

RWANDA / JUDGMENT

NSENGIYUMVA v HAYTON LTD

RLR V.4-2024

COURT

Supreme Court

DECIDED

14 April 2023

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Text

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NSENGIYUMVA v HAYTON Ltd [Rwanda SUPREME COURT RS/INJUST/RSOC 00006/2022/SC- Nyirinkwaya, P.J., Hitiyaremye and Karimunda, J.) 14 April 2023] Labour procedure – Employment contract – Worker governed by employment contract – Is considered as worker governed by employment contract, but which is unwritten, any worker who works for a period of at least six consecutive months offering regular services to the same employer – Any worker who alleges to be so considered, must produce elements of evidence proving that he/she has been regularly working under the above mentioned conditions. Labour procedure – Employment contract – Temporary workers – Workers 'social security contributions – Each worker must have the social security contributions paid, even if he/she works in informal sector or is employed for temporary services. Facts: Rwanda Biomedical Centre (RBC) concluded a transportation contract with Hayton Ltd from 2014. Hayton Ltd had to hire the workers for loading and unloading boxes of medical products and other items that RBC intended to distribute across the country. It is under such a situation that Nsengiyumva was hired among other workers for the above works. Nsengiyumva states that he has been working for Hayton Ltd from 2014 to 2017 under an informal agreement, and when he last reported at his usual workplace, he got informed that his

work has ended. He submitted his claim to the Labour Inspector, but nothing worked out, and that is when he filed a related claim before the Intermediate Court of Nyagatare. The seized Court heard the case at the first level, and held that his claim is unfounded because Nsengiyumva was a daily worker; therefore, he was not illegally dismissed, and the Court upheld that the damages should not be granted in the case. He appealed against the above ruling before the High Court, Chamber of Rwamagana, and the latter held that his appeal is unfounded. He applied for the review of such ruling on grounds of injustice, the application was admitted and the Supreme Court first examined the issue related to determining whether he was illegally dismissed. The applicant seeking the judgment review argues that he was illegally dismissed, he was notified of any fault nor any other reason that prompted his immediate suspension without notice, while he had concluded with the Respondent an indefinite term employment contract. Hayton Ltd, the respondent, submits that the applicant has never been the Company's permanent worker, that he was a daily worker whom it used to pick on the casual workers' waiting recruitment sites, and in case he had been employed from 09/09/2014 to August 2017 as permanent worker as he pleads, he should be having a written employment contract as per the provisions of the Labour law which provides that any worker who works for a period of more than six consecutive months must have a written employment contract. For the issue of determining whether the social security contributions should be paid by his former employer, the applicant states that the respondent should have affiliated him to Rwanda Social Security Board (RSSB) and it should have paid his social security contributions from the time he started the job; and that is from the fourth quarter of 2014 up to August 2017. He therefore requests to the Court to order to the Company to have him registered with RSSB, and pay for him all his unpaid social security contributions.

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The respondent pleads by stating that it should not pay for him the social security contributions since he has never been the Company's formal employee. Held :1. Is considered as worker governed by employment contract, but which is unwritten, any worker who works for a period of at least six consecutive months offering regular services to the same employer. Any worker who alleges to be so considered, must produce elements of evidence proving that he/she has been regularly working under the above mentioned conditions.

2. Each worker must have the social security contributions paid, even if he/she works in informal sector or temporarily. The application for the judgment review on grounds of injustice is founded in part. Statutes referred to: Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 12. Law No 13/2009 of 27/05/2009 governing labour in Rwanda, articles 1, 15, 33 and 47. Law No 15/2004 of 12/06/2004 relating to evidence and its production, article 3. Law No 06/ 2003 of 22/03/2003 modifying and completing the Decree-law of 22/08/1974 determining Social Security Scheme, article 2 Law No 51/2001 of 30/12/2001 governing labour in Rwanda, articles 17, 29, and 33. Cases referred to: RSOCAA 0023/09/CS; Phoenix Metal v. Rwanteli Ntagara Innocent rendered by the Supreme Court on 18/06/2010.

