
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/027

Judgment No.: UNDT/2016/022

Date: 14 March 2016

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

Case No.

7. 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.
8. Both Messrs. Okongo and Osei told OIOS that the Applicant was invited to the police station for an informal conversation but was not arrested.
9. Mr. Osei talked to the Applicant who told him that he used to go to the lowing 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.
10. No police report or any documents related to the alleged misconduct by the Applicant were transmitted to OIOS or MONUSCO by the PNC.
11. This was confirmed by the Applicant who told OIOS that no formal

16. Specifically, it was reported that the Applicant, a security guard with the MONUSCO Security Section in Dungu, DRC, had a sexual relationship with one Ms. GS, a 13-year old Congolese girl which resulted in her becoming pregnant at

24. 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.

25. Pursuant to the agreement the Applicant gave the S family a goat and an amount of USD1, 250 to be paid in installments. A receipt dated 2 July 2011 signed by MD, (the same person as .64 d4 gne7596i9 Tm[(o)-9(f)] TJET3BT0 1 187.82 63 653.6A

say that in Dungu we had at least four false accusations against UN staff just because people want to get some money. All these accusations come from anonymous emails.

34. In an undated CDT report t , 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 Dungu) and cannot be found anymore.

35.

amicable settlement and went to the police station to withdraw the case.

36. The report refers to the habit prevailing 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 habit of sending anonymous emails to the higher MONUSCO hierarchy in order to spoil the reputation of other staff. This was reported by the MONUSCO Administration Office in Dungu:

In 2010 Mr. X² was a victim of false accusations expressed in an anonymous French email copying the OICs of the deciding sections to accuse him of having bad behavior. Consequently LD contract and was dismissed.

On 26/06/2010, through the address daily@yahoo.com, another anonymous email falsely alleged practicing conditionality: sex for work in French. After investigation, it was concluded that the allegation was not true.

In 02/2011, Mr. Y³ received a mail urging him to report to security office (Logbase) ASP while in Dungu town (HQ) because he was transporting staff members who had to go back home after duties at Logbase. When he reported, Mr., Eric the OIC Security did not recognize having written the mail.

On 25/05/2011, [Applicant] was then accused in the same way (liokomakan@yahoo.fr). The person who accused was not trained by the FCDO as per the training for Civil Society Members as he

² Name withheld.

³ Name withheld.

pretended. Because a non-MONUSCO staff cannot have the e-mail addresses of the people copied at all levels (emphasis added).

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

37. 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.

38. 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.

39. Mr. Uliana interviewed GS [redacted], 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.

40. The mother DS too was interviewed with both interviews being conducted [redacted]

41. 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 [redacted] [Applicant] because of your [redacted] o not know to whom in the [redacted]

42. GS also identified the Applicant from a photo array that was shown to her [redacted] only photographs available were those on the MONUSCO grounds passes that staff use.

nurse estimated the miscarriage to have occurred after four and a half months of pregnancy.

57. DS stated that GS miscarried at home whereas GS stated that she spent two nights in a clinic. DS stated that GS clinic, whereas GS DS stated that she never met the Applicant whereas GS stated that Applicant went to her

58. There are numerous inconsistencies in DS many contradictions and divergences, DS to establish that GS actually did exist. In fact, DS

extortion scheme.

59. In support of their conclusion that GS did exist, the investigators consulted the patient list from a clinic where GS was allegedly treated for miscarriage. The investigators conceded during their cross-examination that whatever name a patient gave to the clinic would be the name that would eventually appear in the records of that clinic. Thus according to the Applicant an objective and independent source of information, at least for the purposes of establishing the identity of GS.

60. As to the school records, they do not show the name GS. They refer to GiS. In her interview statement, the alleged victim stated that her full name was GS and did not mention GiS. In addition, the name S is spelled differently in the school record. In particular, there are two letters that are different. Moreover, the

61. The investigators admitted that they did not visit the Belewete School. though the alleged victim herself gave the name Belewete. Finally, the investigators conceded that they did not know for how long the alleged victim had been enrolled in the Li-Laka school. As far as they knew, she could have enrolled

a fact that had to be established
on clear and convincing evidence.

67. The investigators failed to explain satisfactorily the reason for discarding the testimony of Mr. Sumahili Okongo who informed them that the Applicant was dating a waitress in the *nganda* bar who was approximately 24 years of age and who had a young daughter of three or four years of age.

68. The investigators failed to explore any exculpatory evidence. In particular, J even though she allegedly worked in the *nganda* bar as a waitress and her name was mentioned several times by various people, including the alleged victim and her mother.

69. The investigators did not attempt to locate Georgette when they visited the *nganda* in Febr

71. The statements of the witnesses who were interviewed and who were not called at the hearing should not be relied upon as they do not satisfy the test laid down by UNAT in the case of *Nyambuza*⁴:

Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charge

G

appeared to state that, before

81. GS herself stated that she was about 15 years old at the time of her interview (February 2012), meaning that she was about 14 years old when she had

92. UNAT further observed in *Hallal*⁷ that it is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted.

93. In *Diakite*⁸ the Tribunal observed:

The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected *en bloc*. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.

