

RWANDA / JUDGMENT

SEMALI v. RWANDA ENERGY GROUP LIMITED (REG Ltd) English version

RADA 0006/13/CS

COURT

Supreme Court

DECIDED

15 May 2015

CASE / FILE NUMBER

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SEMALI v. RWANDA ENERGY GROUP LIMITED (REG Ltd)

[Rwanda SUPREME COURT – RADA 0006/13/CS (Hatangimbabazi, P.J., Rugabirwa and Mukamulisa, J.) May 15, 2015]

Administrative law – General Statutes for Rwanda Public Service – An employee for the public institution

is governed by the General Statute even though he/she was recruited on the labour contract as long as the law which establishes and determines the responsibilities, organisation and functioning of that institution provides it in its provision.

Administrative law – Taking of oath on the National Flag by the public servant – A public servant cannot disobey the laws and the instructions of the State of Rwanda regarding the taking of the oath under the pretext of the religious beliefs because the Rwanda is a secular state..

Fact : After the publication of the ministerial decree of the minister of Labour and Public service requesting the public service who did not take the oath to do so, EWSA currently known as Rwanda Energy Group Limited (REG Ltd) terminated the employment contract it had with Semali for refusal to take the oath. Semali sued it in the High Court claiming that Rwanda Energy Group Limited (REG Ltd) illegally terminated the employment contract because he was not supposed to take the oath because though he was working in the public institution he was not a public servant because he was governed by the employment contract, he was already employed there and he

couldn't take the oath holding the National Flag uttering the words which make up the oath because they are contrary to the belief of the Jehovah witness . That Court ruled that Rwanda Energy Group Limited lawfully terminated the employment contract.

Semali appealed before the Supreme Court claiming that he did not have to take the oath because he was not a public servant governed by the General Statute for Rwanda Public Service instead he was governed by the employment contract, and the decision dismissing him prejudices his religious beliefs which are protected by the Constitution of Rwanda and International laws which were ratified by Rwanda including Universal declaration of Human Rights an the African Charter on Huma rights and people and claims for various damages.

Rwanda Energy Group Ltd argue that it terminated the employment contract due to a reasonable ground because he refused to take the oath and moreover the ministerial decree required them to do so and non compliance leads to dismissal

Held : 1. An employee for the public institution is governed by the General Statute even though he/she was recruited on the labour contract as long as the law which establishes and determines the responsibilities, organisation and functioning of that institution provides it in its provision.

2. A public servant cannot disobey the laws and the instructions of the State of Rwanda regarding the taking of the oath under the pretext of the religious beliefs because the Rwanda is a secular state..

3.The employer do not pay damages for unfair dismissal when the court has held that the employee was fairly dismissed.

4. The employee should not pay damages for unnecessarily dranging the employer in court because there is no evidence demostrating that he did it voluntarily with the purpose to cause prejudice and he has the right to appeal against a judgment he is not conted with.5. The employer, who refuses to deliver this certificate of employment or omits one of the elements required or who delays to deliver this certificate, may be required to pay damages determined by the competent court. .

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The appeal has merit;

The appellant is hereby ordered to pay to the respondent 162.681 Frw;

The appelled judgment is partially over ruled;

Both parties are hereby ordered to jointly pay the court fees.

Statutes and statutory
instruments referred to:

Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative
procedure, article 162.

Law of 30/07/1888 regulating Contracts or obligations , article 258.

Law n° 13/2009 of 27/05/2009 regulating Labour in Rwanda, article 38 .

Law n° 34/2008 of 08/08/2008 on characteristics, description, ceremonial and respect of the national flag, article 13.

Law N° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service., article 29.