Judgment

I. BACKGROUND OF THE CASE

Rwanda Biomedical Centre (RBC) concluded a transportation contract with Hayton Ltd on 09/09/2014. Hayton Ltd had to look for the manpower for loading and unloading boxes of medical products and other items that RBC intended to distribute across the country. It is under such a situation that Hayton Ltd hired the workers to help accomplishing the above mentioned tasks. Nsengiyumva Ismaël submits that he worked for Hayton Ltd without employment contract from 2014 to 2017, the time on which when he reported at his usual workplace, he got informed that his work has ended.

Nsengiyumva Ismaël first submitted his claim to the Labour Inspector in Gasabo District. On 29/05/2020; a related statement was made, and it indicated that the undertaken negotiations did not work out, and Nsengiyumva Ismaël filed a claim before the Courts.

Before the Intermediate Court of Nyagatare, Nsengiyumva Ismaël stated that Hayton Ltd has illegally dismissed him and he requested for damages for illegal dismissal, notice allowance,

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terminal benefits, the work certificate and related damages, unpaid leave, social security contributions, advocate fee, procedural fee and court fee.

On 29/10/2019, the Intermediate Court of Nyagatare heard the case RSOC 00010/2018/TGI/NYG and held that the claim filed by Nsengiyumva Ismaël is unfounded since he only used to be occasionally hired as a daily worker and therefore he was not illegally dismissed as he alleges, it held that the damages should not be granted in this case and the court fee deposited for filing the claim covers the expenses of the proceedings ; and it is borne to the Public Treasury.

Nsengiyumva Ismaël appealed against the above ruling before the High Court, Chamber of Rwamagana, he submits that due to the fact that the lower court held that he was not illegally dismissed because he was he was a daily worker, it disregarded the elements of evidence it noticed, that he regularly worked for Hayton Ltd from 2014 up to 2017, when he was suspended.

On 31/08/2020, the High Court, Chamber of Rwamagana heard the case RSOCA 00013/2019/HC/RWG and held that the appeal filed by Nsengiyumva Ismaël is unfounded, the Court upheld that the appealed ruling is sustained, and it ordered that the damages should not be granted in the case since both parties defaulted on some of the obligations.

For making the above decision, the Court explained that Nsengiyumva Ismaël should have been considered as a regular worker governed by fixed-tern employment contract, since he worked for a period of more than six consecutive months, instead of being considered as a daily worker, but his dismissal was not illegal as it was caused by the fact that the contract between RBC and Hayton Ltd was terminated. With regard to the issue of payment of his social security contributions, the Court explained that though article 47 (6) of the Law n0 13/2009 of the

27/05/2009 regulating labour in Rwanda provides that the employer must affiliate all the employees to the social security scheme regardless of whether they are daily workers or governed by written or unwritten employment contract, Nsengiyumva Ismaël deprived himself of the right provided under the law because he worked for all the three years for Hayton Ltd Company without having his social security contributions paid, and he thereby never sued the Employer for the issue while he was still in service.

Nsengiyumva Ismaël petitioned the President of the Court of Appeal requesting for the review of the case RSOCA 00013/2019/HC/RWG on grounds of injustice. His application was examined and the Present of the Court of Appeal wrote a letter to the President of the Supreme Court requesting for the concerned case review. In his decision n0 156/CJ/2022 of 26/08/2022, the President of the Supreme Court permitted the requested case review and the case was sent to the Registry of the Supreme Court and it was docketed as RS/INJUST/RSOC 00006/2022/SC.

In his submission, Nsengiyumva Ismaël argued that the alleged injustice lies in the fact that Hayton Ltd, a Company he regularly worked for has illegally dismissed him and the Court did not grant to him the damages related to such dismissal. In addition, Nsengiyumva Ismaël stated that Hayton Ltd never paid for his social security contributions, and he prayed the Court to order for their payment. Hayton Ltd pleaded about those submissions by submitting that Nsengiyumva Ismaël has never been the Company's regular employee since he was only a daily worker. Hayton Ltd argued that there has never been any illegal dismissal that might call for terminal benefits, and that the Company had no legal obligation for remitting his social security contributions.

