



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2011/002  
Judgment No.: UNDT/2013/009  
Date: 23 January 2013  
Original: English

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Before: Judge Nkemdilim Izuako

Registry: Nairobi



7. The Applicant met V01 a third time, on the road, after a party organized by the Indian contingent of MONUC. He was with a colleague, Mr. Brown Lusimanadjo. It was raining heavily, so the Applicant offered to drop off V01 and her friend at the compound of the Grand Chief.

8. On or about 24 December 2007, the Applicant had a party at his house attended by staff members in his section. One Ms. Huguette Piongo approached V01's mother ("W01") and requested her to allow V01 to attend a party organized by UN staff members.

9. V01 did not return home after the party. Ms. Piongo and W01 informed W01 that they had stayed at W01's brother's house after the party.

10. Sometime in 2008, a complaint that Ms. Piongo was using V01 for prostitution with UN staff members was made to Kamina police by W01.

11. On 29 April 2008, the Applicant was summoned to appear in court in Kamina regarding sexual exploitation and abuse claims 3(m)1n

15. By memorandum dated 13 August 2009, the Director, Department of Field Support, referred the Applicant's case to the Assistant Secretary General, Office of Human Resources Management (OHRM) for appropriate action.

*Charges and Applicant's comments on the charges*

16. By memorandum from the Chief, Human Resources Policy Services, OHRM, dated 5 March 2010, the Applicant was charged with misconduct, specifically with:

- a. Engaging in sexual activity with a Congolese female, who was, at the time under the age of 18.
- b. Exchanging money and/or goods and/or services for sex from known prostitutes.
- c. Engaging in sexual relationships with beneficiaries of United Nations assistance, namely, local Congolese women.
- d. Failing to honour his obligations to the local court.
- e. Engaging in the unofficial and unauthorized

- d. He had appeared before the Kamina Court on 26 April 2008 as requested and he had also informed his supervisor that he had been requested to appear before the said Court. His supervisor told him to consult the human rights office.
- e. Upon arrival at the Court he found the Prosecutor with V01. The Prosecutor stated that V01 had alleged that the Applicant had given him (the Prosecutor) one car battery, four new tyres, one barrel of oil and some monthly cash. Right there in his presence, V01 denied that she had said this.
- f. Before departing on leave in April 2008, he scanned a copy of the invitation to appear before the Congolese Court and sent it to his Assistant. When he returned, his Assistant informed him that the matter had been resolved and that all was okay.

19. After reviewing the entire dossier including the Applicant's comments, the Respondent imposed upon the Applicant the disciplinary measure of summary dismissal on 6 October 2010. The sanction was based on the following three charges which the Respondent concluded had been substantiated.

- a. Engaging in sexual activity with a Congolese female, who was at the time under the age of 18.
- b. Engaging in sexual relationships with beneficiaries of United Nations assistance, namely, local Congolese women.
- c. Engaging in the unofficial and unauthorized use of UN vehicles.

20. On 17 January 2011, the Applicant filed the present Application. The Respondent filed a Reply on 17 February 2011.

21. The Tribunal commenced hearing the case in Kinshasa, MONUSCO Headquarters offices on 14 July 2011. On 15 July 2011, the Tribunal issued Order No. 76 (NBI/2011) requiring Counsel for the Respondent to file the personal

appearance of certain witnesses at the hearing. Counsel was directed to inform the Tribunal regarding his compliance with the Order by 19 July 2011.

22. The Tribunal received evidence from the following witnesses:

- a. Ms. Martha Kilimo, MONUC Security (on 13 July 2011).
- b. The Applicant on 14 July 2011.
- c. V01 on 20 July 2011 and on 23 January 2012
- d. W01 (mother of V01) on 20 July 2011 and on 23 January 2012.
- e. Mr. Freedom Segabo, one of the OIOS Investigators, on 23 January 2012.