Law n° 43/2010 of 7/12/2010 eestablishing Rwanda Energy, Water and Sanitation Authority

(EWSA) and determining its responsibilities, organisation and functioning,article 11

Cases referred to : Judgment RADA 0062/12/CS, Kalisa Aristide v. Rwanda Social Security Board (RSSB) rendered by Supreme Court on 06/06/2014.
Judgment RADA 0065/12/CS, Nyirasafari Xavéra v,. Public Service Commission, rendered by the Supreme Court on 12/12/2014.
Judgment RADA 0067/12/CS, Niyonsaba Jean Claude v. RSSB rendered by the Supreme Court on 22/07/2014.
Judgment RSOCA 0001/14/CS , Musabyimana Marcel v. WASAC Ltd, rendered by the Supreme Court on 13/03/2015,

JUDGMENT

BACKGROUND OF THE CASE [1] This case was first instituted before the High Court, Semali Alfred suing EWSA Ltd currently known as Rwanda Energy Group Limited (REG Ltd) on the claim that it pays him various damages for unlawfully terminating the contract of employment they concluded on 03/04/1992 on the ground that he refused to take an oath as it was a requirement for all the civil servants who did not do it as par the ministerial decree of the Minister of Labor of 06/01/2011, in disregard of the fact that he could not take an oath because he was not a civil servant though he was working in that public institution since he was governed by the employment contract and he was already working there and he could not swear in holding the national flag and use the words of the oath since they are contrary to his faith, as he is Jehovah Witness. [2] That Court rendered the judgment holding that the claim of Semali Alfred is not founded and ordered him to pay EWASA Ltd 300, 000 Frw for unnecessarily dragging it into lawsuits. The Court explained that Semali Alfred had take the oath since he was a public servant

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though he was governed by the employment contract , and the fact he did not do that indicates that Rwanda Energy Group legally terminated the employment contract between them. [3] Semali Alfred appealed against that judgment before the Supreme Court asserting that the High Court had to order Rwanda Energy Group Ltd to award him various damages because it unfairly dismissed him. Rwanda Energy Group Ltd asserts that Semali Alfred had take the oath since he was a public servant, and the fact that he did not do that it dismissed him on a just motive and instead it lodged a cross appeal for him to pay it various damages. [4] This case was heard in public on 14/04/2015, Semali Alfred represented by Counsel Nkurunziza François Xavier and Rwanda Energy Group Limited represented by Counsel Ntaganda Kabera Festo. II. LEGAL ISSUES AND THEIR ANALYSIS: Whether Rwanda Energy Group unfairly dismissed Semali Alfred [5] Counsel Nkurunziza François Xavier the counsel for Semali Alfred asserts that the High Court interpreted the laws erroneously and held that Semali had take the oath as required by the Order of the Minister of Public Service of 06/01/2011, and disregarded that he had not take the

oath as he was not the civil servant governed by the Statute of public service, but he was instead governed by the contract of employment. He requested that Rwanda Energy Group Ltd pays him damages because it unfairly dismissed him. [6] He further asserts that even if Semali Alfred would have been the civil servant, he was not concerned with the formality of taking an oath provided by article 29 of the law No 22/2002 of 19/07/2002 establishing the general statute of public service, as he spent more than 18 years as an employee of Rwanda Energy Group Ltd, but instead basing on that article that formality is undertaken by a new civil servant and he would not have been dismissed before consultation of Public Service Commission as provided under article 93 of that law. [7] He adds that the fact that Semali Alfred was dismissed due to his faith implies that the decision of 11/02/2011 dismissing him is void since it is against his rights which includes his faith protected by the Constitution of the Republic of Rwanda in its articles 33, 45 paragraph 2 and 190, and international conventions Rwanda has signed including Universal Declaration of Human Rights in its article 18 and the African Charter of Human and People's Rights in its article 2,7,8,14, 15 and 19. [8] Me Ntaganda Kabare Festo the attorney of Rwanda Energy Group Ltd asserts that the Semali Alfred was dismissed on a legitimate motive since he refused to take an oath, yet the instructions of the Minister of Public Service stated above required all civil servants who did not swear in take the oath, the failure of which would lead to their dismissal. He explains that Semali Alfred had to comply with those instructions and thus takes an oath since he was a civil servant though he was worked in a public institution under the contract of employment, most especially by the time he signed that contract his employer notified him that in case of non-compliance all instructions given to him, he will be immediately dismissed. [9] He concludes asserting that in ruling on this case the Supreme Court would be inspired by the judgment RADA 0066/12/CS, Nshunguyinka Eric v Rwanda Social Security Board (RSSB) rendered by the Supreme Court on 22/07/2014, since the issue addressed in that case is similar to the one involved in this case relating to the dismissal of Semali Alfred for refusing to take an oath and the thus the argument of Semali Alfred that he was dismissed due to his faith is not founded as it is not related to the object of this case.