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The case was heard in public on 20/03/2023, Nsengiyumva Ismaël was assisted by Counsel Uwiragiye Pierre Célestin together with Counsel Ndayambaje Gilbert, while Ruzibiza Rodrigue, the Managing Director of Hayton Ltd, was assisted by Counsel Mugenzi Elie.

For this case, the involved parties debated on the following issues: - Whether Nsengiyumva Ismaël was illegally dismissed from his employment so that he deserves damages; - Whether Hayton Ltd must be compelled to remit the plaintiff's social security contributions in RSSB; - The issues related to the counsel and procedural fees at all levels of proceedings. II. ANALYSIS OF LEGAL ISSUES OF THE CASE

1. Whether Nsengiyumva Ismaël was illegally dismissed from his employment so that he deserves damages

Counsel Uwiragiye Pierre Célestin together with Counsel Ndayambaje Gilbert who both assisted Nsengiyumva Ismaël argue that their client has been illegally dismissed from his employment, arguing that the plaintiff worked for Hayton Ltd from 09/09/2014 up to August 2017, stating that it is after this period of three years that the employer informed him of the end of his services, and he got an immediate dismissal without any prior notice, yet he had been working under indefinite term employment contract. They argued that for all the three years, Nsengiyumva Ismaël had been working as permanent employee of Hayton Ltd, and he was in charge of

loading, unloading and packing boxes of RBC's medical products according to their types, those services were specified on pages 21 and 22 of the contract that RBC had concluded with Hayton Ltd where they indicate the services that would be regularly provided and the worker's monthly salary; and thus differing from the arguments of Hayton Ltd that they were daily workers.

They further submit that the elements of evidence that prove that Nsengiyumva Ismaël was a regular employee include the work attendance lists that all the workers signed every morning; and they therefore assert that Nsengiyumva Ismaël was the Company's regular employee. They submit that they have only managed to find work attendance lists for the years 2016 and 2017, lamenting a fact of not finding the lists for the other years since their request for securing the missing lists from RBC was not honoured. They also argue that another evidence that prove that the plaintiffs worked for Hayton Ltd include RBC's letter of 27/09/2017, by which RBC clarified that the workers who helped for the project of MPPD (Medical Procurement Product Division) were for Hayton Ltd which had been awarded the tender, and any issue related to the workers should be referred to Hayton Ltd.

In terms of legal reference, they rely on article one, article 15, paragraph one, article 29 and article 33 of the Law n0 51/2001 of 30/12/2001 regulating labour in Rwanda which was into force at the time the plaintiffs worked for the Company till the time of their contract termination ; they state that the above articles indicate that he was a regular worker governed by unwritten contract, so that he could not be dismissed without notice and other benefits provided under the law. They also based their argument on the judgment RSOCAA 0023/09/CS opposing Phoenix

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Metal against Rwanteli Ntagara Innocent rendered by the Supreme Court on 18/06/2010 where the Supreme Court explained the illegal dismissal of a worker and the related terminal benefits.

Nsengiyumva Ismaël explains that Hayton Ltd has never picked him on casual workers recruiting waiting sites as Hayton Ltd puts it forth, arguing that from 2009 up to 2012, he was a regular employee of CAMERWA, but when the latter changed into RBC, he kept working within RBC but working for Solidarity Company which later changed to be Abakoranarukundo, later in 2014 they worked for Hayton Ltd. He concludes by sustaining that all these companies kept on passing him and his colleagues on each other, and for all that time, they always worked without written employment contract.

Counsel Mugenzi Elie who assists the Managing Director of Hayton Ltd, avers that Nsengiyumva Ismaël has never been the Company's regular employee, that he was a daily worker whom they always picked on the casual workers' recruitment waiting site, that if he had worked for Hayton Ltd from 09/09/2014 up to August 2017 as permanent worker as he alleges, he should be having a written employment contract as per the provisions of article 17 of the above mentioned Law regulating labour, which provides that any worker who worked for a period of more than six consecutive months, must have a written contract.

