

THE HIGH COURT, AT ITS HEADQUARTERS, TRIED THE PRESENT CASE IN A PUBLIC HEARING ON 30TH OCTOBER 2015 AS FOLLOWS:

Appellant: [REDACTED], daughter of [REDACTED] and [REDACTED], born in [REDACTED], residing at [REDACTED], [REDACTED], [REDACTED], [REDACTED], represented by Advocate [REDACTED], Advocate [REDACTED] and Advocate [REDACTED]

Case: Requesting the Court to grant [REDACTED] the permission to terminate her pregnancy [Appeal of judgment RP 0561/15/TGI/NYGE]

THE PROSECUTION WAS REPRESENTED BY:

PN [REDACTED]

Background of the case

[1]. [REDACTED] aged [REDACTED] states that she is pregnant of [REDACTED] child. That [REDACTED] raped her after giving her alcohol. Her mother, [REDACTED], filed the case at Nyarugenge Intermediate Court requesting the court to grant [REDACTED] permission to carry out a lawful abortion since the pregnancy is a threat to her daughter's life.

Nyarugenge Intermediate Court rejected [REDACTED]'s request, on the ground that there was no criminal charges against [REDACTED] where he had been convicted of raping [REDACTED]. The Court further stated that it is possible to get pregnant without having sexual intercourse, and that there was no evidence produced by [REDACTED] to show that [REDACTED] is threatened by her pregnancy.

[2]. On 08th October 2015, [REDACTED] appealed to this honourable court stating that the sexual intercourse [REDACTED] aged 13 engaged in, could have no other name but rape, and the Prosecutor does not explain the other ways [REDACTED] could have become pregnant.

[3]. The prosecution states that article 165 of Organic Law instituting the Criminal Code exempts the criminal liability for abortion in Rwanda grant a raped pregnant woman the right to terminate that pregnancy, that this article does not concern a defiled child, thus this article shall not be linked to the Article 190 of the above Organic Law instituting the Criminal Code. That the prosecution assertion, that Article 165 of Organic Law instituting the Criminal Code exempts the criminal liability for abortion in Rwanda granted to a raped pregnant woman the right to carry out lawful abortion. The trial court found that article 165 could not be applicable to sexual act against [REDACTED], and thus this Article shall not be linked to the Article 190 of the Organic Law instituting the Criminal Code.

[4]. The Court shall examine:

- The prosecution's point of view which states that Article 165 of Organic Law instituting the Criminal Code of Rwanda is not applicable to a defiled child;
- Whether [REDACTED] was defiled
- Whether [REDACTED] can be granted the right to terminate her pregnancy.

I. Analysis of the case

✓ *The prosecution's point of view on the right to terminate [REDACTED]'s pregnancy*

[5]. The prosecution stated that the exemption from criminal liability for abortion mentioned in article 165,1° of Organic Law No. 01/2012/OL of 02/05/2012 instituting the Penal Code, is applicable to a raped woman who is pregnant which is different from a child defiled provided for under article 190 of the Penal Code, as these are two distinct crimes, since rape is different from child defilement. Their point of view is that this article is not applicable to [REDACTED], aged 13, who got pregnant as a result of defilement.

[6]. The right claimed by [REDACTED] is based on the fact that she was raped at the age of 13 which is called child defilement provided for under article 190 of Organic Law instituting the Penal Code of Rwanda which provides that: "*Child defilement means any sexual intercourse or any sexual act with a child regardless of the form and the means used.*"

This is what [REDACTED] is basing upon to request this court to carry out lawful abortion as provided for article 165 of Organic Law mentioned earlier. This article 165 provides miscellaneous reasons for a lawful abortion which may lead a woman to have a lawful abortion, and one of them is that the woman may have got pregnant as a result of rape.

[7]. The word [Umugore] in Kinyarwanda, [Woman] in English, [Femme] in French has been recurrent where the Prosecutor presents in the aforementioned article that no defiled child is mentioned in the article but instead a woman, thus the Prosecutor understands that the person who is granted the termination of the pregnancy is solely a mature person who is raped.

