URUKIKO RW'IKIRENGA RURI I KIGALI, RUHABURANISHIRIZA IKIREGO GISABA GUKURAHO INGINGO Y'ITEGEKO KUKO INYURANYE N'ITEGEKO NSHINGA, RUKIJIJE MU RUHAME URUBANZA RS/INCONST/SPEC 00003/2019/SC NONE KU WA 4/12/2019 MU BURYO BUKURIKIRA:

HABURANA:

UREGA: KABASINGA Florida mwene Paul SEMANA na Winifred MUKABUZIZI SEMANA, utuye mu Mudugudu wa Estate 2020, Akagari ka Gacuriro, Umurenge wa Kinyinya, Akarere ka Gasabo, Umujyi wa Kigali.

Hari

Leta y' u Rwanda mu izina ry'Intumwa Nkuru yayo

Ikiregerwa: Kwemeza ko ingingo ya 133 y'itegeko Nº68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 29 na 151.

I. IMITERERE Y'IKIREGO

[1] KABASINGA Florida yatanze ikirego asaba Urukiko rw'Ikirenga kwemeza ko ingingo ya 133, igika cya gatanu y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranyije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 29 na 151, bitewe n'uko asanga ibangamiye uburenganzira ku butabera buboneye ikaba inabangamira ubwigenge bw'umucamanza mu gutanga ibihano.

[2] Iyo ngingo ya 133, igika cya gatanu y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 iteganya ko: "*[….] Iyo gusambanya umwana byakurikiwe*

no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha. […]".

[3] Leta y'u Rwanda ivuga ko ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranyije n'Itegeko Nshinga, ko ntaho ibangamiye uburenganzira ku butabera buboneye bw'uregwa kandi iyo ngingo ntaho ibangamiye ubwigenge bw'umucamanza.

[4] Urubanza rwaburanishijwe mu ruhame n'Urukiko rw'Ikirenga ku wa 06/11/2019, Kabasinga Florida watanze ikirego yunganiwe na Me Rwagitare Fred Fiston na Me Mugabonabandi Jean Maurice, Leta y'u Rwanda ihagarariwe na Me Batsinda Aline.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

- **Kumenya niba igika cya gatanu cy'ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kinyuranije n'ingingo ya 29 y'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015.**

[5] Kabasinga Florida n'abamwunganira bavuga ko ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 29 y'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015 ivuga ko buri wese afite uburenganzira ku butabera buboneye. Bakomeza bavuga ko agace k'ingingo ya 133 kanyuranye n'Itegeko Nshinga ari akavuga ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha.

[6] Basobanura ko iyo haciwe urubanza hagatangwa igihano hitawe ku mpamvu nyoroshyacyaha iyo zihari, biri mu bigize uburenganzira ku butabera buboneye buteganywa n'Itegeko Nshinga. Ko rero mu gihe

hari ingingo y'itegeko ibuza gusuzuma izo mpamvu nyoroshyacyaha, ituma uregwa washoboraga kugabanyirizwa ibihano, avutswa ubwo burenganzira ku butabera buboneye. Bakomeza basobanura ko imiterere y'ingingo ya 133, agace kayo karebana no gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore, iteje ikibazo kuko igihano cya burundu kidashobora kugabanywa, hari abo kibangamira hakurikijwe imikorere y'icyaha bigatuma hari abahanwa cyane kurusha abandi kandi mu buryo busanzwe atariko byakagombye kugenda.

[7] Batanga urugero rw'ushobora guhamwa n'icyaha cyo gusambanya umwana ufite imyaka iri hagati ya 14 na 18, yagikoze afite imyaka iri hejuru ya 50, ko we ashobora kugabanyirizwa ibihano agahanishwa igifungo cy'imyaka 25, naho ufite imyaka 19 wasambanye n'ufite 17 babyumvikanyeho, nyuma bakabana nk'umugabo n'umugore azahanishwa igifungo cya burundu kidashobora kugabanywa. Basanga ibyo binyuranye n'Itegeko Nshinga mu ngingo yaryo ya 29, bagasaba ko ingingo ya 133 ibiteganya, yavanwaho.

[8] Me Batsinda Aline uhagarariye Leta y'u Rwanda avuga ko ibiteganywa n' ingingo ya 133 y'itegeko riteganya ibyaha n'ibihano muri rusange, bitanyuranye n'Itegeko Nshinga kuko ntaho bigaragara ko abantu babuzwa uburenganzira ku butabera buboneye, ko ibyo uwareze avuga abishingira ku marangamutima.

[9] Akomeza avuga ko ingingo ya 29 y'Itegeko Nshinga igaragaza uburenganzira umuntu afite kandi bugomba kubahirizwa kugira ngo ahabwe ubutabera buboneye, ariko ko urega muri uru rubanza atagaragaza uburyo ingingo ya 133 y'itegeko riteganya ibyaha n'ibihano muri rusange yica bumwe muri ubwo burenganzira. Ntiyerekana niba iyo ngingo itubahiriza uburenganzira buteganywa mu ngingo ya 29 ari bwo kumenyesha uregwa imiterere n'impamvu z'icyaha akurikiranyweho, uburenganzira bwo kwiregura no kunganirwa, ubwo gufatwa nk'umwere kugeza igihe Urukiko rubifitiye ububasha ruhamije uregwa icyaha,uburenganzira bwo kuburanira

imbere y'Urukiko rubifitiye ububasha, ubwo kudakurikiranwa, kudafatwa, kudafungwa cyangwa kudahanirwa ibyo ukurikiranwe yakoze, cyangwa atakoze iyo amategeko y'igihugu cyangwa amategeko mpuzamahanga atabifataga nk'icyaha igihe byakorwaga.