With regard to the work attendance lists that were produced as evidence proving that Nsengiyumva Ismaël was the Company's regular employee, Counsel Mugenzi Elie submits that though Hayton Ltd has never recognised such lists since they bore no signature by the Company's Managing Director, such lists and the accompanying signatures constitute an evidence that Nsengiyumva and his colleagues were daily workers; because it is clear that none was a regular employee as the names of the workers kept daily changing and it is obvious that none of them has ever worked for at least 5 days a week.

Ruzibiza Rodrigue, Managing Director of Hayton Ltd, argues that after concluding the contract with RBC, he used to pass by casual workers' recruitment waiting sites, and pick a certain number of casual workers depending on the available works of loading or unloading the vehicle, and Nsengiyumva Ismaël was among them. He submits that he always brought these workers to RBC and handed them over to the security personnel who then passed them on RBC employee for the work supervision. In the evening, all workers used to line up for pay for and each would get the daily pay, and that is why the Company had no related payroll, since the plaintiffs were just daily workers. DETERMINATION OF THE COURT

Both parties to this case agree that Nsengiyumva Ismaël worked for Hayton Ltd, they did not conclude a written employment contract. They disagree on the working modalities since Nsengiyumva Ismaël argues that he was working under an indefinite term employment contract because he regularly worked for the Company for a period of more than six consecutive months as provided under the law while Hayton Ltd argues that he was a daily worker whom they occasionally hired depending on the availability of the work. It is this issue that has to be first examined for determining whether Nsengiyumva Ismaël has been illegally dismissed from his employment, and whether he deserves related damages.

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Article one, paragraph 33 of the Law n0 13/2009 of 27/05/2009 regulating labour in Rwanda which was into force when Nsengiyumva Ismaël was still working for Hayton Ltd provided that a permanent worker is a worker who is hired for a fixed-term or an unspecified period that lasts for more than six (6) consecutive months with the same employer ; while sub-paragraph 34 provides that a daily worker is a worker who is hired on a day to day basis.

Article 15, paragraph one of the above mentioned Law provides that the contract of employment can be oral or written. It can be signed in the form that is suitable to the contracting parties [...]. All the means available may be invoked in its proving.

All the above mentioned articles denote that even when the worker has no written contract from his/her employer, a worker who has regularly worked for a period of at least six consecutive months for the same employer must be considered as a worker governed by employment contract because such situation implies that they have unwritten agreement. However, for asserting such fact, any worker who alleges to be so considered, must produce the elements of evidence that prove that he/she has regularly worked for a period of more than six consecutive

months.

Article 12, paragraph one of the Law n° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that the claimant must prove a claim, failing which the respondent wins the case. The provision of the above article corroborates the provision of paragraph one of article 3 of the Law n° 15/2004 of 12/06/2004 relating to Evidence and its production, which provides that each party has a burden of proving his/her allegations.

With regard to this case, Nsengiyumva Ismaël argues that he was the Company's permanent worker, the elements of evidence he puts forth include the work attendance lists and accompanying signatures that all workers signed every time they reported for work, a copy of a bank cheque used for withdrawing their salaries and a letter written by RBC asserting that he was employee of Hayton Ltd.

With regard to the statements of the Managing Director of Hayton Ltd that he does not recognize those lists as he did not sign on them, the Court finds that they should not be taken into consideration because, in accordance with the contract of 18/09/2015 concluded with RBC, he should not sign on them as, with reference to the "General conditions of the contract" which is also part of this agreement, both parties agreed that the inspection of the contract management would be conducted by Mr. Muhoracyeye Plagène, the Project Manager, and it is clear that the latter signed on the lists¹.

The work attendance lists that Nsengiyumva Ismaël produced before the Court as evidence to prove that he has been the regular employee of Hayton Ltd, indicate that he worked for the Company as follows: - For the year 2016: • For the month of April, he worked for 17 days;

1 CGG 25.2. For the Purpose of the contract management and inspection, the Project Manager shall be: RBC/MPPD/Muhoracyeye Plagène/warehouse operation manager.