[8]. The Court finds that this confusion shall be cleared by what those crimes have in common; that is the rape victims are raped against their consent. Regarding the child, under 18 years, the child is considered unable to decide for themselves concerning sexual intercourse, this is also called rape. Referring to the Article 190 of the aforementioned Organic Law which uses the word "child defilement" instead of "rape" that is mentioned in Article 165 of the present Organic Law does not change that a child was raped, since it was done against their consent.

[9]. What has been mentioned also puts emphasis on the National Protocol for operationalization of exemptions for abortion in the Penal Code of 2012], by the Ministry of Health whereby on page 9 it is written that young women under 18 who are made pregnant the act is referred to as child defilement as provided for by article 190 of Organic Law instituting the Penal Code, and to be punished as people who committed rape.¹

✓ **Knowing whether [REDACTED] was raped and examining whether this shall be the reason for being granted the permission to terminate the pregnancy**

[10]. [REDACTED] and her lawyers object to the decision of Nyarugenge Intermediate Court which deprived [REDACTED] of her right to terminate her unwanted pregnancy as a result of defilement Since the Court ought not to wait until the presumed accused of [REDACTED] is found guilty. Whereas no one is dubious about [REDACTED]'s age. And whereas no one is dubious about the fact that [REDACTED] is pregnant as it was shown by the doctor's report. They also got the opportunity to present the paper showing that [REDACTED] was examined in Muhima Hospital on 27 October 2015, where Dr. [REDACTED] proved that [REDACTED] was 18 weeks and 3 days pregnant.

[11]. [REDACTED]'s lawyers state that they object of the former Court's decision whereby it said that a woman can get pregnant without being raped, but provided no other possible ways [REDACTED] might have got pregnant.

The lawyers stated that the right of [REDACTED] to request on behalf of her daughter [REDACTED], is provided for under article 165 of Organic Law instituting the Penal Code of Rwanda as well as International Protocols in which Rwanda is a signatory.

[12]. The Court finds that pursuant to article 190 of the Organic Law mentioned as well as article 217 provide that a child is any person under eighteen (18) years unless otherwise provided for by other laws.

[13]. The fact that [REDACTED] was born on [REDACTED] [REDACTED] as shown by her Birth Certificate issued by the Executive Secretary of Kicukiro on [REDACTED], is proof that she is now 13 years old.

¹ Young women under the age 18, who become pregnant are also considered as child defilement according to Article of Law No. 54 of 14/12/2011 relating to the rights and the protestation of children and article 190 of the penal code, and should be treated as rape cases.

[14]. The fact that ██████████ had forced sexual intercourse as shown by the doctor's report which states that ██████████ is no longer virgin but pregnant.²The report also contradicts the statement of the Intermediate Court which stated that a woman can get pregnant without being raped, and did not provided other possible ways that might have been happened to ██████████ to be pregnant of the pregnancy for which she is requesting termination.

[15]. Basing on ██████████'s age written on her Birth Certificate and the doctor's report mentioned above, the Court finds that the crime committed against ██████████ is qualified as child defilement as provided for under article 190 of the above mentioned Organic Law, which in other words is rape.

[16]. The Court finds that article 165 of Law no. 01/2012 of 02/05/2012 instituting the Penal Code provides the exemption of criminal liability for a woman who commits abortion and a medical doctor who helps a woman to abort if one of the following conditions is met: **1stWhen a woman has become pregnant a result of rape (...)**; the exemption of the criminal liability mentioned in the 2nd part and the 3rd of the first paragraph of this article is only admissible when **the person who requests for the abortion has presented to the doctor the decision** of a competent Court approving one of the conditions mentioned in those parts.