[10] Asoza avuga ko ibijyanye n'ubutabera buboneye Umushingamategeko yabyitayeho, ko ntaho ingingo ya 133 inyuranyije n'ingingo ya 29 y'Itegeko Nshinga, ko ahubwo izo ngingo zombi zijyanye hakurikijwe ibiteganywa mu gace ka 4 k'ingingo ya 29, aho iteganya ko ibyaha n'ibihano bijyanye nabyo biteganywa n'amategeko. Ibyo urega yasobanuye mu kirego cye, asanga ashaka kuvanga ubukure mu rwego rusanzwe (social) no mu rwego rw'amategeko. Asoza asaba ko Urukiko rwakwemeza ko ingingo ya 133 itanyuranye n'ingingo ya 29 y'Itegeko Nshinga.

Uko Urukiko rubibona

[11] Ingingo ya 29 y'Itegeko Nshinga ivuga ko: "*Buri muntu wese afite uburenganzira ku butabera buboneye, […]*". Iyo ngingo ikomeza irondora bimwe mu bigize ubwo burenganzira.

[12] Iyo ngingo ya 29 y'Itegeko Nshinga igaragaza bimwe mu bigize uburenganzira ku butabera buboneye. Nkuko bigaragazwa n'imyandikire y'iyo ngingo, ntabwo ibigize uburenganzira ku butabera buboneye byarondowe byose. Hakoreshejwe ijambo **burimo**, mu cyongereza "i***ncludes"***. Ibi bivuze ko uretse ibivugwa muri iyo ngingo ya 29, hari n'ibindi bigize uburenganzira ku butabera buboneye.

[13] Ubutabera buboneye busobanurwa mu buryo butandukanye, hari ubutabera buboneye bushingiye ku migendekere ***procedural due process*****: a course of formal proceedings (such as legal proceedings) carried out regularly and in accordance with**

established rules and principles[1]**.** Ni ukuvuga uruhererekane rw'ibigomba kubahirizwa mu migendekere y'urubanza hashingiwe ku mahame ateganywa n'amategeko. Hari n'Ubutabera buboneye bushingiye ku biteganywa n'itegeko ***substantive due process*****: protection against enactement of arbitrary and unreasonable legislation or other measures that would violate peoples'rights.**[2] Ubu buryo bwo bubuza ishyirwaho ry'amategeko cyangwa izindi ngamba zidashyira mu gaciro zibangamira uburenganzira bw'abaturage.

[14] Ikibazo gisigaye ni ukumenya niba ibirebana no gusuzuma impamvu nyoroshyacyaha n'itangwa ry'igihano gikwiye, nabyo biri mu bigize uburenganzira ku butabera buboneye. Kuri iki kibazo, Urukiko rusanga mu manza nshinjabyaha, uburenganzira ku butabera buboneye butangirana n'ibikorwa by'iperereza, bugakomereza ku bikorwa by'ikurikiranacyaha, iby'iburanisha n'itangwa ry'ibihano ku byaha biteganyijwe n'amategeko ahana. Bivuze ko n'ibirebana n'isuzumwa ry'impamvu nyoroshyacyaha n'ibihano biri mu gice cy'iburanisha, nabyo bigomba kubahiriza amahame agize ubutabera buboneye kuri izo ngingo.

[15] Ingingo ya 49, igika cya mbere y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange igaragaraza ibyo umucamanza akurikiza mu gutanga igihano. Iyo ngingo ya 49 igira iti: "*Umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo*. […]". Urukiko rusanga ibiteganywa n'iyi ngingo ari byo bigenderwaho n'Umucamanza mu kugena igihano; kunyuranya nabyo, byaba ari ukunyuranya n'ibigize uburenganzira ku butabera buboneye mu itangwa ry'igihano.

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[1] Definition of due process, available at ; https://dictionary.findlaw.com/legal-terms/d.html accessed on 2nd December 2019

[2] John N. Ferdico. Criminal Procedure for the Criminal Justice Professional. Thomson, wadsworth 9th Edition, P.22

[16] Ingingo ya 133 y'itegeko Nº 68/2018 iteganya igihano cya burundu ku wahamwe n'icyaha cyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore. Iyo ngingo ntiyemera ko icyo gihano kigabanywa kubera impamvu nyoroshyacyaha. Ibyo bikaba bivuguruza kuba Umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye uregwa agikora, uko yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo nkuko biteganywa n'ingingo ya 49 ivugwa mu gika kibanziriza iki. Hakurikijwe uko ingingo ya 133, igika kirebana n'uwahamwe n'icyaha cyo gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore iteye, bigaragara ko ububasha bw'Umucamanza ku wahamwe n'icyo cyaha, bugarukira gusa ku kwemeza ko ahamwa n'icyaha, naho ibishingirwaho hatangwa igihano, nta bubasha abifiteho kuko igihano cy'igifungo cya burundu giteganywa n'itegeko cyagizwe ntayegayezwa. Ibi bikaba binyuranye n'ibiteganywa n'ingingo ya 49 iteganya ibyo umucamanza ashingiraho atanga igihano.