94. Whether the Applicant made the statement that the Respondent submits he made to Ms. Besong on the name GS depends on the credibility of the Applicant on that statement.

95. As a trier of facts, a first instance jaacc5mhea-5(a)4(c)4(a)4(nd)-9()99((o)-9wei)-3(r)-6(ot)-11

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[A]ppellate courts have been repeatedly warned by recent cases at the highest level not to interfere with findings of fact by trial judges unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach include the expertise of trial judges in determining what facts are relevant to the issues to be decided and what those facts are if they are disputed; that in making his decision the trial judge will have regard to the whole of the evidence presented to him whereas an appellate court can only consider aspects of that evidence; the atmosphere of the courtroom cannot be recreated by reference to documents; and duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case⁹.

97. Very often the testimony of a witness can be counterchecked from other evidence, oral or documentary. In the absence of any documentary evidence the task becomes more arduous. In the present case, the Tribunal is confronted with two versions, that of the Applicant and that of Ms. Besong. The Tribunal had the benefit of listening to both and can only judge the credibility of each by their vocal demeanour as opposed to body language assessment as the testimony of the two was given and recorded by phone.

98. In an email Ms. Besong sent to Mr. Douglas Andrew Tremitière of the Conduct and Discipline Team on 29 August 2011 she wrote:

Dear Duke
Good morning once more.
We called [Applicant] this morning and he has given us the girls
(*sic*) name as, GS.

99. Ms. Besong called the Applicant following the complaint about a young
G
been provided in the anonymous complaint submitted to MONUSCO when in fact
it was not. Then he stated that a colleague had told him that he had impregnated a

113. It was submitted that indicia exist to render the statement of GS probative in that she identified the Applicant from a photographic array.

114. It is settled now that it is perfectly permissible to make use of a photographic array for the purpose of identifying a suspect in a criminal case or an individual involved in a case of misconduct. In the case of *Liyanarachchige*¹⁴ the Tribunal held,

It is not disputed that the use of the standard identification parade aligns the suspect with people of similar stature and origin as him. The witnesses are then asked whether they can pick him/her up. Such a procedure cannot be resorted to in all cases. This is so because the witnesses may not be available in the place or jurisdiction where the investigation is taking place or because the suspect may not be physically available or there is a need to protect witnesses as in the present case given the nature of the case under investi or

affecting such identifications, conscious of their limitations and potential unreliability, and has ast269(a)4(s269(un)-9)-269(a)4(st269(a)4(s2694dciou)-269(a

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130. In this regard the Tribunal will endorse what Judge Meeran stated in *Mmata*¹⁶

It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an

The General Assembly Resolution 63/253 reaffirmed that the new system of internal justice was to ensure respect for the rights and obligations of all staff members and the accountability of managers and staff members alike. The provisions of Article 9 of the Statute of the Dispute Tribunal provide for oral hearings to be held in public unless exceptional circumstances require them to be closed. Article 11.6 of the Statute provides that the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the

The Tribunal must therefore balance the need for accountability with the protection of personal data in each case according to its circumstances.

In judgments, it is unlikely to include names. Applicants are routinely named by the UNDT and UNAT in the headings of published cases except in circumstances where anonymity is granted by the Tribunal.

The Tribunal emphatically does not entertain the naming of any person in a judgment for the purpose of humiliation, although it is accepted that adverse findings against an individual may cause some embarrassment to that person.

In the present case, the actions and behaviours of some staff members and managers have been called into serious question. In the circumstances of this case, having balanced the private effects of naming individuals against the public requirement for open justice and accountability, the Tribunal has decided to name all those individuals who appeared and gave evidence. Any person who did not give oral evidence before the Tribunal will be referred to in this judgment by their functional title at the time of the contested decision²¹.

141. The learned Judge found for Mr. Finiss and mentioned the names of all those involved in the selection process. She even referred them to the Secretary-General for appropriate action to be taken to enforce accountability on account of their responsibility for the biased assessment and unlawful selection decision.

142. The Judgment of Judge Shaw was confirmed on appeal and UNAT did not redact the names mentioned in the first instance decision. The appeal against referral was rejected by UNAT and it endorsed the following conclusion of Judge Shaw who decided that the,

²¹ *Finiss* UNDT/2012/200, paras. 15-19.

[s]election exercise [that] was so seriously flawed beyond the admitted procedural error that it reflected badly on the Organization which is committed to ensuring and upholding the highest standards of efficiency, competence and integrity of its staff members in the discharge of their functions as international civil servant.

143. In *Pirnea*²², UNAT held,

Article 10(9) of Appeals Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the judgements wil

jurisdiction and unfairly with regard to the harassment and abuse of authority findings it made against the individuals concerned.

150. It would appear from the *Luvai*

