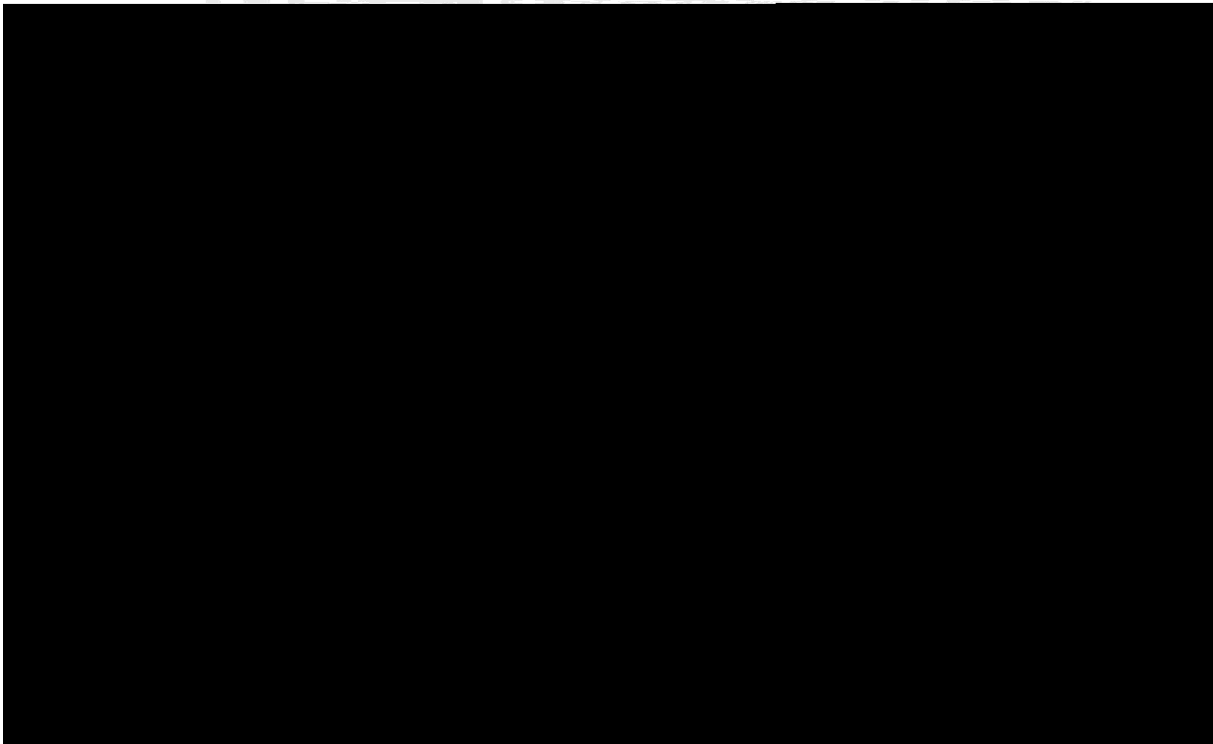




Judgment No. 2017-UNAT-741



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... The PNC spoke to GS and on a Sunday in May 2011 and [sic] sent a text message to the Applicant requesting him to attend the police station.

... On the same Sunday, the Applicant informed his colleague, Mr. Sumaili Okongo, a MONUSCO security guard that he had been asked to appear at the police station. Mr. Okongo informed the supervisor Mr. Eric Osei, a security officer in MONUSCO, Dungu.

... Both Messrs. Okongo and Osei attended the police station separately. There they saw the Applicant talking to the PNC captain who assured both Messrs. Okongo and Osei that there was no problem and that the Applicant would join them soon.

... Both Messrs. Okongo and Osei told OIOS that the Applicant was invited to the police station for an informal conversation but was not arrested.

... Mr. Osei talked to the Applicant who told him that he used to go to the place of "the girl" and used to give her money to buy beer. Following their enquiry, the PNC submitted a file on the case to the Office of the Prosecutor in Isiro and at the material time the matter was still pending.

... No police report or any documents related to the alleged misconduct by the Applicant were transmitted to OIOS or MONUSCO by the PNC.

... This was confirmed by the Applicant who told OIOS that no formal statement about the alleged misconduct was taken from him and that the police did not compile any formal documents related to the matter.

... The Applicant was kept in custody for 48 hours and released. The police explained that they did not have any means to transfer the Applicant to the Office of the Prosecutor in Isiro, DRC, some 210 kilometers from Dungu.