[17] Igihano ntayegayezwa kandi kinanyuranye n'ihame ryo guca urubanza rutabera (fair trial) riboneka mu Masezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki [3] mu ngingo ya 14 (5) ivuga ko: "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal and according to law*". Icyo iyi ngingo iteganya n'uko uwahamwe n'icyaha afite uburenganzira bwo kujuririra urukiko ruri hejuru y'urwaciye urubanza rumuhamya icyaha. Ku birebana n'igihano ntayegayezwa giteganywa ku cyaha runaka, uwo cyahamye ntashobora kujuririra ibirebana n'igihano kuko umucamanza uburanisha ubujurire adashobora kugihindura bitewe n'uko nyine ari ntayegayezwa. Ibi kandi byanavuzwe n'Intumwa yihariye y'Umuryango w'Abibumbye ku bwigenge bw'ubucamanza (*The United Nations Special Rapporteur on the Independence of the Judiciary*). Yagize ati: " […] *the right of appeal*

[3] International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. U Rwanda ruyemeza ku wa 12/02/1975 (reba Itegeko Teka No 8/75 ryo ku wa 12/02/1975, Igazeti ya Leta n° 5 of 01/03/1975

contained in Article 14(5): […] is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards"[4]. N'uwahamwe n'icyaha cyo gusambanya umwana byakurikiwe no kubana nk'umugore n'umugabo, kujuririra igihano cyo gufungwa burundu ntacyo byamumarira kuko icyo gihano kidashobora guhindurwa. Bityo, ibyo bikaba binyuranye n'ingingo ya 14 (5) ivugwa muri iki gika.

[18] Ingingo ya 49 igika cya kabiri y'iri Tegeko yemera ko hashobora kubaho impurirane y'impamvu nkomezacyaha n'impamvu nyoroshyacyaha mu rubanza rumwe ndetse ikanagaragaza uko zitabwaho mu guca urubanza mu magambo akurikira: "*Iyo hari impurirane z'impamvu zashingirwaho, umucamanza agomba kwita ku rutonde rukurikira mu kugena igihano: 1º impamvu nkomezacyaha; 2º impamvu nyoroshyacyaha".* Kuba itegeko ryemera ko umucamanza yita ku mpamvu nkomezacyaha no ku mpamvu nyoroshyacyaha icyarimwe, Urukiko rusanga ibyo ari kimwe mu bigize uburenganzira ku butabera buboneye. Kuba rifata kubana nk'umugabo n'umugore nk'impamvu nkomezacyaha ku wasambanyije umwana, rigakumira umucamanza gushingira ku mpamvu nyoroshyacyaha yabona ngo abe yagabanya ibihano, binyuranye n'ihame ry'uko buri wese afite uburenganzira ku butabera buboneye ku birebana n'ibihano.

[19] Ibiteganywa n'ingingo ya 49 ko Umucamanza asuzuma icyarimwe impamvu nkomezacyaha n'impamvu nyoroshyacyaha, ni ihame ryemewe n'ahandi kandi itegeko rinyuranyije naryo riba rigomba kuvaho. Urugero ni urubanza **Jurek v. Texas** rwaciwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika, ruhereye no kuzindi manza rwaciye rwavuze ko mu guhana hagomba kwitabwa ku

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[4]Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) Australian Journal of Human Rights at http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#Heading140.

mpamvu nyoroshyacyaha, itegeko ryabuza kwita kuri izo mpamvu riba rinyuranye n'Itegeko Nshinga. Rwagize ruti: "*But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in Woodson v. North Carolina, [428 U.S.,] at 303-305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in Woodson and Roberts v. Louisiana [428 U.S. 325 (1976)]. A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. "Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.*"[5].

[20] Ingingo ya 58 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "*Umucamanza ubwe ni we ugena niba impamvu nyoroshyacyaha zemezwa n'umucamanza zahabwa agaciro. Kwemeza impamvu nyoroshyacyaha bigomba gusobanurwa mu cyemezo cy'urukiko*". Iya 59 ivuga zimwe mu mpamvu nyoroshyacyaha zemezwa n'umucamanza. Ibiteganywa n'izi ngingo, bishingiye ku nshingano umucamanza afite mu manza mpanabyaha zo gutanga igihano gishingiye ku mikorere y'icyaha, ku myitwarire n'imibereho y'uwagikoze, ku muryango cyakorewemo no ku wagikorewe. Ibi bikaba ari muri bimwe bigize ubutabera buboneye, Itegeko cyangwa ingingo yaryo yatuma bitagerwaho yaba inyuranye n'Itegeko Nshinga. Nkuko byemejwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika, mu rubanza **ROBERTS v. LOUISIANA,** uca urubanza agomba kwita ku mpamvu nyoroshyacyaha zaba izirebana n'uregwa cyangwa izirebana n'icyaha, itegeko ryanga ko izo mpamvu zisuzumwa rifatwa nk'irinyuranye n'Itegeko Nshinga. Rwabivuze muri aya magambo: *"As we emphasized […], it is essential that the capital sentencing decision allow for consideration of whatever*

[5]United States Supreme Court, **Jurek v. Texas, 428 U.S. 262 (1976), July 2, 1976**

mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the [Louisiana] <u>statute does not allow for consideration of particularized mitigating factors, it is unconstitutional</u>[6]".