[17]. The court finds that Article 14 (2) C of the *Protocol to African Charter on Human and People's rights on the rights of Women in Africa, in which Rwanda is signatory* and authorized its use in Rwanda concerning the observation of Article 14.2.c, provides that member States shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in case of rape.³³ Article 14 (2) (C) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provides that States Parties shall take all appropriate measures to **protect the reproductive rights of women by authorizing medical abortion in case of sexual assaults, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.**

[18]. The Court finds that ██████████ has the right to request a medical abortion for ██████████ as it is clear that she was defiled at the age of 13, and any child defilement regardless of the form and any means used is qualified as defilement as the sexual intercourse is done against the child's consent.

² Examination form in case of alleged rape or other sexual offence, made by ██████████ Hospital on ██████████ : pregnancy positive, hymen not intact, multiple old tears.

³ <http://www.achpr.org/fr/instruments/women-protocol/visited> on 28 October 2015

✓ *Concerning ██████████'s best benefits to request a medical abortion*

[19]. ██████████ explained to the Court that this pregnancy threatens ██████████ life as it prevented her from going back to school, and the child is not happy with her pregnancy to the point that she wants to abort it using any substance that might take away her life.

The Court asked ██████████ (who was requested to appear in the Court for informational purpose) if it was her wish to abort as well as the reason that pushes her, she explained that the pregnancy embarrasses her as it makes her ashamed among her schoolmates and does not allow her to go to school. She further stated that she was defiled by ██████████ who gave her a beer called “coffee”, and that she was defiled unconsciously.

[20]. Pursuant to the case of the child named ██████████ aged 13, studying in P 5, it is beyond reasonable doubt that getting pregnant made her shameful among her schoolmates as she states since she is still young, and the fact that she tried to abort as mentioned by her mother during the hearing. The Court finds that it is hard for ██████████ aged 13 to assume the responsibility of a mother considering the maturity age which is 21 provided for by the Civil Code whereby a person can become a parent and 18 years allowing someone to decide on their behalf concerning sexual intercourse as provided for by other laws.

[21]. The Court finds that the fact that ██████████ needs to continue her lessons is reasonable since she is still a pupil in P 5, giving birth and bringing up her child would prevent her from continuing her studies as well as her future life.

[22]. The Court finds that ██████████ aged 13 has the right and benefits to abort as requested by her mother, ██████████ for this pregnancy is a result of defilement as explained.

The Court also finds that, as approved by doctor ██████████ who examined her on 27 October 2015, the penultimate requested for an abortion is 22 weeks and since ██████████'s pregnancy hasn't reached 22 weeks mentioned in “*National Protocol for operationalization of exemptions for abortion in penal code 2012*”.

[23]. As it is the wish of ██████████ and her lawyers, the Court finds that the medical abortion of ██████████'s pregnancy shall be carried out by Kacyiru Police Hospital, as it is deemed competent, this decision shall be immediately communicated to the Hospital's Director for the pregnancy to be terminated before it reaches 22 weeks as explained above.

III. THE COURT'S DECISION

[24]. HEREBY declares that [REDACTED] s appeal is well-founded;

[25]. HEREBY declares that the judgment rendered to the case RP 0561/15/TGI/NYGE shall be altered in all its aspects;

[26]. HEREBY declares that [REDACTED] is granted permission to have a medical abortion;

[27]. HEREBY orders Kacyiru Police Hospital on behalf of the Director to carry out medical abortion for [REDACTED] and thus be performed before the pregnancy reaches 22 weeks.

[28]. HEREBY orders that the decision immediately be communicated to the Hospital's Director having its Headquarters at Kacyiru;

[29]. Hereby orders that the Court's fees shall be deposited in the Government Treasury as the case was filed in the child's best interests.

Thus pronounced in a public hearing on 30th October 2015, in the High Court by:

Judge

President of the Jury

Judge

Mukakalisa Ruth

Kaliwabo Charles

Kabagambe Fabienne

(Signed)

(Signed)

(Signed)

Court Clerk

[REDACTED]

(Signed)

Certified true copy

In witness whereof, Court Clerk [REDACTED]

On 30 October 2015

(Signed)