... By letter of 13 March 2013, Mr. Anthony Branbury, Assistant Secretary-General for Field Support (ASG/DFS), referred the matter to the Office of Human Resources and Management (OHRM).

... By letter of 3 May 2013, the Applicant was charged with having had a sexual relationship with a minor in 2011 and he was invited to submit his response to the charge.

... The Applicant denied the charge in a memorandum dated 22 May 2013.

... By letter of 7 January 2014, the Applicant was informed that he was dismissed from the Organization.

The Evidence

***Applicant***

... The Applicant stated to the OIOS investigators that he had been in a sexual relationship with a girl from the S family in Dungu for eight months during 2010 and 2011. Her name was Georgette S (same family name as GS but not the same person) and she was 24 years old and had a three[-]year old daughter. He gathered her age from her electoral card.

... The Applicant had first met Georgette at an *nganda*<sup>3</sup> situated at Eighth Avenue in Dungu where she worked as a waitress. Georgette never told the Applicant she was pregnant and he was not aware whether Georgette gave birth to a child as a result of their relationship.

... The Applicant provided MONUSCO CDT a written agreement dated 12 June 2011. The agreement was signed by the Applicant, Mr. Okongo, as well as by one MB and one AB, allegedly family representatives of the S family.

... Pursuant to the agreement the Applicant gave the S family a goat and an amount of USD 1,250 to be paid in installments. A receipt dated 2 July 2011 signed by MD, (the same person as DS) and IS for the family and by the Applicant and Mr. Okongo, indicates that the Applicant paid USD 400. A receipt dated 8 August 2011 and signed by MD as well as by the Applicant and Mr. Okongo shows that the Applicant paid another USD 300.

... The Applicant explained that it was Georgette who asked him to compensate the family because she had spent a lot of time with him. Georgette added that it was her older brother Richard who suggested that the Applicant compensate the family.

... In the course of a meeting with Ms. Christine Besong, Conduct and Discipline Officer based in Bunia, Ms. Besong asked the Applicant the name of the girl with whom he had a relationship. According to Ms. Besong, he gave the name G but not the family name as he was not aware of it. The Applicant never mentioned the name Georgette to

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<sup>3</sup> A place where beers are stocked and purchased by the public and serves as a bar.



the toilet". Mr. Okongo also told the investigators: "I can only say that in Dungu we had at least four false accusations against UN staff just because people want to get

***Testimony of Mr. Jason Uliana, Chief of Investigations Section, OIOS***

... Mr. Uliana went to investigate the allegation in Bunia and was assisted by a United Nations Police (UNPOL) officer. He stated that the Applicant had admitted he was in a relationship with a girl called G. He added that during the first encounter with the Applicant he did not mention the name he had given to CDT and later gave the name Georgette.

... Mr. Uliana travelled to Dungu and proceeded to the *nganda* on Eighth Avenue. There he attempted to locate the alleged victim GS and her mother. After some fruitless efforts he managed to talk to the chief of the village who helped him to meet GS and her mother.

... Mr. Uliana interviewed GS with her mother's consent, DS in the presence of an independent witness. Mr. Uliana stated that he impressed on both GS and her mother that they should speak the truth.

... The mother DS too was interviewed with both interviews being conducted in French "but primarily in Congolese" with the help of an interpreter.

... In her interview GS mentioned the name of the Applicant though in his statement to Mr. Uliana said she mentioned the Applicant as being the man from the United Nations who had a relationship with her. She never worked at the *nganda* on Eighth Avenue but she did live there with her sister J, a fact confirmed by DS, the mother of GS who added however that JS was not her daughter. GS had a miscarriage and went to the hospital with her mother DS. DS was asked the following "Did you receive any benefit from [Applicant] because of your pregnancy? She answered "He gave some money but do not know to whom in the family".

... GS also identified the Applicant from a photo array that was shown to her with the names hidden by stating "Oui j'ai reconnu" (Yes I have identified). The only photographs available were those on the MONUSCO grounds passes that staff use.

... DS told the investigators that she had never seen the Applicant and therefore could not identify him. When she saw that her daughter GS was pregnant she asked her about it and GS told her that "she had sex with [Applicant] of MONUSCO". She never received anything from the Applicant and the document dated 12 June 2011 that she signed was brought to her by a person who asked her to sign it. She added "I signed but was not told what it was for".

... Mr. Uliana could not get the birth certificate or the identity card of GS as she had none. The mother gave the age of GS as being 15 on the day of the interview which was 21 February 2012.