[21] Itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, rifata ibikorwa bitandukanye nk'icyaha cyo gusambanya umwana iyo byakorewe ku muntu utarageza ku myaka cumi n'umunani. Igihano kuri icyo cyaha kiri hagati y'igifungo cy'imyaka makumyabiri (20) na makumyabiri n'itanu (25). Iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore bifatwa nk'impamvu nkomezacyaha, igihano kikaba igifungo cya burundu kidashora kugabanywa kubera impamvu nyoroshyacyaha kuko itegeko ritabibuza. Itegeko ariko ntirifata gusambanya umwana igihe kirekire nk'impamvu nkomezacyaha iyo batabanye nk'umugabo n'umugore. Ibi na byo bikaba bitumvikana.

[22] Harebwe ibishobora gushingirwaho nk'impamvu nyoroshyacyaha, Urukiko rusanga hari ibyumvikana byatuma uwahamwe no gusambanya umwana bigakurikirwa no kubana nk'umugabo n'umugore agabanyirizwa ibihano, kurusha uwahamwe n'icyo cyaha ariko batabanye nk'umugabo n'umugore. Ntibyumvikana ukuntu uwahamwe no gusambanya umwana aruta cyane mu myaka y'ubukure, yarabikoze ku gahato, akamwangiza, ashobora kugabanyirizwa ibihano hashingiwe ku mpamvu nyoroshyacyaha, mu gihe uwagikoze afite imyaka 19, ubana n'uwagikorewe ufite imyaka 17 nk'umugabo n'umugore ku bwumvikane bwa bombi, ndetse bashobora no kuba barabyaye abana, babana mu bwumvikane bagamije kubaka umuryango, ahanishwa igifungo cya burundu kidashobora kugabanywa. Hari n'ababana kuko babona aribyo byakoroshya ubuzima bwabo, nk'igihe bombi cyangwa umwe muri bo ari imfubyi nta bundi bufasha bafite.

[6] United States Supreme Court, **ROBERTS v. LOUISIANA** (1977), No. 76-5206, June 6, 1977.

[23] Ibi ntabwo ari ibishoboka gusa ahubwo bigaragara mu manza zaciwe. Urugero ni urubanza RP 00062/2019/TGI/HYE rwaciwe n' Urukiko Rwisumbuye rwa Huye kuwa 18/02/2019, aho Ubushinjacyaha bwaregaga uwitwa BARAKAGWIRA Gilbert w'imyaka 19, icyaha cyo gusambanya umwana w'umukobwa w'imyaka 16, akaza kumutera inda, maze aba bombi bagafata icyemezo cyo kubana nk'umugore n'umugabo, ariko ababyeyi b'umukobwa bakaza kumukurayo amaze yo ijoro rimwe gusa. Muri uru rubanza uwarezwe yemeye icyaha ndetse avuga ko uwo yateye inda bakundanaga, uwakorewe icyaha nawe yemeraga ko yakundanye n'uwamuteye inda ndetse bakemeranywa kubana nyuma y'uko amuteye inda. Urukiko rwahamije BARAKAGWIRA Gilbert icyaha cyo gusambanya umwanya ndetse rumukatira igifungo cya burundu nkuko amategeko abiteganya, kuko nyuma yo kumusambanya baje kubana nk'umugore n'umugabo umunsi umwe nk'uko uregwa abyiyemerera. Uregwa muri urwo rubanza afite imyaka 19 y'amavuko gusa, ku buryo nk'uko amategeko y'u Rwanda abiteganya nawe ubwe adafite ububasha bwo kuba yasezerana byemewe n'amategeko.

[24] Mu rundi rubanza rwaciwe n'Urukiko Rwisumbuye rwa NGOMA, BARIMENYA Venant w'imyaka 66, wari uzi ko abana n'ubwandu bw'agakoko gatera SIDA, yahamwe n'icyaha cyo gusambanya abana babiri, umwe ufite imyaka itanu undi ufite imyaka 10. Yahanishijwe gufungwa burundu. Naho mu rubanza RP 00499/2018/TGI/MUS rwaciwe n'Urukiko Rwisumbuye rwa Musanze, NTAHORUTABA Wellars w'imyaka iri hagati ya 18 na 19, yahamwe n'icyaha cyo gusambanya umwana w'imyaka 16 bumvikanye, yamuteye inda ndetse babana nk'umugabo n'umugore. Ubushinjacyaha bwari bwamusabiye gufungwa imyaka 20, NTAHORUTABA Wellars ariko Urukiko rumuhanisha gufungwa burundu. Izi manza zombi zivugwa muri iki gika zatanzwemo igihano cya burundu hashingiwe ku ngingo ya 133, igika cya gatanu. Nkuko bigaragarira buri wese, imikorere y'icyaha kuri aba bantu bombi iratandukanye cyane, ingaruka z'icyaha ku bakorewe icyaha ziratandukanye. Iyo hataza kuba hari igihano ntayegayezwa, Umucamanza yashoboraga gutanga ibihano

bitandukanye yitaye ku mwihariko wa buri wese. Hakaba hakwibazwa niba ubutabera bwaragezweho muri izo manza za BARAKAGWIRA Gilbert na NTAHORUTABA Wellars.

