

RWANDA / JUDGMENT

KALISA v. INSTITUT POLYTECHNIQUE DE BYUMBA (IPB)

RLR V.1 - 2015

COURT

Supreme Court

DECIDED

2 May 2014

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KALISA v. INSTITUT POLYTECHNIQUE DE BYUMBA (IPB) [Rwanda SUPREME COURT – RSOCAA 0061/12/CS (Mutashya, P.J., Rugabirwa and Gakwaya, J.) May 02, 2014] Contract or obligations law – Damages – The act of informing other institutions the fault committed by an employee which leads to his or her dismissal while he was not given a hearing to refute it, is considered as defamation of character – Any act of man, which causes damage to another obliges him by whose fault it happened to repair it – Law of 30/07/1888 relating to contracts or obligation, article 258. Labour law – Damages resulting from failure to promotion – Even when an employee has reached the time of promotion, damages are not awarded to him/her for failure to be promoted if s/he was dismissed before working for a necessary period to be remunerated a new salary. Civil procedure – Burden of proof – The plaintiff could not be given the damages because his family was traumatized due to his dismissal since he did not produce the evidence thereto. Civil procedure – Inadmissibility of a new claim at appellate level – A claim which was not debated upon before the first instance level cannot be examined for the first time at the appellate level.

Facts: Kalisa Alphonse entered into an employment contract with Institut Polytechnique de Byumba (IPB) to perform for it the duties of a lecturer. Latter IPB wrote a letter to him, informing him that they have terminated the employment contract they had with him because of various faults including the one of drunkenness. Kalisa Alphonse was not satisfied with that decision and he approached the labour inspector in Gicumbi District but both parties did not come to an agreement which led him to file a case in the Intermediate Court of Gicumbi arguing that he was unlawfully dismissed, therefore he should be given damages for it, that Court decided that his claim has merit and consequently it ordered IPB to give him damages for it. Kalisa was not contented with the decision and appealed in the High Court arguing that he was not awarded the damages for being defamed by IPB, and also he was not awarded the notice allowance, the money increment on promotion and procedural expenses. IPB filed cross appeal stating that the salary base on which the notice allowance was calculated on was not the one which should have been based on, The Court decided that the appeal has merit in parts and also pronounced itself on the salary which deserves to be based on, in the calculation of the damages. Kalisa appealed to the Supreme Court arguing that the High Court did not award him the damages for defamation caused by IPB, those of trauma which his family members went through as a result of his dismissal and the increment on promotion moreover he was entitled to it, therefore requests damages equal to the salary of the remaining period until his retirement. On those grounds IPB states that his appeal has no merit because what happened on him are not different from what happens to any other dismissed employee.

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Held: 1. The act of informing other institutions the fault committed by an employee which leads to his or her dismissal while he was not given a hearing to refute it, is considered as defamation of character, the offender pays damages for it

2. Even when an employee has reached the time of promotion, damages are not awarded to him/her for failure to be promoted if s/he was dismissed before working for a necessary period to be remunerated a new salary.
3. The plaintiff should not be awarded the damages for his family being traumatized due to his dismissal since he did not produce the evidence for it.
4. A claim which was not debated upon before the first instance level cannot be examined for the first time at the appellate level.
5. If there are expenses incurred by the party who won the case, he is awarded procedural costs. Concerning the counsel fees, the court cannot award them to the party who does not precise its sum. Appeal has merit in part. Institut Polytechnique de Byumba should pay damages to the appellant. Cost to the respondent. Statutes and statutory instruments referred to: Law of 30/07/1888 relating to contracts or obligations, article 258. No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] On 11 September 2006, IPB1 entered into an employment contract with Kalisa Alphonse to perform the duties of a lecturer, on 19 September 2009 the administration of IPB wrote a letter informing him that they had terminated the employment contract they had concluded with him because of various faults demonstrated in that letter. [2] Unsatisfied with the decision terminating the contract concluded with IPB, Kalisa Alphonse referred the case to the labor inspector of Gicumbi District. After both parties failed to make an agreement, Kalisa Alphonse filed a claim to the Intermediate Court of Gicumbi stating that he was unlawfully dismissed and consequently requested various damages. The Intermediate Court of Gicumbi decided that his claim has merit and confirmed that he was unlawfully dismissed because the provisions relating to the dismissal notice for gross negligence were not respected. Therefore, it ordered IPB to pay Kalisa Alphonse the damages amounting to 1,837,768Rwf covering damages for unlawful dismissal, dismissal compensation, compensation for the annual leave of 2009 he did not enjoy, procedural costs and the counsel fees.. 1 Institut Polytechnique de Byumba.