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- For the month of May, he only worked for 2 days; • For the month of August, he worked for 15 days; • For the month of September, he worked for 18 days; • For the month of October, he worked for 16 days; • For the month of November, he worked for 19 days. - For the year 2017: • For the month of January, he worked for 8 days.

With reference to the elements of evidence that Nsengiyumva Ismaël has himself produced, the Court finds that his argument of being the Company's regular employee is not true. For instance, in the year 2016, it is clear that he has never worked for a period of six consecutive months, neither did he complete a month at work. While for the year 2017, he only worked for one month, and moreover for only 8 days. The Court finds that he was a daily worker for a salary of 1,363 Frw per day as evidenced by the letter of 30/05/2017 addressed by himself and his co- workers to RBC seeking an advocacy for salary increment. The Court finds that the fact that Nsengiyumva Ismaël does not admit that they wrote such letter cannot be taken into consideration because he relied on it before the Intermediate Court of Nyagatare by stating that it is included in the elements of

evidence which prove that they were permanent workers².

With regard to other elements of evidence he produced, the Court finds that the bank cheque he submitted does not constitute an evidence that can prove that he was the Company's regular employee, because such cheque does not indicate any other detail apart from the amount of money that was paid to Tuyisenge Gashugi. Concerning the letter written by RBC on 27/09/2017, the Court finds that such letter does not indicate that Nsengiyumva Ismaël has been the Company's permanent employee; rather, as stated by himself, the letter only indicates that he was one of the employees of Hayton Ltd and the latter has never denied such fact.

Basing on the article one, paragraph 33 and the article 15, paragraph one of the above mentioned Law n0 13/2009 of 27/05/2009, as well as on the abovementioned articles related to the elements of evidence and the elucidations that have so far been provided, the Court finds that Nsengiyumva Ismaël has produced no single evidence that can prove that he has regularly worked for Hayton Ltd for a period of at least six consecutive months for being considered as the worker governed by the contract. The Court therefore finds that Nsengiyumva Ismaël has not been illegally dismissed since he has never been the Company's permanent employee as it has been above explained.

Having noted that Nsengiyumva Ismaël has not been illegally dismissed from his employment due to the fact that he has never been legally permanent employee of Hayton Ltd, the Court finds that it is not necessary to examine the issue concerning the claimed damages related to his dismissal.

2. Whether Hayton Ltd must pay social security contributions for Nsengiyumva Ismaël

² See paragraph 7 of that case.

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Counsel Uwiragiye Pierre Célestin and Counsel Ndayambaje Gilbert who assist Nsengiyumva Ismaël submit that Hayton Ltd should have affiliated Nsengiyumva Ismaël to Rwanda Social Security Board (RSSB) from 09/09/2014; it should have paid for him the contributions for the fourth quarter of 2014, the contributions for 2015, 2016 and 2017 until August. They state that the above mentioned contributions must be computed with reference to a basic salary of 95,000 Frw x15%, that rate is indicated on the website of Rwanda Social Security Board: www.imisanzu.rssb.rw, such is equivalent to 14,250 Frw per month; therefore, they request to the Court to order to Hayton Ltd to affiliate Nsengiyumva Ismaël to Rwanda Social Security Board (RSSB), and remit all his unpaid social security contributions.

[32] Counsel Mugenzi Elie who assist the Managing Director of Hayton Ltd submits that the social security contributions should not be paid for Nsengiyumva Ismaël because he has never been the employee of Hayton Ltd. DETERMINATION OF THE COURT

Article 2, paragraph one of the Law n0 06/2003 of 22/03/2003 modifying and complementing the Decree-Law of 22/08/1974 relating to Social Security Scheme, provides that this Legislation concerns workers under Labour regulations, non-retired political appointees, and Statutes-governed public servants; while paragraph two of the above article stipulates that temporary workers shall as well be considered as workers mentioned under paragraph one of this article ...

Article 47, sub-paragraph 6 of the Law n0 13/2009 of 27/05/2009 governing labour in Rwanda when Nsengiyumva Ismaël was working for Hayton Ltd, provided that one of the employer's obligations is to affiliate the workers to the social security scheme.