23. During the hearings on 20 July 2011, Counsel for the Applicant was unable to participate as he had departed from Kinshasa. The Tribunal was still sitting in Kinshasa hearing other cases. On that day the Tribunal received evidence from V01 and W01 in closed proceedings. Counsel for the Applicant was informed to appear via teleconference but was unable to do so ostensibly due to technical problems. Counsel for the Applicant was subsequently provided with the audio recordings of the hearing and was given an opportunity to cross examine the said witnesses on 23 January 2012.

24. Ms. Kilimo's testimony is summarized below.

- a. She has been a Security Officer with MONUSCO since 2004 and was the Applicant's colleague.
- b. The Applicant is a gentleman who treats women with respect and there had never been any sexual allegations made against the Applicant when she worked with him. She only came to know about the Applicant's troubles when he was summarily dismissed.
- c. She h(c)-3(.) TJ ET Q q BT /F1 11.28 Tf 0 0 0 rg 0.9981 0 t(S)-19(h)31(e)T /F1 11.t

d. Under cross examination, the witness said she had never worked in the same location with the Applicant but only knew him during the trainings conducted by their unit in which they both participated.

25. V01's testimony is summarized below.

a. She was born on 30 June 1993. She knew the Applicant but it was through another girl who took her to him. The girl's name is Ms. Piongo. She had met the Applicant only once at a party in his house when she accompanied Ms. Piongo.

b. Ms. Piongo told her to lie to investigators. Her interview with the investigators lasted between three and five days. Ms. Piongo gave her advice throughout.

c. She could not recall what she told the investigators.

d. It is true that she told the investigators that she had visited the Applicant when she was fifteen years old. She told them that the Applicant offered to give her money. She told investigators that she attended a party at the Applicant's house. She told the investigators that she had sex with the Applicant at that party.

e. She told the investigators that the Applicant gave her an envelope with USD150 and telephone numbers. She gave them the envelope.

f. She told the investigators that as she left the Applicant's house, she ran into her mother. Her mother took her to the police station in Kamina where she admitted to the police officer that she had sex with the Applicant.

g. She never went to the police station at any time at all. She met with a Prosecutor and the Applicant over this matter.

h. Ms. Piongo told her that before the Applicant left Kamina, they had to extort money from him. Ms. Piongo sent her to the Prosecutor. She could not remember everything that she told the

Prosecutor but recalled telling him that she had sex with the Applicant.

26. W01's testimony is summarized below.
- a. She is V01's mother. She reported the matter to both the police in Kamina and to MONUC. She reported because Ms. Piongo had told her that V01 was in the Applicant's house. At that time V01 was 15 and a half about 16 years old.
  - b. She sued Ms. Piongo because she used to pick V01 from school and roam around with her.
  - c. She remembered being interviewed by UN investigators. The interview lasted about five days. She did not state to the Investigators that she saw her daughter leaving the Applicant's house.
  - d. She recalled her daughter telling her that she had sex with the Applicant. She then brought a report to the Prosecutor and the matter ended there.
  - e. The Applicant has never visited her or offered her any money regarding this matter.
  - f. She could not remember how long her daughter had been missing from home in 2007. She searched for her for five days. She went to the Applicant's house but did not find her daughter there. She stood outside and did not go into the premises.
  - g. Ms. Piongo told her to make reports about this matter to get money.
  - h. She doesn't know what the Applicant looks like. She never spoke to anyone in the Applicant's office regarding this matter. She told the i0.9981 0 0 1 186. 116.1aannnr spoke

- i. Her daughter was not physically examined by a female police officer when she took her to the police station. Ms. Piongo was arrested because she took her daughter V01 away for many days. She did not speak to Ms. Piongo after her daughter returned and has not spoken to her since.
- j. It is Ms. Piongo who brought the clothes that she showed to investigators as having been bought for her daughter by the Applicant. When her daughter returned, she told her that she was with Ms. Piongo at the Applicant's residence.
- k. It was Ms. Piongo who told her the Applicant's first name.
- l. Ms. Piongo requested her permission to take V01 to a party. They thereafter told her that they had stayed at V01's brother's house.