[25] Imiterere y'Itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ku birebana no guhana icyaha cyo gusambanya abana, igaragaza ko ryashatse kugihana ryihanukiriye bitewe n'ingaruka zacyo. Urukiko rwemera rudashidikanya ko icyaha cyo gusambanya umwana ari kibi kandi ko kigomba guhanwa. Ariko mu kugihana ntibikuraho uburenganzira uregwa afite bwo guhabwa ubutabera buboneye burimo no kugabanyirizwa igihano igihe hari impamvu nyoroshyacyaha.

[26] Muri rusange, kuba umucamanza adashobora gusuzuma no gushingira ku mpamvu nyoroshyacyaha igihe zihari, ngo agabanyirize igihano uwahamwe n'icyaha cyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, Urukiko rusanga binyuranye n'ibiteganywa n'ingingo ya 29 y'Itegeko Nshinga ivuga ko buri muntu wese afite uburenganzira ku butabera buboneye, kuko bituma uwahamwe n'icyo cyaha ahanishwa iginaho atari akwiye. Ingingo y'itegeko ibigena gutyo, igomba kuvaho nkuko byavuzwe mu rubanza **Lockett v. Ohio** "*A statute that prevents the sentencer in capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty, and, when the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments*[7]*"*. Nubwo uru rubanza rwarebaga igihano cy'urupfu kidateganyijwe mu mategeko y'u Rwanda, ibyo ruvuga byanavugwa ku gihano kiremereye kurusha ibindi aricyo gufungwa burundu.

[7] Supreme Court of the United States, **Lockett v. Ohio**, 438 U.S. 586 (1978)

[27] N'ubusanzwe abahanga ntibavuga rumwe ku gihano cy'igifungo cya burundu, kuko hari abavuga ko gitesha agaciro amwe mu mahame mpuzamahanga y'imihanire, nko kuba igihano gikwiye gushingira ku buremere bw'icyaha cyakozwe ndetse no kubaha agaciro ka muntu. :***mandatory sentence of life imprisonment arguably undermines a number of established common law and internationally recognised sentencing principles, including proportionality, equality before the law and respect for human dignity***.[8]

[28] Hashingiwe ku bisobanuro bitanzwe mu bika bibanziriza iki, Urukiko rusanga ibiteganywa n'ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 iteganya ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranye na rimwe mu mahame agize uburenganzira ku butabera buboneye rivuga ko umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo, ikaba inyuranye n'ingingo ya 29 y'Itegeko Nshinga.

- **Kumenya niba igika cya gatanu cy'ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange kinyuranije n'ingingo ya 151 y'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015**

[29] KABASINGA Florida n'abamwunganira bavuga ko ingingo ya 133 y'itegeko ryavuzwe haruguru inyuranyije n'ibiteganywa n'ingingo ya 151, 5^0 y'itegeko Nshinga, aho iyo ngingo iteganya ko Abacamanza bakora umurimo wabo w'Ubucamanza mu bwigenge kandi batavugirwamo n'ubutegetsi cyangwa ubuyobozi ubwo ari bwo bwose. Bakomeza bavuga ko umucamanza akwiye kubaho akora inshingano

[8] The label of life imprisonment in Australia: A pricipled or Populist approach to an ultimate sentence. John L Andeson. P. 748 available at http://www.austlii.edu.au/au/journals/UNSWLJ/2012/30.html, accessed on 27 November 2019

ze, akurikiza amategeko mu kazi ke ariko nta rwego rwaba urwa Leta cyangwa urwigenga rumubuza ubwisanzure, niyo yaba ari Inteko Ishinga Amategeko.

[30] Bakomeza bavuga ko iyo urwego rushinga amategeko rushyizeho itegeko rizirika umucamanza ku buryo atabona umwanya n'ubwinyagamburiro bwo gushyira mu gaciro, ruba rumubujije umudendezo wo gutanga ubutabera buboneye buteganywa n'ingingo ya 29 y'itegeko Nshinga. Basoza bavuga ingingo ya 133, agace ka kane y'Itegeko rihana ibyaha, ibuza umucamanza gutanga ubutabera buboneye ashingira ku mpamvu nyoroshyacyaha, yavaho kuko ituma umucamanza atigenga mu kazi ke, kuko ategetswe gutanga igifungo cya burundu gusa, ibyo bikaba binyuranyije n'ingingo ya 151 y'Itegeko Nshinga.

[31] Intumwa ya Leta, Me Batsinda Aline avuga ko ingingo ya 151 y'itegeko Nshinga igaragaza amahame agenga ubucamanza, ariko ko urega atagaragaza rimwe muri ayo mahame cyangwa menshi muriyo anyuranije n'ingingo ya 133, akaba adasobanura uburyo iyo ngingo itubahiriza ihame ryo guca imanza mu izina ry'abaturage n'iryo kuba ntawe ushobora kwicira urubanza ubwe, iryo kuburanishiriza imanza mu ruhame no kuburanishiriza mu muhezo mu gihe no mu buryo biteganywa n'amategeko, iryo kugaragaza impamvu zashingiweho mu icibwa ry'urubanza no kurwandika mu ngingo zarwo zose no kurusomera mu ruhame, iryo gukurikiza icyemezo cy'ubucamanza bikozwe na buri wese, iryo kuba abacamanza bakurikiza itegeko kandi bakora umurimo wabo w'ubucamanza mu bwigenge nta kuvugirwamo n'ubutegetsi cyangwa ubuyobozi ubwo aribwo bwose.

[32] Akomeza avuga ko akurikije ibyo urega yasobanuye, asanga urega yagaragaje uburyo abona uburemere bw'ibihano itegeko riteganya ibyaha n'ibihano muri rusange ryateganyije mu ngingo yaryo ya 133. Avuga ko nta rwego na rumwe rwabujije umucamanza ubwisanzure ndetse n'ubwigenge kubera ko mu mirimo akurikiza itegeko kandi

rikaba rihari. Asanga ingingo ya 133 ntaho inyuranyije n'Itegeko Nshinga, mu ngingo yaryo ya 151.

Uko Urukiko rubibona

[33] Ingingo ya 61 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe muri 2015 iteganya ko: "Inzego z'Ubutegetsi bwa Leta ni […] Ubutegetsi Nshingamategeko, Ubutegetsi Nyubahirizategeko, Ubutegetsi bw'Ubucamanza. Ubu butegetsi uko ari butatu buratandukanye kandi buri butegetsi burigenga […]". Ubwigenge bw'Ubucamanza bukomoka ku ihame riteganywa n'iyi ngingo ryuko inzego z'Ubutegetsi bwa Leta uko ari butatu (Ubutegetsi Nshingamategeko, Nyubahirizategeko n'Ubutegetsi bw'Ubucamanza) butandukanye kandi buri butegetsi bwigenga (*separation of powers*).

[34] Ingingo ya 151, 5^0 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 nkuko ryavuruwe muri 2015, iteganya ko : «[…] *Abacamanza bakurikiza itegeko kandi bakora umurimo wabo w'ubucamanza mu bwigenge kandi batavugirwamo n'ubutegetsi cyangwa ubuyobozi ubwo ari bwo bwose* ». Naho ingingo ya 4 n'iya 5 z'Itegeko nº 09/2004 ryo ku wa 29/04/2004 ryerekeye imyitwarire mu kazi k'ubucamanza zivuga ko : « *Umucamanza arigenga mu kazi ke. Asuzuma, mu bwisanzure, ibirego yashyikirijwe kandi akabifataho ibyemezo, atitaye ku bamushyiraho igitugu. Mu manza yaregewe, umucamanza agomba kwirinda ikintu cyose cyatuma afata ibyemezo byaba binyuranyije n'imiburanishirize yagenwe n'amategeko. Ategetswe guca urubanza akurikije amategeko arugenga* ». Ingingo zivugwa muri iki gika, zishyiraho ihame ry'uko umucamanza yigenga mu kazi ndetse zikanagaragaza ibigize ubwo bwigenge birimo kutavugirwamo, gusuzuma mu bwisanzure ibirego yashyikirijwe, kwirinda ibyatuma afata ibyemezo binyuranyije n'amategeko no gukurikiza amategeko arebana n'urubanza aca.

[35] Ihame ry'ubwigenge bw'umucamanza mu kazi ke, rijyana n'ihame ry'ubwigenge bw'urwego rw'Ubucamanza. Rifatwa nk'ubwisanzure

umucamanza afite bwo kuburanisha no guca imanza mu nzira n'uburyo biteganywa n'amategeko, akabikora nta gitutu icyo aricyo cyose cyaba icy'inzego za Leta, n'icy'abandi. Urukiko rw'Ikirenga rwa Canada rwasobanuye mu rubanza **R. v. Beauregard** ubwigenge bw'umucamanza mu magambo akurikira : « *The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider—be it Government, pressure group, individual or even another judge—should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision*"[9]. Icyo aricyo cyose cyabuza umucamanza guca urubanza mu bwisanzure cyaba kinyuranyije n'ihame ry'ubwigenge bw'umucamanza. Ku birebana n'uru rubanza, ikibazo gihari ni ukumenya niba ibiteganywa n'itegeko ko igihano kidashobora kugabanywa kubera impamvu nyoroshyacyaha byaba byambura cyangwa bibangamiye ubwigenge bw'umucamanza.

[36] Ingingo ya 133 iteganya igihano ntayegayezwa, ibuza umucamanza gutanga igihano mu bushishozi bushingiye ku mpamvu nyoroshyacyaha yabonye. Ibi bikaba byambura umucamanza ubwigenge bwo gutanga igihano kigendanye n'icyaha cyakozwe, ashingiye ku mikorere yacyo, uko cyakozwe, imyitwarire y'uwagikoze, n'ingaruka zacyo kuwagikorewe no ku muryango nyarwanda muri rusange. Urukiko rw'Ikirenga rwo muri Afurika y'epfo rwabisobanuye neza mu rubanza **S v. Toms; S v. Bruce** aho rwavuze ko: "*the first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires*

[9] Supreme Court of Canada, **R. v. Beauregard**, [1987] LRC (Const.)

proper consideration of the individual circumstances of each accused person"[10].