... Mr. Uliana was also present when Mr. Jana Ramsey, an OIOS investigator interviewed one Mr. CS, a nurse working in a polyclinic in Dungu where GS was treated for a miscarriage. The nurse identified GS from a photograph shown to him. The age of GS was assessed as 14 years by the nurse.

... Mr. Uliana also showed a photo array consisting of MONUSCO ground passes to the nurse with a view to identifying the Applicant as the latter had allegedly been to the polyclinic to settle a bill. In relation to the payment by the Applicant the nurse stated “Peut-être c’est lui qui a visité mon hôpital et je pense que il (*sic*) il a payé la facture de Germain (*sic*). Mais je ne suis pas sur (May be it is him that visited my hospital and I think that he settled the bill of GS. But I am not sure). The nurse purportedly identified the person on photograph 3 as the Applicant. His statement following the identification reads: “Peut-être c’est le numéro 3” (Maybe it is number 3).

... Mr. Uliana was also shown a document that purports to be the records of the polyclinic that indicate that GS attended the polyclinic on 12 June 2011.

... Mr. Uliana also went to a school that GS attended with the purpose of finding out her age. The headmaster of the school confirmed her attendance at the school on being shown her picture. Though GS mentioned the name of the school as Belewete, the school where Mr. Uliana went was named Li-Laka and Mr. Uliana explained that the name did not matter much to him. Mr. Uliana was shown a register at the school where the name of GS also called GiS appears.

... Regarding the witness Ghislaine S, Mr. Uliana stated that he did attempt to





to consider the identification by the nurse as evidence by itself and as corroboration of other evidence.

9. The Dispute Tribunal also erred when it concluded that the identifications of Mr. Mobanga by the complainant and the nurse were included in their written statements and could not be relied upon. This was an error as the identifications by the complainant and the nurse were recorded in separate written statements that were drafted in French and signed.

10. The Secretary-General contends that the Dispute Tribunal erred in law by not considering relevant documentary evidence. First, the clinic's medical records were not considered. The medical records established that the complainant was 14 years old on the date that she received treatment for a miscarriage at the clinic. Second, the note to case file summarizing the investigators' visit to the *nganda* was not considered. The visit confirmed the identity of the complainant and provided other corroborating evidence. Lastly, the Dispute Tribunal did not examine the records of Lilika school, which established that the complainant had attended the school in the sixth grade in 2011/2012, thereby confirming that she was a minor at the material time.

11.

truthfulness, including its consistency with evidence gathered from the nurse, clinic, and

based on unsworn out-of-court hearsay statements. The Dispute Tribunal applied the

that the complainant attended and the credible evidence of a scheme to make false allegations

24. We wish to also emphasise that a disciplinary investigation is not a criminal trial and while we expect that the process and the methodology adopted throughout the investigation be fair, transparent and in accordance with the relevant Staff Regulations and Rules, the

28. In the instant appeal, it is our finding that the UNDT erred when it considered that the the identification of Mr. Mobanga by the complainant in the photo array was not reliable on the basis that the use of MONUSCO grounds pa

to support the charge of misconduct. The nurse's statement and the records obtained from the clinic and the school were important pieces of evidence presented to the Dispute Tribunal for it to have an understanding of the factual matrix which the Secretary-General relied on in making its decision and also for the Dispute Tribunal to determine what weight should be ascribed to this evidence. The Dispute Tribunal erred when it rejected this evidence.

31. In *Nyambuza*,<sup>15</sup> the staff member challenged her separation for misconduct for allegedly soliciting and receiving monies in exchange for hiring and continuing service with the United Nations. The only evidence against Ms. Nyambuza were written witness statements signed by three witnesses during the investigation, summaries of the oral testimony of two witnesses before the Joint Disciplinary Committee and the testimony of one witness before the UNDT. We held as follows<sup>16</sup>

... The UNDT determined that the [witnesses'] evidence ... had "little probative value" because these witnesses did not appear before the UNDT and were not subject to cross-examination. This rationale is not correct as a matter of law under our jurisprudence in *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302 (full bench). Nevertheless, the UNDT's determination that the evidence had "little probative value" is correct, for the reasons discussed below.

... Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member. When a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value.

32. We find that the UNDT erred in not concluding, on the totality and preponderance of the evidence, that there was sufficient evidence against Mr. Mobanga of a clear and convincing nature for the charge of misconduct.

#### Judgment

33. The appeal is upheld and Judgment No. UNDT/2016/022 is vacated in its entirety.

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<sup>15</sup> *Nyambuza v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-364.

<sup>16</sup> *Ibid.*, paras. 34 and 35 (internal footnotes omitted).



**THE UNITED NATIONS APPEALS T**