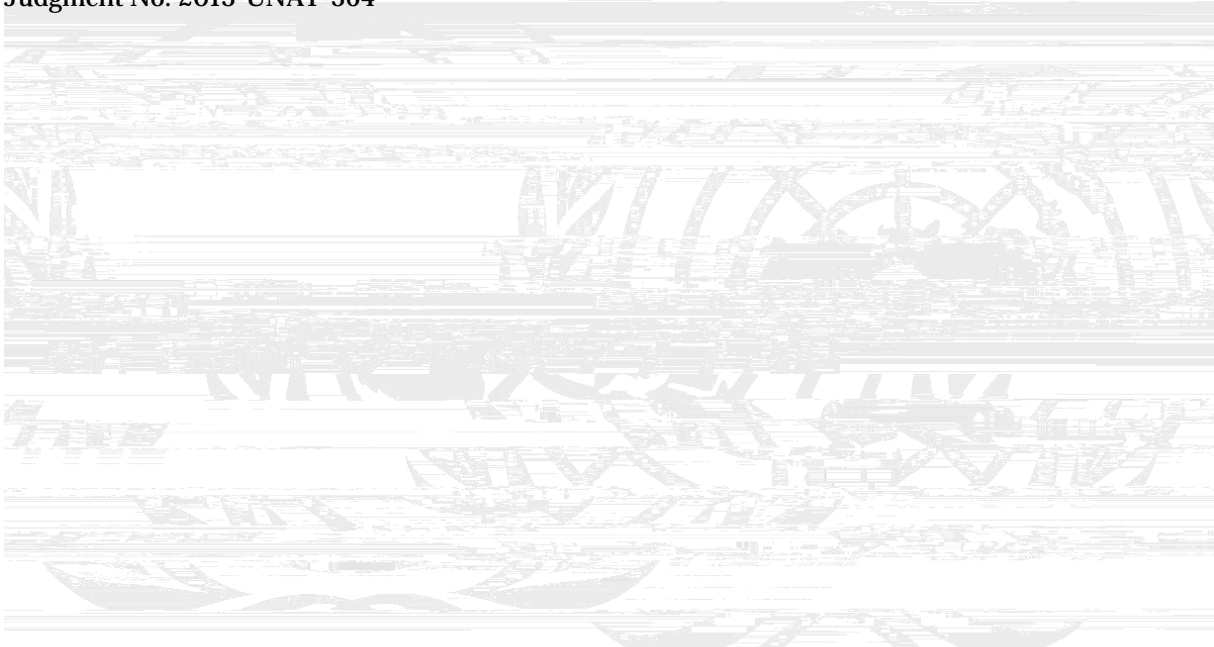




Judgment No. 2013-UNAT-364



Counsel for Ms. Nyambuza:

Miles Hastie

Counsel for Secretary-General:

Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/139, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 18 September 2012 in the case of *Nyambuza v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 16 November 2012, and Ms. Cathy Nyambuza filed her answer on 8 January 2013.

### **Facts and Procedure**

2. Ms. Nyambuza began employment with the United Nations Observation Mission in the Democratic Republic of the Congo (MONUC) on 3 February 2004, as a Junior Clerk at the GL-2 level. In this role, Ms. Nyambuza was responsible for composing lists of Casual Daily Workers (CDWs) to be employed and giving those lists to Security for posting.

3. In late 2005 or early 2006, several CDWs made complaints against Ms. Nyambuza and other staff members in the Engineering Section (Section) of MONUC at Bukavu, alleging they had extorted money from CDWs to obtain and keep jobs (“money for jobs scheme”) with MONUC.

4. The Special Investigations Unit (SIU) conducted an investigation of these complaints. The two lead investigators (Mssrs. Jacinto Bala and Manfred Gruber) conducted interviews with all the complainants they could find, as well as the thirteen accused staff members, including Ms. Nyambuza. As to the allegations against Ms. Nyambuza, the SIU investigators interviewed three CDWs: Mr. Hussein Masudi, Mr. Kurhengamuzimu Lievain and Mr. Telesphore Bisho. Each of these CDWs wrote a statement in French describing the “money for jobs scheme” and implicating Ms. Nyambuza. Each statement contained the following introduction: “This statement (consisting of \_\_\_ pages, and signed by me) is true to the best of my knowledge. I make it voluntarily knowing that if I intentionally reveal false information, I may become liable to administrative or disciplinary action.”

5.

6. The SIU issued a preliminary investigation report on 5 June 2006. The preliminary investigation report summarized the voluntary statements by many CDWs and the accused, and generally concluded:

Although... the proof and evidence of the personal receipt of the money collected cannot be established, the collective complainant letters submitted by the [CDWs] who readily and voluntarily stated in their complaint letters cannot be ruled out as false, artificial and fictitious complaints. Likewise, said complaints cannot be appraised as fabricated story lies because those workers were so afraid. ...

12. On 2 May 2008, the Officer-In-Charge, OHRM, decided that the matter should be referred to an *ad hoc* Joint Disciplinary Committee (JDC) at MONUC, which was established on 13 July 2008. On 7 August 2008, Mr. Bisho wrote a letter recanting his allegations against Ms. Nyambuza, which was transmitted to the JDC.