27. Mr. Segabo's testimony is summarized below.

- a. He has experience as an investigator having served as a police officer for 16 years.
- b. The case against the Applicant arose from a report received from the Conduct and Discipline Unit that the Applicant had allegedly engaged in prohibited sexual conduct involving a female minor and several local women in Kamina.
- c. He interviewed the Applicant, V01, W01 and other witnesses.
- d. V01 provided an account as to what transpired between herself and the Applicant. She told him that she met the Applicant at a party at his house where the two had sexual intercourse.
- e. V01's age was established by verifying her date of birth from her school records.
- f. V01 gave investigators an envelope which had handwritten phone numbers scribbled on it. Then investigators verified that the







37. The Administration hasnot supplied clear and convincing evidence of misconduct. This charge is not made out.

*Charge 2 -*

43.

49. The Applicant requests rescission of the disciplinary decision, in the alternative, compensation equivalent to the salary lost from the date of his dismissal to trial. He also requests 3 months' pecuniary damages.

#### Respondent's case

50. The Respondent frames his case as follows:

51. The evidence before the Respondent made it highly probable that the Applicant had engaged in sexual activity with V01 who was, at the time, a minor.

52. There was also evidence before the Respondent that the Applicant had engaged in several sexual relationships with local Congolese women, gave them money and/or favours and, on at least one occasion, had consensual sexual intercourse with a local woman and thereafter offered her money.

53. The Applicant has given differing versions of events. When interviewed by the Investigators, his account was that

- a. He met V01 in May or June 2007. V01 subsequently visited him at his residence and remained there for several hours consuming alcoholic beverages.
- b. V01 visited his house about five times and beeped him constantly.
- c. He might have given V01 about 200 Congolese francs.
- d. W01 had filed a complaint against him for sexual exploitation of

g. Ms. Mounkaila

- c. He met V01 on three occasions: at the house of the Chief following his initial arrival in Kamina; at a volleyball game; and on the street returning from a party.
- d. He never met W01 and ~~did~~ having gone to her house ~~to~~ offer her money.
- e. V01 did not appear to be a minor at the time he first met her.
- f. He knew Ms. Piongo. Ms. Piongo and V01 tried unsuccessfully to extort money from him. He reported the attempted extortion ~~to the~~ Mission Chief of Human Rights but he could ~~not~~ explain why he did not report the attempted extortion to the police or his supervisors.
- g. Ms. Piongo had visited his office in Kamina upon her release from jail. She asked him to reimburse her brother who had posted her bail bond. The Applicant could ~~neither~~ explain why Ms. Piongo would personally visit his office to seek reimbursement from him for her bail bond nor

56. At the time that V01 was sexually assaulted by the Applicant, she was a minor and he was an authoritative UN figure in the small community of Kamina,

## Considerations

62. The legal issues arising from the facts in this case are as follows:
- a. Did the 20 July 2011 hearings violate the Applicant's right to a fair hearing?
  - b. Has the Applicant made out a case sufficiently compelling to lead the Tribunal to the conclusion that there was no basis upon which the charges against him were established?
  - c. Was the disciplinary measure imposed on the Applicant disproportionate to the offense made out against him?

*Did the 20 July 2011 hearings violate the Applicant's right to a fair hearing?*

63. The Applicant submitted that the hearing on 20 July 2011 generated several issues that violated his right to a fair hearing in the following ways:
- a. There was inadequate notice of the hearing;
  - b. Given the inadequate notice, Counsel for the Applicant was unable to attend the hearing;
  - c. Since Counsel was unable to attend, the truth-serving function of the adversarial system was impaired;
  - d. The courtroom was sealed to the public and there was no clear record of the proceedings accessible to the Applicant further aggravating the problem; and
  - e. There was reasonable apprehension of injustice since the witnesses who testified on that day were summoned by the Tribunal to provide potentially important evidence concerning extremely serious allegations and were fully examined by both the Tribunal and the Respondent.