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[3] Kalisa Alphonse appealed to the High Court stating that he was not awarded damages for defamation by IPB because it wrote to him a letter and addressed a copy to the administration of private institutes of Higher Education affiliated in CRIPES2 and ARIPEs3, for not being given the notice, for not being paid promotion accruals relating to academic grade and for not being paid for procedural costs. IPB filed a cross appeal to that of Kalisa Alphonse requesting that the salary which was based on for computation of the notice allowance is gross salaries of 409,402Rwf while it should be based on the salary of 306,607Rwf which is the net salary. [4] The High Court rendered the judgment and decided that the appeal of Kalisa Alphonse has merit in parts; ordered that the average salary which is relied on for computing what Kalisa Alphonse should be paid is 306,607Rwf instead of 409,442Rwf which was decided by the Intermediate Court. It ordered IPB to pay 2,007,880Rwf to Kalisa Alphonse computed in the following way: Notice allowance amounting to 306,607Rwf; Damages for unlawful dismissal amounting to 919,821Rwf; Dismissal compensation amounting to 306,607Rwf; Compensation for leave he did not enjoy amounting to 334,845Rwf; Procedural costs and the counsel fees amounting to 700,000Rwf. [5] Concerning the fact of being defamed by IPB as his employer, the High Court found it without merit because the fact that IPB informed the administration of the private institutes of Higher Education was in the context of implementing the memorandum entered with other institutions of Higher Education which are in the same association of ARIPEs and indeed, he should not be awarded damage for the fact of being subjected to harassment through false allegations which resulted into trauma. [6] Concerning the damages he was requesting regarding his failure to pay the loan he received from BCR Ltd and approved by IPB, which subsequently dismissed him; the Court found that those damages could not be awarded because the contract he concluded with BCR Ltd engages himself alone and BCR

Ltd, and does not engage IPB., Therefore it cannot be held liable. [7] Kalisa Alphonse appealed against the judgment again to the Supreme Court arguing that the Judge refused to award him the damages relating to defamation disregarding that the dismissal letter contained defamatory statements against him and was copied to the Institutions of Higher Education affiliated with the association called ARIPEs. He stated in addition that he was not paid moral damages for his family traumatized because of his dismissal; that the Court did not decide on the fact that he was not awarded compensation for promotion accruals while he deserved it pursuant to internal rules of IPB. He also requested for damages for the remaining period for him to retire. [8] On those grounds, IPB argues that the grounds for appeal of Kalisa Alphonse are without merit because what was done for Kalisa Alphonse is not different from what is done for any other dismissed lecturer. 2 Conseil des Recteurs des Instituts Privés d'Enseignement Supérieur 3 Association Rwandaise des Instituts Privés d'Enseignement Supérieur

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- [9] The hearing was held in public on 18 March 2014; Kalisa Alphonse Makala appeared and assisted by Counsel Nkundabarashi Moise whereas IPB was represented by Counsel Marie Louise Ndengeyingoma. II. ANALYSIS OF LEGAL ISSUES
1. Whether IPB committed a fault in notifying the members of ARIPEs the ground for Kalisa Alphonse's dismissal to the extent that it should be charged damages [10] Kalisa Alphonse states that IPB committed the fault of informing the institutions affiliated with ARIPEs of his dismissal and its ground because it is contrary to the rules relating to termination of the contract since the termination engages the contracting parties. Therefore he is not concerned by the fact that those institutions have concluded the memorandum on academic program information sharing among them, because he is not involved; thus, this dismissal being informed to those institutions prevented him to get a job anywhere especially in education sector. [11] Nkundabarashi, the counsel for Kalisa Alphonse argues that the fact for IPB to have notified all higher learning institutions that he was dismissed due to drunkenness is serious defamation which IPB did while in the previous year it evaluated his performance and confirmed that he is a good employee. Thus, stating that it was done in the context of information sharing is not true because the information which should be disseminated is not as such as the one relating to Kalisa Alphonse dismissal. Therefore, he requests to be paid the damage amounting to 10,000,000Rwf. [12] Ndengeyingoma Louise, the counsel for IPB argues that the fact of notifying all institutions affiliated with ARIPEs about the dismissal of an employee is normal and commonly done for all employees as IPB must not cover up the drunkenness related fault which is the cause of his dismissal. Additionally, in article 11 of the internal rules Kalisa Alphonse signed, drunkenness is a gross negligence which causes immediate dismissal of the employee; furthermore, the event was not defamation, it is rather the information sharing on his dismissal. Therefore, he was dismissed because of gross negligence, and this had to be included in his dismissal letter. [13] He continues arguing that in the memorandum the private institutions of Higher

Education concluded, the dissemination of information about the employees dismissal is included, therefore adducing that it is done for those who are involved in the academic program is without merit because that is common to all employees, and the fact to have been dismissed due to drunkenness should not be covered up for fear of being imitated by others. Therefore, IPB could not pay him correlative damages he requests for. THE VIEW OF THE COURT [14] The Court finds that in the minutes of the meeting of the board of directors members of the association of the private institutions of Higher Education in Rwanda held on 15 October 2008 regarding the sharing of information, they agreed as demonstrated in the minute of the

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session, that they should share all the information regarding those institutions but avoid disseminating likely ambiguous information to the population⁴. [15] The Court finds that in all letters wrote to Kalisa Alphonse requesting him for explanations; none mentioned that he came to work while drunk⁵, and drunkenness was raised only in the meeting which took place on 19 September 2009 and a decision was made to terminate the contract. [16] The fact that the drunkenness was included among the grounds IPB produced for dismissal of Kalisa Alphonse while he did not defend himself on this fault, and that letter circulated among all private institution of Higher Education in Rwanda that Kalisa Alphonse was dismissed due to drunkenness; the Court finds that this act is a defamation likely to dishonor and consequently deprive him of the opportunity to get another job elsewhere especially in education sector. Therefore, IPB should be held liable pursuant to article 258 of the civil code book III⁶ which stipulates that “any act of man, which causes damage to another obliges him by whose fault it happened to repair it”. [17] The Court finds therefore that due to the faults which IPB committed against Kalisa Alphonse as explained, it should pay him 2,000,000Rwf in damages awarded in the Court’s discretion since 10, 000,000Rwf he requests for is excessive.

2. Whether Kalisa Alphonse should be granted damages for not being promoted. [18] Kalisa Alphonse states that he was not allocated the promotion accrurement while, a performance evaluation was conducted and it was confirmed that he is a good employee and also the administrator suggested his promotion after the submission of the required documents. Hence it is the negligence of administrators who did not promote him after submitting the required documents. [19] Nkundabarashi, the counsel for Kalisa Alphonse argues that his client’s performance was evaluated on 6 January 2009, and the administration of IPB confirmed that he is a good employee who deserves a promotion, but instead he was dismissed nine (9) months after that performance evaluation, thus he was never promoted as it was recommended by his superiors. Therefore, the Vice Rector having confirmed his promotion to that grade after submitting all the necessary documents while Kalisa submitted those documents in vain, thus those are faults of IPB whose superior administration negligence should not affect him. [20] He further argues that he cannot be a victim because there is no letter or an order promoting him, because he was not the one who would have promoted himself. He added that if 4 Avoid information that can confuse the public and

share information about their institutions on the various programs, verify the document in file on page of 45-47. 5 Verify the letter he was written on 04 December whereby he was requested to did not link what concerning the marks of the students and to not participate in the meeting of preparing a schedule (page 41); the letter of 06 August,2009 whereby he was written for providing the explanation due to not perform the week schedule of 10 August up to 16 August 2009 (page 23). 6 Any act of man that causes damage to another obliges the person by whose fault it happened to repair.

