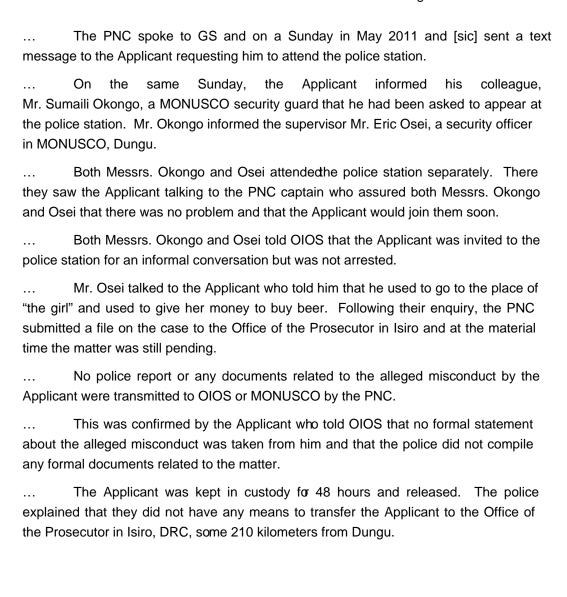
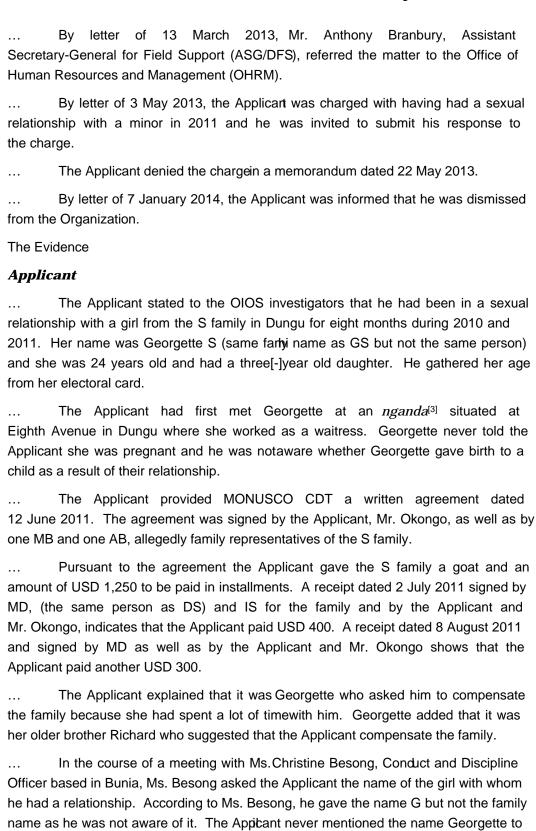


Counsel for Mr. Mobanga: Michael Brazao, OSLA

Counsel for Secretary-General: Nathalie Defrasne





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

Judgment No. 2017-UNAT-741

the toilet". Mr. Okongo also told the investigators: "I can only say that in Dungu we had at least four false accusations againstUN staff just because people want to get some money. All these accusations come from anonymous emails."

... In an undated CDT report titled "Allegation Report From Dungu", it is stated that the report was being compiled in connection with an unidentified email sent to "cdumonuc@un.org" accusing the Applicant of having impregnated a 13-year old girl in Dungu, his duty station. It was also mentioned in the undated report that after a meeting with some informants the following was reported:

The girl is aged more than 18 years old, after the incident she was shifted to her village (24 Km from Du ngu) and cannot be found anymore.

- ... The report also mentions that the Applicant and the girl's family had an amicable settlement and went to the police station to withdraw the case.
- ... The report refers to the habit prevaling in the region of people sending malicious messages. This is what the report mentions:

It is important to mention that some malicious people have now the

Judgment No. 2017-UNAT-741

## 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 personwho 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 alseing 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.

Judgment No. 2017-UNAT-741

... 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 photog raph 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 schoolconfirmed 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

Judgment No. 2017-UNAT-741

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.

							,	Judgm	ent l	No. 2017	-UNAT	-741
truthfulness,	including	its	consistency	with	ev	idence	gathered	from	the	nurse,	clinic,	and

							Judgme	ent No. 201	17-UNAT-	741
based	on	unsworn	out-of-court	hearsay	statements.	The	Dispute	Tribunal	applied	the

	Judgment No. 2017-UNAT-741
that the complainant attended and the credible	evidence of a scheme to make false allegation

Judgment No. 2017-ONA1-741
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

Judgment No. 2017-ONA1-741
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 compla inant in the photo array was not reliable on the basis that the use of MONUSCO grounds pa

Judgment No. 2017-UNAT-741

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>6</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). Neverthe less, 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 reliabil ity 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.

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

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

# THE UNITED NATIONS APPEALS T