64. The Tribunal's decision to move to Kinshasa to hear this case was necessitated by the following factors:

- a. The poor sound quality when using a telephone communication to connect between Nairobi (where the Tribunal and Counsel for the Respondent was sitting), Addis Ababa (where Counsel for the Applicant was sitting) and Bukavu, (Democratic Republic of Congo, where most of the witnesses were expected to testify) from the poor sound quality in the courtroom made it difficult to hear witnesses and their Counsel and sometimes it was impossible for interpreters to deliver quality interpretation.
- b. The need for a better audio connection with Bukavu to facilitate hearing the witnesses and the interpreters via telephone.
- c. Numerous technical problems had been experienced with the telephone connection to the Democratic Republic of Congo during a previous hearing.
- d. The outcome of a cost benefit analysis of the options available for organizing proceedings that are consistent with the principles of the rule of law, open justice and due process.

65. Having commenced hearing the case in Kinshasa, the Tribunal, in accordance with article 17 (1) of its Rules of Procedure, was minded to issue Order No. 76 (NBI/2011) requiring Counsel for the Respondent to avail the personal appearance of certain witnesses at the hearing. Counsel for the Applicant had already made plans to depart from Kinshasa by the time the Respondent was able to comply with the Tribunal's Order and to avail some of the witnesses required by the Tribunal. That notwithstanding, various attempts were made to contact Counsel for the Applicant to ensure his participation via teleconference but these attempts proved futile.

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<sup>1</sup> See at para. 16 of *Forbert Bagula* UNDT/2011/138.

66. The Applicant's Counsel was subsequently provided with audio recordings of the court proceedings of on 26 July 2012 and was afforded an opportunity to cross examine the witnesses on 23 January 2012.

67. Article 17 (2) of the Tribunal's Rules of Procedure provide

sexual abuse stipulate that sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures including summary dismissal. Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. A mistaken belief in the age of a child is not a defence.

70. Paragraph 6 of the MONUC Code of Conduct on SEA which was applicable at all material times, prohibited all MONUC personnel from engaging in any act of sexual abuse and sexual exploitation or any other form of sexually humiliating, degrading or exploitative behavior. It also prohibited any type of sexual activities with children (persons under the age of 18) regardless of the age of majority or age of consent locally.

71. When reviewing disciplinary cases, the Tribunal inquires into:

- a. whether the facts on which the disciplinary measure was based have been established;
- b. whether the established facts legally amount to misconduct under the Staff Regulations and Staff Rules; and
- c. whether the disciplinary measure applied is proportionate to the offence<sup>2</sup>

72. The Appeals Tribunal has not set an exact standard for the quantum of proof required but when termination of a staff member's employment is a possible outcome, misconduct must be established by clear and convincing evidence<sup>3</sup>.

*Charge 1 - Engaging in sexual activity with a Congolese female, who was, at the time under the age of 18 years.*

73. With respect to this charge, the Applicant denied having had a sexual relationship with V01. The Applicant testified that the allegations of having sex with V01 arose from an extortion scheme created by one Ms. Piongo. He submitted that the fact that he was reported to the Police or summoned to Court

<sup>2</sup> Mahdi 2010-UNAT-018.

<sup>3</sup> Molari 2011-UNAT-164.

are equally consistent with a 'shame' (or false information provided by Ms. Piongo) as local charges alone cannot constitute evidence of guilt less if those charges are dropped. It is submitted that any errors he made in reporting his difficulties are equally consistent with shame from simply being named a sex offender. The Applicant further submits that the investigation process conducted by OIOS in this case was marred by irregularities and that the investigation statements were inaccurate or concocted by witnesses including V01, who had already reversed her story several times.

