi Prison. So the parents of the raped child would not have made such a bargain if they had animosity with the defendant.

B. Whether Tuyisenge Emmanuel was indeed punished as an adult for an offence he committed before the age of 18 years.

5. Tuyisenge Emmanuel was convicted based on Article 34 of Law No. 27/2001 of 2001 Relating to Rights and Protection of the Child Against Violence which provides that anybody who rapes a child who is below 14 years of age shall be sentenced to life imprisonment. The court found that there was a mitigating circumstance and reduced his sentence to 10 years instead of life imprisonment. The defendant alleges that the sentence was unlawful because he was sentenced as an 18-year-old person.
6. The birth certificate issued by the administrative official in Kanzenze Sector, Rubavu District on 14/08/2006 indicates that Tuyisenge Emmanuel was born on 18/12/1986. The crime of rape with Niyonsenga Mutoni took place on 18/01/2004, meaning that Tuyisenge Emmanuel was 17 years and one month. He reached 18 years on 18/12/2004. Article 77 of the Rwanda Penal Code stipulates that if the offender is over the age of fourteen but less than eighteen years at the time of the commission of an offence, if he/she would be subjected to death penalty or life imprisonment with special provisions, he/she shall be liable to a term of imprisonment of 10 years to 20 years. Tuyisenge Emmanuel was to be punished under this article, after which the Court could reduce his sentence based on mitigating circumstances rather than applying a sentence imposed on perpetrators of child rape who are 18 years and above.
7. The Supreme Court finds that Tuyisenge Emmanuel should have been sentenced to between 10 and 20 years. As indicated by the High Court, there are mitigating circumstances including the fact that this is the first time he has been prosecuted by a court, his young age, the fact that at the time of arrest he was still a student in need of further education, the Supreme Court finds that Tuyisenge Emmanuel should have his sentence reduced in accordance with Articles 82 and 83 of the Rwanda Penal Code.

III. COURT DECISION

8. Declares that the appeal filed by Tuyisenge Emmanuel is admissible and partially-founded.
9. Holds that Tuyisenge Emmanuel had committed rape before the age of 18.
10. Holds that there are mitigating circumstance for the crime Tuyisenge Emmanuel is charged with.
11. Sentences him to 7 years in prison.
12. Orders the defendant to pay Mukeshimana Gentille 165.000Frws in accordance with the judgment under appeal

13. Orders the defendant to pay the costs of the proceedings totaling 33.550FRW.

ISSUED AND PUBLICLY READ THIS 18/02/2011 BY THE SUPREME COURT
COMPOSED OF Sam RUGEGE: President, HAVUGIYAREMYE Julien and KAYITESI R.
Emily: JUDGES, ASSISTED BY MUKAMURENZI Béatrice: REGISTRAR

Signed

Sam RUGEGE

President

Signed

HAVUGIYAREMYE Julien

Judge

Signed

KAYITESI R. Emily

Judge

Signed

Mukamurenzi Béatrice

Registrar