The above mentioned articles denote that, in any circumstance, each worker's social security contributions must be remitted, even if he/she works in informal sector or he/she is employed for temporary services.

As it has been above explained, Nsengiyumva Ismaël was daily worker for Hayton Ltd for a period of time that is specified under paragraph 26 of this case. For all that period, he was entitled to have his social security contributions remitted as per the provisions of sub-paragraph of the article 47 of the above mentioned Law n0 13/2009 of 27/05/2009, since such is the employer's obligation.

Regarding the statements of Hayton Ltd that it should not pay the social security contributions for Nsengiyumva Ismaël, basing on the fact that he was never employed as worker governed by the contract, the Court finds that they are unfounded because each worker is entitled to the payment of social security contributions, irrespective of the employment modalities, the Court bases its position on the paragraphs one and two of article 2 of the above mentioned Law n0 22/03/2003 and sub-paragraph 6 of article 47 of the aforementioned Law n0 13/2009 of 27/05/2009.

With reference to all the above provided explanations, the Court finds that Hayton Ltd should approach Rwanda Social Security Board (RSSB) and proceed with the computation of the

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social security contributions to be paid for Nsengiyumva Ismaël for all the period he worked for the Company and such calculation will be based on 1,363 Frw per day as it has been above clarified.

3. Concerning the counsel and procedural fees at all levels of proceedings

Counsel Uwiragiye Pierre Célestin and Counsel Ndayambaje Gilbert who assist Nsengiyumva Ismaël argue that Hayton Ltd should pay to him 3,000,000 Frw for the counsel fee and 300,000 Frw for the procedural fee at the level of all courts, the total is 3,300,000 Frw and he should be refunded 60,000 Frw deposited at the level of the lower courts.

Counsel Mugenzi Elie who assist the Managing Director of Hayton Ltd avers that Nsengiyumva Ismaël does not deserve damages because it is him who dragged himself in unnecessary lawsuits; rather, he must pay to Hayton Ltd the damages amounting to 2,000,000 Frw for dragging the Company in unnecessary lawsuits and 1,000,000 Frw for the counsel fee.

Nsengiyumva Ismaël sustains that he should not pay to Hayton Ltd the damages as it seized the courts for exercising his rights for the sake of justice. DETERMINATION OF THE COURT

The Court finds that Nsengiyumva Ismaël deserves the damages for procedural and counsel fees he claims because it is evident that the judgment for which he sought review is tainted with injustice and it is clear that he had to hire a lawyer for assisting him for the case from the lower courts up to this level. However, the Court finds that the claimed sum of 3,300,000 Frw is excessive and unjustified; therefore, in its discretion, the Court grants to him the procedural and counsel fees as follows:

- 300,000 Frw at the level of the Intermediate Court of Nyagatare;
- 300, 000 Frw at the level of the High Court, Chamber of Rwamagana;
- 800,000 Frw at the level of the Supreme Court.

III. DECISION OF THE COURT

[43] Holds that the application filed by Nsengiyumva Ismaël seeking the injustice-related review of the judgment RSOCA 00013/2019/HC/RWG rendered by the High Court, Chamber of Rwamagana on 31/08/2022 has merit in part.

[44] Holds that the reviewed case is overruled on the issue concerning the social security contributions that Hayton Ltd must pay for Nsengiyumva Ismaël.

[45] Orders to Hayton Ltd to pay for Nsengiyumva Ismaël all his social security contributions for all the days he worked for the years 2016 and 2017, as above expounded.

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[46] Orders to Hayton Ltd to pay to Nsengiyumva Ismaël the following damages for procedural and counsel fees as follows:

- 300,000 Frw at the level of the Intermediate Court of Nyagatare;
- 300,000 Frw at the level of the High Court, Chamber of Rwamagana;
- 800,000 Frw at the level of the Supreme Court.

[47] Orders to Hayton Ltd to refund to Nsengiyumva Ismaël 60,000 Frw for the court fee he deposited at the level of the lower courts.

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