17. On 29 June 2009, Ms. Nyambuza filed an application with the former Administrative Tribunal, and the Secretary-General filed an answer on 18 December 2009. The case was subsequently transferred to the Dispute Tribunal.

18. The Dispute Tribunal held a hearing on 12 and 13 July 2011, at which testimony was taken from Ms. Nyambuza and Mr. Bala, one of the SIU investigators. On 11 August 2011, the Secretary-General filed a motion to reopen the proceedings to take testimony from Mr. Bisho, who was previously not available. Ms. Nyambuza filed an opposition to the motion. On 22 August 2011, the UNDT granted the motion to reopen the proceedings, and direct testimony was taken under oath from Mr. Bisho by teleconference on 13 December 2011. Mr. Bisho failed to return to the hearing for cross-examination on 14 December 2011.

19. On 18 September 2012, the UNDT issued Judgment No. UNDT/2012/139, which concluded that “[t]he sanction of summary dismissal was based on unsubstantiated charges”. Based on this conclusion, the UNDT, *inter alia*, rescinded Ms. Nyambuza’s summary dismissal and reinstated her in the service of MONUC or the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) “with retroactive effect” or, alternatively, ordered compensation in lieu of reinstatement in the amount of two years’ net base salary.

### **Submissions**

#### **The Secretary-General’s Appeal**

20. The UNDT made an error of law in concluding that two witnesses before the JDC, Mssrs. Masudi and Lievain, were “untested” and the Secretary-General could not rely on their testimony. Rather, their testimony was “tested” since Ms. Nyambuza was present at the hearing before the JDC and had an opportunity to cross-examine them and to offer rebuttal evidence.

21. The UNDT erred in not accepting the testimony of Mssrs. Masudi and Lievain due to the failure of the Administration to produce them at the hearing before the UNDT. Article 16(2) of the UNDT Rules of Procedure provides that a hearing shall “normally” be held following an appeal of a disciplinary action. The use of the word “normally” means that the witnesses need not be present and orally examined in every case.

**THE**







35. 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.<sup>7</sup> 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.<sup>8</sup>

36. The written statements signed by Mssrs. Mahudi and Lievain during the SIU investigation are lacking indicia of reliability or truthfulness. First, the statements were written in French; but the averment of truthfulness was in English, and the witnesses may not have been able to read English. Second, under the English averment of truthfulness, each witness merely made the representations that the statement was “true to the best of [his] knowledge” and “if [he] intentionally reveal[ed] false information, [he] may become liable to administrative or disciplinary action”. These representations are significantly different than those required under Article 17(3) of the UNDT Rules of Procedure (UNDT Rules).<sup>9</sup> The phrase “to the best of my knowledge” is problematic and, since neither Mr. Mahudi nor Mr. Lievan was a staff member at the time he gave the written statement, the possibility of administrative or disciplinary action offered little assurance of the witness’s truthfulness.<sup>10</sup>

37. Since there is no transcript of the evidence taken before the JDC, this Tribunal cannot determine whether Mssrs. Masudi’s and Lievain’s testimony was reliable or truthful. Without a transcript, we have only the JDC report’s summarization of the witnesses’ testimony. Such summarization is merely hearsay, which may properly be found to have “little probative value” when it does not corroborate competent evidence.

38. As this Tribunal has stated:

... [T]he notion of justice and fair trial mandates that witness statements shall form part of the case records. This is particularly important if the Judgment is appealable and heavy reliance has been placed on what the witnesses said before the [JDC].

...

... While appraising the testimony of a witness, this Tribunal is entitled to examine the complete statement of the witness in order to form a balanced view on his

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<sup>7</sup> *Applicant, ibid.*

<sup>8</sup> *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.

<sup>9</sup> Article 17(3) requires that each witness state: “I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.”

<sup>10</sup> *Azzouni, ibid.*

or her credibility before deciding whether the evidence can be accepted. This cannot be done in the absence of the written record. Therefore, there has been a grave error of procedure.<sup>11</sup>

It is the responsibility of the Administration to assure that a transcript of the proceedings before the JDC can be provided to the Appeals Tribunal, if requested; the Administration was unable to do so.

39. The quality of the Administration's evidence is not saved by the findings and conclusions of the JDC. The JDC panel, who observed the demeanor of Mssrs. Masudi and Lievain, found their testimony established the facts underlying Ms. Nyambuza's alleged misconduct on "the balance of probabilities." This standard of proof is considerably less than the clear and convincing evidence standard required for dismissal of a staff member.<sup>12</sup>

40. This Tribunal finds, for the foregoing reasons, that the Administration's failure to provide a transcript of the proceedings before the JDC constitutes a grave error of procedure. This Tribunal finds, for the foregoing reasons, that the Administration's failure to provide a transcript of the proceedings before the JDC constitutes a grave error of procedure.

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2013 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Simón

Entered in the Register on this 19<sup>th</sup> day of December 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar