

RWANDA / JUDGMENT

NGABO v. RWANDA REVENUE AUTHORITY (R.R.A)

RADA 0013/12/CS

COURT

Supreme Court

DECIDED

9 January 2015

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NGABO v. RWANDA REVENUE AUTHORITY (R.R.A) [Rwanda SUPREME COURT – N° RADA 0013/12/CS (Kanyange, P.J., Gakwaya and Hitiyaremye, J.) 9 January, 2015] Laws regulating labour – Gross negligence – A termination of contract may take place without notice in the case of gross negligence by one of the parties which has to be notified to the other party within forty-eight (48) hours.– Law n° 13/2009 of 27/5/2009 regulating labour in Rwanda 32. Fair dismissal – Gross negligence – Even though the Law reserves to the employer the right to immediately sanction the employee who have committed a gross negligence without request for explanations to the allegations against him, that do prevent the employer from, prior to sanctioning him to make a decision of giving him time for defence and carrying out investigation on the allegations against him. Fair dismissal – Gross negligence – When an employer decides to give the employee who committed a gross negligence time to present his defence and to carry out the investigation on what he is accused of prior to dismissing him ,that does not erode the character of the grossness of the negligence. Fact: Ngabo was dismissed from the post of Principal Revenue Officer at the

R.R.A because of unethical manner and damages the reputation of R.R.A, when he checked the vehicle while smelling alcohol and caused a delay its passenger as a result of drunkenness and also drove the institution vehicle without the permission where by R.R.A considered them as gross misconduct. Ngabo sued in the High Court claiming for damages for the unfair dismissal. The Court ruled the claim without merit. Ngabo appealed in the Supreme Court claiming that the previous court disregarded his defence and it erred in its judgment , and he states that there was no concrete evidence produced to the High Court to demonstrate that there was drunkenness and again for him having gone in the bars or smell alcohol do not imply that he was drunk because not everyone who goes to the bar takes alcohol , even if the take it doesn't mean they have to get drunk, he executed well his duties and there was no witness inthe court to witness that he was drunk. And for the RRA first requesting him for the explanations about the allegations levied against him and temporarily suspended him and later on definitely dismissed him indicates that the fault of which it based to dismiss him should not be considered as a gross misconduct but a normal fault which is sanctioned by a temporary suspension, for if it was a gross misconduct, RRA should have not gone through all those procedures, but instead it should have terminated the employment contract immediately, without a notice because gross negligence is a fault which cannot be tolerated R.R.A pleaded that what Ngabo did is a gross negligence which are provided for in the Code of Conduct for R.R.A. staff and Disciplinary Procedures and that unusual conduct because of drunkness ,checking the vehicle alone and also mistreating the passengers are gross negligence and also driving the vehicle without a permission and moreover the was a chauffeur to drive him is also a gross negligence and the court relied on the document written and signed by the passenger who were in that vehicle R.R.A further avers that even though the conduct of NGABO could not be tolerated as it is a gross misconduct but he was

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suspended and he was no longer on duty and nothing prohibits that prior to dismissing an employee there investigation in order to determine whether his conduct was really gross misconduct Held: 1. A termination of contract may take place without notice in the case of gross negligence by one of the parties which has to be notified to the other party within forty-eight (48) hours.

2. The fact that the employee searched the vehicle due to drunkenness and having taken the car of RRA without authorization constitutes a gross misconduct that would lead an employer to terminate the contract of employment concluded with the employee therefore the contract was terminated for the just cause.
3. Even though the Law reserves to the employer the right to immediately sanction the employee who have committed a gross negligence without request for explanations to the allegations against him, that do prevent the employer from, prior to sanctioning him to make a decision of giving him time for defence and carrying out investigation on the allegations against him

4. When an employer decides to give the employee who committed a gross negligence time to present his defence and to carry out the investigation on what he is accused of prior to dismissing him ,that does not erode the character of the grossness of the negligence..
5. The the dismissal of Ngabo is in accordance with the law.
6. The employer cannot be awarded the damages for the abuse of procedure, since it is the right of the litigant to lodge an appeal as long as he is not contended with the ruling but he should only be awarded damages arising from the loss incurred in these proceedings.. The appeal has no merit;. The cross appeal has merit in parts; The appellante has to pay to the respondent the damages for the expenses he incurred in this case; Court fees on the apeallante. Statutes and statutory instruments referred to: Law n° 13/2009 of 27/5/2009 regulating contract in Rwanda ,article 29,32. Law of 30/07/1888 regulating contracts or obligations, article 258 Doctrine: LEFEBVRE, Mémento pratique, Social,, droit du travail-sécurité sociale, Levallois, 1999, P.634.

Judgment

BACKGROUND OF THE CASE [1] This case begun in the High Court, on 20/12/2010, NGABO James alleging that Rwanda Revenue Authority (RRA) dismissed him without a just cause, claiming various damages arising from that act. He explains that he was RRA employee in the Western Province as a Principal Revenue Officer and on 03/12/2001 he received a letter dismissing him which indicated that he behaved badly and distorted the reputation of RRA because he searched the car RAB 472 S of

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Kigali Safari and delayed passengers therein because he was drunk, and he took the job vehicle of RRA without authorization. He also explains that RRA dismissed him basing on that alleging them to be gross misconduct. Due to the RRA behaviors NGABO James requests the court to hold that he was unfairly dismissed and thus be awarded damages. [2] On 21/03/2012, the High Court rendered the judgment RAD 0177/10/HC/Kig and held that the complaint instituted by NGABO James is no founded and ordered him to pay court fees equal to 29.800 Frw. [3] NGABO James was not contended with the ruling, and on 19/04/2012 appealed before the Supreme Court asserting that the High Court disregarded his arguments and thus wrongly qualified facts and applied article III.2.3 paragraphs ff and ii of the code of conduct of RRA staff and disciplinary procedures where it was not fit, as it ruled that NGABO James committed a gross misconduct and it also disregarded article 62 of the law No 15/2004 of 12/6/2004 relating evidence and its production. He also asserts that disregarded the provisions of article 25 of the statute governing RRA civil servants and also denied him damages he calimed. [4] The RRA lodged an incidental appeal requesting damages worth 1.000.000 due to abuse of procedure and the losss incurred in this case as provided under article 258 of the civil code book three. [5] The public hearinmg was held on 18/11/2014, NGABO James, represented by Counsel RUTEMBESA Phocas and R.R.A. represented by Counsel MUGIRE Joseph and Counsel KABIBI Spéciose. II. ANALYSIS OF LEGAL ISSUES

- a. To know whether the conducts of NGABO James constitutes a gross misconduct [6] Counsel RUTEMBESA Phocas asserts that under paragraph 5, page 2 of the judgment appealed against, the High Court held that NGABO Jmaes committed a gross misconduct as provided for by the code of conduct of RRA staff under its article III.2.3. paragraphs ff and ii since there are witnesses who testified that he passed in a bar prior to going to carry out search of smuggled products and basing on 3 of the law No 15/2004 of 12/6/2004 relating to evidence and its production held that his counsels did proves any conflicts between NGABO James and those witnesses to the extent they can falsely testify against him. [7] With regard to the fact that NGABO James was breathing beer's smell and passed in bars, RUTEMBESA Phocas asserts that there is no conclusive evidence that the High Court was submitted with to the extent that it couold rule that there has been drunkenness. He further explained, even if it may be true, such misconduct is not provided for under article III.2.3. of the code of conduct of RRA staff stated above, therefore he finds that the assertion that NGABO James passed in bars or he was stenching beer does not necessarily imply that he was drunk because whoever goes in the bar does not necessarily drink beer and even they may drink it it does not mean that they get drunk. He concludes putting forward that NGABO James was on duty and he discharged it well.

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- [8] With regard to witnesses who testified tht NGABO James had a stench of beer, Me RUTEMBESA Phocas asserts that the High Court should have not ruled there have been witnesses in the case yet no person has testified, in the court room, that he has seen NGABO James in drunk state. He explained that instead, what have been produced by RRA are unsigned statements proving that the person who searched them was stenching beer, therefore he finds that the findings of the High Court are contrary to the provisions of article 62 of the law No 15/2004 relating to evidence and its production. [9] Counsel MUGIRE Joseph and Counsel KABIBI Spéciose asserts that as indicated court submissions of NGABO James, he concedes that he was stanching beer and he passes in various bars. They explain that by passing in bars and stenching beer lead him to be come drunk and therefore discharged his duties inappropriately during the serach of the car RAB 472 S of Kigali Safari while drunk and stenching beerand delayed passengers passengers there in. They also explain that what he committed amounts to the misconduct provided under the Code of conduct of RRA staff and disciplinary procedures in its article III.2.3. paragraphs ff and ii, thus considering abnormmal conduct of NGABO James due to getting drunk, while he searched the car alone while he is not authorized to do that and mistreated the passengers therein, suffices to conclude that it is a gross misconduct. [10] Counsel MUGIRE Joseph and Counsel KABIBI Spéciose also assert that NGABO James took the car of RRA without having power to do so, which a misconduct provided for article III.2.2 of the code of conduct for RRA staff and disciplinary procedure, therefore they find that in case he took the car without authorization yet he had the driver who had to carry him, that is a gross misconduct too that led the High Court to taking that decision in that is in accordance with the law. [11] With regard to

witnesses, Counsel MUGIRE Joseph and Counsel KABIBI Spéciose assert that NGABO James wants to infer what the court did not mean since it is obvious in the copy of the judgment that nowhere the court mentioned that it based on testimonies of witnesses, but instead it based on evidence produced by RRA written and signed by passengers (Jean- Robert KIDAMAGE, NAKURE REHEMA and UWIMANA Angèlique) who were in the car searched by NGABO James while drunk, they therefore find that the decision of High Court is not contrary to article 62 of the law No 15/2004 of 12/6/2004 relating to evidence and its production. COURT'S VIEW [12] Article 29 of the law No 13/2009 of 27/5/2009 regulating labour in Rwanda provides for that "the employment contract of undetermined period can be terminated any time upon the will of one of the parties but on just cause. That termination is preceded by the notice that is given by the person who wants to terminate." [13] Article 32, paragraph 2 of the law No 13/2009 regulating labour in Rwanda provides for that "however, the employment can be terminated without a prior notice in case of gross misconduct of one of the parties. In that case, one of the parties notifies the other within 48 hours", and under paragraph 3, that article provides for that "the gross misconduct is determined by the competent court."

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[14] Article III.2.2., paragraph g of the code of conduct for RRA staff and disciplinary procedures provides for that "Serious misconducts include unauthorized use or abuse of the R.R.A's facilities or equipment including computer system" and article III.2.3. paragraphs ff provides that Gross misconducts include being in a drunken or intoxication state during the service hours" and paragraph ii provides that Gross misconducts include incapacity with work due to alcohol or being the influence illegal drugs." [15] The Supreme Court finds that as indicated in the letter of 21/9/2010 notifying NGABO James of his dismissal, RRA terminated their employment contract due to the gross misconduct he committed while he discharged his duty inappropriately carrying out search in the car RAB 472 S of Kigali Safari stenching beer and delaying passengers therein and taking the institution's car without authorization. [16] Basing on the words of NGABO James in the affidavit and the testimony of 27/7/2011 (the day NGABO James allegedly that led to his dismissal) by KIDAMAGE Jean Robert, the driver of the car with plate RAB 472 S of Kigali Safari searched by NGABO James and the testimony of 27/7/2010 by passengers who were in that car stated above, including NAKURE REHEMA and UWIMANA Angèlique, the Supreme Court finds that the allegations of RRA really occurred¹ since he concedes that in 3 bars until 1 am waiting the confirmation of person who told him that there is a car carrying smuggled products, and another person informed him , about 4 am that the car of Kigali Safari that carries smuggled products is depart by that time and he puts that he searched that car of Kigali Safari by 5 am, which mean that NGABO James did not sleep during that night. [17] The Supreme Court finds that in case NGABO James wasn't drunk by the time he searched that car he should have not brought Intersec employees so they can help him to search yet he knew that the search is conducted by RPD and his position prohibits him to carry out those duties of customs

without agreement with the leaders of the province and borders as indicted in his job description under article 3, paragraph i2, therefore the manifested when considered junctively with the testimony of KIDAMAGE Jean Robert, the driver of the car that was searched by NGABO James and the testimonies of NAKURE Rehema and UWIMANA Angèlique passengers who were in that car relating to his conduct during the search and the fact that he was stenching beer and it was apparent on his face that he was drunk, they indicate that he searched that car due to drunkenness. [18] With regard to the assertion NGABO James that there is no conclusive evidence that indicates that he was drunk, the Supreme Court finds this is worthless as long as his behavior indicated that he was not in a normal state and the passengers in that car he was searching

1 Le motif légitime suppose notamment qu'il soit réel c'est-à-dire existant, précis et objectif, Cass.soc.2-6-1988; 10- 5-1989 n° 1966; 7-1-1998 n° 32; RJS 2/98 n° 153 in Francis LEFEBVRE, *Mémento pratique, Social,, droit du travail-sécurité sociale*, Levallois, 1999, P.634. 2 Responsibilities Monitor audit group performance by :(i) "Liaises customs operations with border and regional coordinators".

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testifies in the writing bearing their signatures that he was stenching beer, therefore the fact that NGABO James asserts that in his affidavit he told the driver of that car that they are going to carry out search in it and there are women in that car with a huge bag, this clearly indicates that those who were interrogated for the purpose of investigation were really in that car and they testified what they have seen. [19] The Supreme Court finds that as he himself concedes, NGABO James took the car without authorization in the night of 26 towards 27/7/2010. [20] Basing on the description of NGABO James' job and the requirements of the job of Principal Revenue Officer, the Supreme Court finds that the fact that he searched the car due to drunkenness as explained above and having taken the car of RRA without authorization constitutes gross misconduct that would lead RRA to terminating the contract of employment concluded with NGABO James with just cause. [21] Due to the foregoing reasons, the Supreme Court finds that the ruling of the High Court that NGABO James committed gross misconduct is legally a based decision, thus that ground of appeal NGABO James is not founded.

- b. To know whether NGABO James was dismissed in violation of the law [22] Counsel RUTEMBESA Phocas asserts that the High Court held under paragraph 6 of the judgement appealed against that NGABO James was not unfairly dismissed since he committed gross misconduct, yet prior to dismissing NGABO James the RRA requested him explanations about the allegations against him and suspended him and later on dismissed him. He explains that, in case he committed the gross misconduct the RRA should have not gone through all those procedures, but instead it should have dismissed him immediately, without a notice in accordance with article 25 of the Statute of RRA servants that provides for that no employee can be inflicted to a penalty without being given his right of defence in writing except if it is a gross misconduct or he/she was caught red handed. [23] Counsel

RUTEMBESA Phocas further asserts that even though no misconduct that was committed by NGABO James, what RRA did prior to dismissing him indicates that the alleged misconduct for which he was dismissed cannot be qualified as gross, but instead it is a mere misconduct, sanctioned by suspension as provided under article 26 of the Statute of RRA servants. He explains that the misconduct allegedly committed by NGABO James occurred on 27/7/2010 but RRA terminated the contract of employment on 21/9/2010 after two months, therefore he finds that what RRA did was no longer under the category of gross misconduct. [24] Counsel RUTEMBESA Phocas concludes putting that as long as there have not been what provided for under article 25 of the Statute of RRA servants, the High Court had no single

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reason to rule that NGABO James was in accordance with the law since basing on the teachings³ of the legal scholar Olivier NDUHUNGIREHE the gross misconduct is a misconduct that cannot be tolerated at all, and in case it committed the parties terminates it immediately without a notice. [25] Counsel MUGIRE Joseph and Counsel KABIBI Spéciose asserts that the assertion of NGABO James is not founded because for the purpose of investigation while in suspension he was summoned before the disciplinary Committee so that he give explanayions on allegations against him as provided under article 25 of the Statute of RRA servants, therefore his explanations did not satisfy the memebbers of that committee, and later on the decision of dismissing him was taken and as provided under article IV.3 of the code of conduct for RRA staff and disciplinary procedures, the competent authority notified him of the sanction decided for him equivalent to his misconduct. [26] Counsel MUGIRE Joseph and Counsel KABIBI Spéciose further put forward that pursuant to article 25 of the Statute of RRA servant is not a criminal offense but a gross misconduct and there should be added another gross misconducted of taking the institution's car without authorization. They explain that the fact that NGABO James works in Rubavu, his conduct would not reach immediately the competent authiority as they are based in Kigali, which is the reason why he was suspended for the purpose of investigation. [27] Counsel MUGIRE Joseph and Counsel KABIBI Spéciose concludes putting forward that even though the conduct of NGABO James cannot be tolerated as it is a gross misconduct but he was suspended, he was no longer on duty and nothing prohibits that prior to dismissing an employee there investigation in order to determine if his/her conduct is really gross. COURT FINDINGS [28] Article 25 of the Statute of RRA servants provides for that "No sanction will be taken against a staff without giving him the opportunity to defend himself in writing, except in the case of a gross offence or flagrante delicto" [29] Article 26 of the Statute of RRA servants provides for that "A staff that is presumed to have committed on offence may be suspended from his duties for 2 months depending on the gravity of offence until the closure of the instruction. If the case is closed without results, the suspension will be cancelled from the date of publication. However, if the sanction is decided, its effects will start from the date of suspension.

3 "La faute lourde est une faute grave qui rend immédiatement et définitivement impossible toute collaboration professionnelle entre l'employeur et le travailleur. Et, c'est l'auteur de la rupture qui doit établir l'existence d'une faute dans le chef de l'autre partie. Cette faute doit être à ce point

grave qu'il n'est pas envisageable de poursuivre l'exécution du contrat pendant l'écoulement d'un délai de préavis, ou d'attendre la décision d'un juge sur une demande de résolution judiciaire", Olivier J.P. NDUHUNGIREHE, Cours de droit social, première partie: considérations préliminaires et droit de travail, P. 60.

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- [30] The Supreme Court finds that the gross misconduct committed by NGABO James occurred on 27/7/2010 but he was dismissed on 21/9/2010 and he was awarded all benefits provided for by the law. [31] The Supreme Court also finds that RRA took the decision of suspending NGABO James on 30/7/2010 for the purpose of investigating misconduct he allegedly committed on 27/7/2010. [32] The Supreme Court finds that in the meantime RRA made an affidavit on 4/8/2010 on allegations against him making a report on what it did on 17/8/2010 and inviting him on 2/9/2010 in the meeting for examination of his conduct and on 17/9/2010, the Board of Governors of RRA held a meeting examining the report submitted to it by the Disciplinary Committee held on 2/9/2010. [33] With regard to the assertion of NGABO James that he was unfairly dismissed since he was not dismissed immediately, that is to say on 27/7/2010 instead of 21/9/2010, the Supreme Court is of the view that even though article 25 of the Statute of RRA Servants gives the employer the right to immediately sanction the employee who might have committed gross misconduct without request for explanations in writing relating to allegations against him, that cannot prevent the employer from, prior to sanction him, taking the decision of giving him time for defence and carrying out investigation on the allegations against him, therefore in case the employer takes the decision allowing the employee who might have committed gross misconduct the time for defence in writing or the decision to carry out investigation on the allegations against the employee, cannot take away its nature of being gross. 4 [34] In addition, the fact that RRA took the decision on 30/7/2010 the decision to suspend NGABO James on his duties due to gross misconduct that he investigated over is a ground indicating that the survival of relationships between two parties was no longer possible, therefore, the Supreme Court finds that the fact that he was dismissed on 21/9/2010 after investigation cannot take away the gravity of his misconduct. [35] Pursuant to the forgoing explanations, the Supreme Court finds that NGABO James was not unfairly dismissed but instead his dismissal is in accordance with the provisions of article 25 and 26 of the Statute of RRA servants and 32 paragraph 2 of the law No 13/2009 regulating labour in Rwanda and thus that ground of appeal of NGABO James is not founded.
- c. To know whether RRA should be awarded damages it claims [36] Counsel MUGIRE Joseph and Counsel KABIBI Spéciose asserts that pursuant to article 167 of the law No 21/2012 of 14/6/2012 relating to civil, commercial, labor and administrative procedure RRA request that NGABO James be condemned to payment of damages equal to 1000,000 Rwf due to abuse of procedure and other losses incurred.

4 Il a été jugé que “un retard dans le prononcé du licenciement ôte à la faute son caractère de gravité, sauf si ce retard est de courte durée, ou est justifié par les besoins d’une enquête ou par le respect de la procédure”, , in Francis LEFEBVRE, Mémento pratique, Social,, droit du travail-sécurité sociale, Levallois, 1999, P.636.

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[37] Counsel RUTEMBESA Phocas asserts that R.R.A. should be awarded damages it request because the ground for institution of proceedings is obvious. VIEWS OF THE COURT [38] Article 258 of the civil code book III provides for that any act of person that cause damage to another obliges its author the fault arising therefrom the payment of damages. [39] The Supreme Court is of the view that damages claimed by RRA due to abuse of procedure, are not founded since it is the right of the litigant to lodge an appeal as long as he is not contended with the ruling, thus RRA should only be awarded damages arising from the loss incurred in these proceedings. [40] The Supreme courts, however finds that since the amount requested by RRA is excessive, it, in its discretion (ex aequo et bono), awards it damages equal to 300,000 Rwf. III. DECISION OF THE COURT [41] It holds that the appeal of NGABO James is not founded; [42] It holds that the incidental appeal of RRA is not founded; [43] It holds that the incidental appeal of RRA is founded on some grounds; [44] It holds that the ruling in judgement RAD 0177/10/HC/KIG rendered by the High Court on 21/372013 remains intact; [45] It ordered NGABO James to pay RRA 300,000Rwf of damages relating to the loss incurred in this case; [46] It ordered NGABO James to pay court fees equal to 100,000 Rwf.

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