[37] Nkuko byavuzwe n'Urukiko rw'Ikirenga muri Leta Zunze Ubumwe z'Amerika mu rubanza ***Graham v. Florida***[11]**,** guca urubanza mu bwigenge bijyana no guhuza icyaha n'uburemere bw'igihano kuri icyo cyaha kandi bikozwe n'umucamanza. Urukiko rwagize ruti: **"***The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question*". Urukiko rusanga mu gihe umucamanza nta mahitamo afite uretse gutanga igihano ntayegayezwa, akabuzwa gutanga igihano kijyanye n'uburemere bw'icyaha, bimwambura ubwigenge bwo guca urubanza ahuje uburemere bw'igihano n'icyaha.

[38] Mu gihugu cy'Ubuhinde, Urukiko rw'Ikirenga rwaho rwaciye urubanza ***Mithu v. State of Punjab*** ruvanaho ingingo ya 303 y'itegeko rihana ry'icyo gihugu yagenaga igihano ntayegayezwa kuko yatumaga umucamanza atisanzura mu gutanga agihano ashingiye ku mpamvu zitandukanye zijyanye n'urubanza. Urwo Rukiko rwagize ruti:"*a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair*[12]". Nta wavuga ko umucamanza yigenga mu gutanga igihano mu gihe agomba gutanga igihano ntayegayezwa kitajyanye n'uburemere bw'icyaha, uburyo cyakozwemo, n'igihe hari

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[10] South Africa: Supreme Court of Appeal, S v Toms; S v Bruce (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802 (AD); [1990] 2 All SA 248 (A) (30 March 1990)

[11] Supreme Court of the United States, ***Graham v. Florida***, 560 U.S. 48 (2010), "holding that a life imprisonment without parole sentence on a juvenile offender convicted of armed burglary with assault, and attempted robbery, was offensive to the Eighth Amendment. [The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion]

[12] Supreme Court of India, ***Mithu v. State of Punjab*** [1983] 2 SCR 690

impamvu nyoroshyacyaha zikomeye zari gutuma agabanyirizwa igihano.

[39] Hashingiwe ku bisobanuro bitanzwe mu bika bibibanziriza iki, ibiteganywa n'ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 ko iyo gusambanya umwana byakurikiwe no kubana nk'umugabo n'umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha, binyuranye n'ingingo ya 151,5^{0} y'Itegeko Nshinga iteganya ko abacamanza bakora umurimo wabo w'ubucamanza mu bwigenge, kuko babujijwe gushingira ku mpamvu nyoroshyacyaha batanga igihano gikwiye.

[40] Hari izindi ngingo ziteganya ibihano bidashobora kugabanywa, Urukiko rukaba nta cyemezo rwazifataho kuko zitaregewe. Leta yazisuzuma ikareba niba zidakwiye guhindurwa kugirango zihuzwe n'ibivugwa muri uru rubanza.

[41] Mu gihe cyo gusuzuma iki kirego rwasanze hari n'ikindi kibazo mu itangwa ry'ibihano muri rusange kijyanye n'intera iri hagati y'igihano gito (minimum) n'ikinini (maximum) rukaba rukwiye kugira icyo rukivugaho kuko kiri mu murongo umwe n'ikibazo rwaregewe.

- ***Ibirebana n'ibihano biteganywa n'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange mu gihe hari impamvu nyoroshyacyaha***

[42] Ingingo ya 60 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: "*Iyo hari impamvu zigabanya ububi bw'icyaha, ibihano bishobora kugabanywa ku buryo bukurikira: 1º haseguriwe ibiteganywa mu ngingo ya 107 igihano cyo gufungwa burundu gishobora kugabanywa ariko ntikijye munsi y'imyaka makumyabiri n'itanu (25); 2º igihano cy'igifungo kimara igihe kizwi cyangwa ihazabu bishobora kugabanywa ariko ntibijye munsi y'igihano gito ntarengwa giteganyirijwe icyaha cyakozwe*."

[43] Mbere y'itegeko rivugwa mu gika kibanziriza iki, hakoreshwaga Itegeko Ngenga N° 01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy'amategeko ahana. Uburyo ibihano bigabanywa iyo hari impamvu nyoroshyacyaha biteganywa n'ingingo ya 78 y'iryo Tegeko mu buryo bukurikira: "*igihano cyo gufungwa burundu cyangwa cya burundu y'umwihariko gisimbuzwa igihano cy'igifungo kitari munsi y'imyaka icumi (10); 2° igihano cy'igifungo kuva ku myaka icumi (10) kugeza ku myaka makumyabiri n'itanu (25) gishobora kugabanywa kugeza ku gifungo cy'imyaka (5); 3° igihano cy'igifungo kirenze imyaka itanu (5) ariko kitageze ku myaka icumi (10) gishobora kugabanywa kugeza ku gifungo cy'umwaka umwe (1); 4° igihano cy'igifungo kuva ku mezi atandatu (6) kugeza ku myaka itanu (5) gishobora kugabanywa kugeza ku gifungo cy'amezi abiri (2); 5° igihano cy'igifungo kiri munsi y'amezi atandatu (6) gishobora gusubikwa*".