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the administration thought that he could not be promoted after having submitted the necessary documents, it would have responded to his request, informing him the reasons why he was not promoted, therefore the lack of the feedback is considered as a tacit approval for which he is requesting for damages amounting to 12,640,786Rwf, which is the equivalence of the balance between his previous salary and the one he would have been remunerated if he had been promoted and those damages are based on article 81 of Law no 13/2009 of 27/05/2009 regulating labor in Rwanda which stipulates that “Upon expiry of employment contract, the employee shall be paid his/her salary soon after its expiry and any other indemnities he/she is entitled to under the contract”. [21] Ndengeyingoma Louise, the counsel for IPB states that Kalisa Alphonse was never promoted as he alleges, because after the evaluation of the performance it follows the promotion of the employee. Therefore, since that decision never occurred, he should not request for the promotion accruals while he is aware that he was never promoted on that grade. THE VIEW OF THE COURT [22] Article of 1.6.2.3 of the internal rules of IPB provides that “a candidate to the rank of the Assistant lecture, the holder of a doctorate degree. He/she may also be appointed to that rank the holder of a Master justifying an experience of three years in the assistant grade”; the analysis of this article shows that an assistant lecturer to be promoted to the grade of lecturer who has the duty to assist the lecturers (Chargé des Cours Associé), as prerequisite must hold a doctorate degree, he can also be promoted to that grade when he holds a Masters degree and a working experience of three years as an assistant lecturer. [23] The document in the case file demonstrate that Kalisa Alphonse began to work as assistant lecturer on 11 September, 2006 and also holds a masters degree as demonstrated during the hearing of the case and the counsel for IPB does not contest it. Kalisa was dismissed on 19 September 2009 which is obvious that he was dismissed when he had fulfilled the requirements to be promoted. [24] The Court finds that even though the promotion of a lecturer who is on the same grade with Kalisa Alphonse and who has fulfilled the requirements is not mandatory according to the internal rules of IPB, the grounds on the fact that the administrator of IPB could make an decision to promote or not should be explained in that decision and the person concerned informed. [25] However, the Court finds no reason in the case file as to why Kalisa Alphonse was not promoted while the administrators’ opinions suggested on his promotion “avis favorable” to the position of Chargé des Cours Associé. Additionally, Kalisa Alphonse produced evidence in support during the hearing and the counsel for IPB could not challenge the document otherwise. 7. 7 Scorecard deposited by Alphonse KALISA in the hearing on 18.03.2014, signed by the

administration of IPB on 06/01/2009

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- [26] The Court finds that even if he got the favorable opinion on 06 January 2009, the three year he was required to fulfill in order for him to be promoted was achieved on 11 September 2009, and he was dismissed on 19 September 2009 after 9 days in excess only, therefore he cannot be awarded the damage relating to the difference between the previous salary and the current salary because he was not in service and to be remunerated you should have worked. Consequently, the damages he requests for not being promoted are without merit.
3. Whether he should be awarded damages for his defamation which caused his family and him trauma. [27] Kalisa Alphonse argues that the defamation against him by writing to all higher learning institutions stating that he is drunkard, caused trauma on his whole family because he was the one who used to provide for it, thus he requests damages for that.. [28] Regarding those damages, the counsel for IPB argues that they should not be awarded to him because he does not demonstrate any one of his family members who went to seek treatment from the counseling centre nor he demonstrates anyone who was admitted to hospital for those grounds. [29] The Court finds that the damages he requests for his traumatized family should not be awarded to him because he did not produce evidence for it. Concerning the damage equal to the remaining period for Kalisa Alphonse to go for the retirement leave [30] On this issue, Kalisa Alphonse states that he relies on article 1.15.4 of the rules regulating IPB stipulating that a lecturer benefits of the retirement leave at the age of 70, and he was dismissed 19 year before the retirement which is equivalent to 202 months. Thus, he requests for the damages equal to 306,607Rwf (for monthly salary) x 202= 61,934,614Rwf. [31] The Court finds that either in the Intermediate Court of Gicumbi, or in the High Court this issue was not debated upon, hence it cannot be examined for the first time in the Supreme Court. [32] Kalisa Alphonse requests 140,000Rwf for the procedural costs, including transport expenses, court fees he paid throughout the progress of the case up to the Supreme Court as he demonstrated in his submissions, and also requests for the counsel fees pursuant to the written contract he concluded with his counsel. [33] The counsel for IPB states that he should not be awarded the procedural costs because he did not produce evidence for it. For the counsel fees, she argues that Kalisa Alphonse submitted the written contract he entered with his counsel; therefore, they are the ones who are engaged as they concluded it themselves. [34] The Court finds that there are expenses incurred by Kalisa Alphonse for the progress of this case, therefore he deserves to be awarded 140,000Rwf for the procedural fees he requested for and it is in range.

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- [35] Concerning the counsel fees, the Court finds that except that it is stated in his submissions that he requests it, he did not precise the amount the Court can refer to and award it. III. THE COURT DECISION [36] Decides that the appeal of Kalisa Alphonse has merit in part; [37]

Orders Institut Polytechnique de Byumba to pay Kalisa Alphonse the sum of 2,000,000Rwf for the damage of being defamed, 2,007,880Rwf awarded by the High Court and 140,000Rwf of the procedural fees, all amounting to 4,147,880Rwf; [38] Orders Institut Polytechnique de Byumba to pay the Court fees amounting to 34,250Rwf.

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