74. Having reviewed the entire case record, the following undisputed facts have been established:

- a. The Applicant knew V01 and had met her on several occasions.
- b. V01 was at the material time under the age of eighteen years.
- c. The Applicant gave V01 some money even though the specific amount and reasons for the gift are contested by the Parties.
- d. V01 attended a party at the Applicant's house with Ms. Piongo.
- e. A complaint that Ms. Piongo was using V01 for prostitution with UN staff members was made to Kamina police by W01 sometime in 2008.
- f. The Applicant was summoned on two separate occasions to appear in Court in Kamina regarding sexual exploitation and abuse claims involving V01. He attended Court on 31 May 2008.
- g. Ms. Piongo was known to the Applicant and visited him in his offices at the UN premises to recover bail money after her arrest on allegations of trafficking V01 and her release on bail.

75. The fact that the Applicant was twice summoned to appear in Court in Kamina regarding sexual exploitation and abuse claims involving V01 does not by itself establish that he had sexual relations with the underage girl. However, in her record of conversation contained in the OIOS investigation report, V01 the investigators who interviewed her a few months after the alleged sexual

liaison that she twice had sexual intercourse with the Applicant, the first time being sometime in 2007 and the second time at Applicant's party on 25 December 2007 when she attended with Ms. Piongo.

76. In W01's statement to the investigators, she stated that V01 had attended a party at the Applicant's house and that V01 had told her that she had had sex with the Applicant at the party

77. The OIOS investigators interviewed local police in Kamina who confirmed that V01 was brought to their station on one occasion in 2007 by her mother W01 with a report that she found her sneaking out of a certain premises the early hours of the morning. Upon a physical examination by a female Police officer, it was confirmed that she had recently engaged in sexual intercourse.

78. While testifying before the Tribunal, V01 stated that she had only met the Applicant once and that Ms. Piongo had told her to lie to the investigators she had sex with the Applicant at his party. She then contradicted herself by stating that she had never gone to the police station.

also interviewed Congolese Police



Ms. Piongo would personally visit his office to seek reimbursement from him for her bail bond nor could he explain why Ms. Piongo was not rearrested on the spot and why not if he had in fact reported her attempted extortion to the relevant authorities. The Applicant could not adequately explain how an alleged extortionist could be so confident to gain such easy access to his UN office.

- g. A situation where a mother on different occasions had reported to such local law enforcement authorities as the Court and the Police and then the UN Mission authorities that her underage child was in a sexual relationship with a UN staff member is serious indeed. It was sufficiently serious for these local authorities to wade into the matter and for the OIOS to conduct a detailed investigation in which not less than fifteen people gave witness statements leading to a conclusion that such a relationship existed. The Applicant in this situation would need more than an alleged extortion scheme by his, Mr. Piongo to convince the Tribunal that disciplinary action should be taken against him.

*Charge 2 - Engaging in sexual relationships with beneficiaries of United Nations assistance, namely, local Congolese women.*

84. The Tribunal has reviewed the entire record before it and finds that the Respondent has failed to prove this charge. The Respondent has failed to show that the women with whom the Applicant had sexual liaisons were beneficiaries of UN assistance. It does not stand to reason that any Congolese woman was a beneficiary of United Nations assistance. The Respondent actually needed to make a showing that the Applicant had used his position as a staff member to obtain sexual favours from vulnerable local women who depended on UN assistance. Such vulnerable women may include refugees and others living under UN food and medical assistance and physical protection.

*Charge 3 - Engaging in the unofficial and unauthorized use of UN vehicles.*

85. The Applicant had conceded this charge but submitted that his motives were innocent. This charge has been substantiated.

*Was the disciplinary measure imposed on the Applicant disproportionate to the offence?*

86. The wording in paragraphs 3.2 (a) and (b) of ST/SGB/2003/12 is clear. Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures including summary dismissal. Mistaken belief in the age of a child is not a defence. The Tribunal, having found that there is a preponderance of evidence that the Applicant engaged in sexual activity with V01 who was at the time under the age of 18 years, holds that the disciplinary measure of summary dismissal that was imposed on the Applicant was proportionate to the offence.

## Judgment

87. In view of its findings above, the Tribunal rejects the Application in its entirety.