[44] Itegeko Nº 68/2018 ryemera ko igihe hari impamvu nyoroshyacyaha, igihano cyagabanywa ariko ntikijye munsi y'igihano gito giteganywa n'Itegeko. Mu gihe Itegeko Ngenga N° 01/2012/OL, ryo ryemeraga ko igihe hari impamvu nyoroshyacyaha igihano kigabanywa kikajya munsi y'igihano gito mu buryo bwagenwe n'ingingo yaryo ya 78 ivugwa mu gika kibanziriza iki. Ku byaha byinshi, igihano gito ntarengwa (minimum) ntikigeze gihinduka ukurikije uko ayo mategeko yagiye akurikirana, ndetse hari naho cyazamuwe. Ibyo bituma uwahamwe n'icyaha hari n'impamvu nyoroshyacyaha, atagabanyirizwa igihano ku buryo bukwiye, ndetse rimwe na rimwe akaba yahanwa hafi kimwe y'uwakoze icyaha hatari impamvu nyoroshyacyaha.

[45] Kuba Umushingamategeko yarahisemo ko mu gihe hari impamvu nyoroshyacyaha, ibihano bitangwa bishobora kugabanywa ariko ntibijye munsi y'igihano gito ntarengwa giteganyirijwe icyaha cyakozwe, Urukiko rusanga byaba biri mu gaciro, mu gihe intera hagati y'igihano gito (minimum) n'igihano kinini (maximum) ibaye nini, hibandwa ku kugabanya igihano gito. Ibi nibyo byatuma ibiteganywa n'Ingingo ya 49, igika cya mbere y'itegeko Nº 68/2018 ryo ku wa

30/08/2018 iteganya ko Umucamanza atanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo, bishyirwa mu bikorwa mu buryo nyabwo. Gushingira ku mpamvu nyoroshyacyaha hagatangwa igihano gito ntarengwa giteganyirijwe icyaha (minimum) kandi kiri hejuru, ntacyo bimarira uregwa, n'ubutabera muri rusange.

[46] Ubushakashatsi bwagaragaje ko iyo itegeko riteganya igihano umucamanza adashobora kugabanya, hari ubwo ahitamo kudahamya umuntu icyaha kuko abona uburyo yagikoze ndetse n'imyitwarire ye muri rusange bihabanye n'uburemere bw'igihano ashobora guhabwa[13]. Iyo bigenze gutyo icyo itegeko ryagiriyeho ntikiba kigezweho.

[47] Muri rusange, gushyiraho no gutanga igihano, byagombye gushingira ku kamaro kacyo n'icyo kigamije. Hari uguhana uwakoze icyaha (*denunciation*), guca intege no gukanga uwahanwe n'abandi bashobora gukora icyaha nk'icyo, (*deterrence*), kugorora no kwigisha (*rehabilitation*), kurengera rubanda binyuze mu gufunga uwakoze icyaha kugirango adakomeza kugira nabi (*protection of the public*). Nkuko byavuzwe mu rubanza ***R v Smith***[14] rwaciwe n'Urukiko rw'Ikirenga wa Canada. Rwabivuze muri aya magambo: *"[T]he court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate* ***to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender****. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other*

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[13] Mandatory Sentencing & the Independence of the Judiciary, available at: https://www.ruleoflaw.org.au/wp-content/uploads/2015/11/MandatorySentencing.pdf, visited on November 30, 2019

[14] Supreme Court of Canada, R v Smith, [1987] 1 S.C.R. 1045

penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves". N'ingingo z'amategeko ahana mu Rwanda, zagombye guteganya ibihano bifite intera nini hagati y'igihano gito (minimum) n'igihano kinini (maximum) ituma umucamanza atanga igihano akurikije akamaro kacyo nkuko kavuzwe hejuru.

[48] Kubw'ibyo, Urukiko rusanga byihutirwa ko hashyirwaho politiki yo guhana ishingiye ku bushakashatsi bwimbitse, ihuza amahame mpuzamahanga mu guhana n'ibibazo byihariye biri mu muryango nyarwanda, kandi umucamanza agahabwa ubwisanzure bwo gutanga igihano akurikije uburemere bw'icyaha, ingaruka icyaha cyateye, impamvu zatumye agikora, uko uwagikoze yari asanzwe yitwara, imibereho ye bwite n'uburyo icyaha cyakozwemo.

III. ICYEMEZO CY'URUKIKO

[49] **Rwemeje ko** ikirego cyatanzwe na Kabasinga Florida gifite ishingiro.

[50] **Rwemeje ko** ingingo ya 133 y'itegeko Nº 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, igika cyayo cya gatanu kivuga ko: "***Iyo gusambanya umwana byakurikiwe no kubana nk'umugabo umugore, igihano kiba igifungo cya burundu kidashobora kugabanywa kubera impamvu nyoroshyacyaha***" kinyuranyije n'ingingo ya 29, n'iya 151 z'Itegeko Nshinga ryo muri 2003 ryavuguruwe muri 2015. Icyo gika kikaba nta gaciro gifite nkuko biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

[51] **Rutegetse ko** uru rubanza rutangazwa mu igazeti ya Leta.

[52] **RUKIJIJWE GUTYO KANDI RUSOMEWE MU RUHAME NONE KU WA 04/12/2019.**

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