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THE VIEW OF THE COURT [10] Article 2 of the law No 22/2002 of 09/07/2002 establishing the Statute of Public Service provides that "this Law makes the General Statutes for Rwanda Public Service. It contains general provisions governing the management of Government employees. Public Service is made up of the whole of jobs and working posts in Rwanda public administrations." [11] With regard to knowing whether Semali Alfred was a Public servant or not article 11 of the law No 43/2010 of 7/12/2010 establishing Energy Water Sanitation and determining its mission, organization and functioning that was in force by the time Semali Alfred was dismissed provides that "the employee of EWSA are governed by the General Statute of Public Service" [12] Pursuant to the provisions of those article, the court finds that by the time Semali Alfred was an employee of Rwanda Energy Group Ltd, he was a public servant governed by the General Statute of Public Service though recruited by that institution basing on the contract of employment stated above, which means that he would have sworn in as required by

the instructions of the Minister of Public Service and Labor on 06/01/2011. [13] This is also in conformity with the the judgment RSOCA 0001/14/CS (Musabyimana Marcel v WASAC Ltd) rendered by the Supreme Court on 13/03/2015 were it held that he was a public servant though he was governed by the contract of employment and the General Statute of Public Service. [14] With regard to the oath of the public servants, article 29, paragraph one of the law No 22/2002 of 09/07/2002 establishing the general statute of public service provides that “Before starting his duties, every public servant takes the following oath : I..., in the name of the Almighty God, I hereby solemnly swear that I will discharge my duties, I will not dissappoint the Republic of Rwanda, I will respect the Head of State and other State organs and I strive for whatever is in the best interests of all Rwandans respecting the Fundamental Law and other Laws” [15] As for the procedures of taking oath by public servants, article 13 of the alw No 34/2008 of 08/08/2008 determining the structure, meaning, use and the respect of the national flag, provides that «People in executive power, legislative power and the judiciary provided for the laws and others provided for by special laws that governs them take an oath before the national flag. The person who takes an oath holds it with the left hand and rise the hand. The person whose arm is amputated or disabled one arm or both wears it. » [16] The dossier contains the letter n° 035/19.23 of 06/01/2011, the Minister of public service and labor addressed to all directors of public institutions giving them instructions to make take oath all civil servants who did not take an oath due to various reasons and notified them that civil servants who will not take an oath for any ground whatsoever will be dismissed with immediate effect by the competent authority for the misconduct of non-compliance with rules and regulations governing them after a 15 days notice requesting them to take an oath which they refused. [17] In the file, there is also the letter of 27/10/2010, the Director of RECO&RWASCO that became Rwanda Energy Group Ltd addressed to Semali Alfred requesting him explanations relating to the non-compliance of the swearing in policy. In the letter of 29/10/2010, Semali Alfred replied to his employer that the reason why he did not take an oath, they used the national flag and the oath different with his conscience because he is a Jehovah Witness. On 25/01/2011, the employer gave him a notice of 15 days for him to take an oath and Semali Alfred did not do that until he was dismissed on 11/02/2011 and indicated by the letter in the dossier. [18] The Court finds that Semali Alfred who was a civil servant by the time he worked for Rwanda Energy Group had to take an oath stated above holding the national flag as provided under

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article 14 of the aforementioned law, and the fact that he did not that indicates that there no fault on behalf of Rwanda Energy Group Ltd by dismissing him due his misconduct of not taking an oath as provided under the instructions of the Minister of Public Service and Labor stated above, which means that he not dismissed due to his faith as he contends. [19] The Court further finds that as held in several cases rendered by this Court1 Semali Alfred could not base on his faith and thus refuses to comply with the laws and orders of Rwanda relating to the swearing in of civil servants stated above, since according to article 16 of the Constitution of the Republic of Rwanda of 04/06/2003 as amended to date, the Rwanda is a secular State and all individuals are equal

before the law and are protected by the Constitution of equal footing without any discrimination.² [20] As held on in the case RADA 0062/12/CS, *Kalisa Aristide v Rwanda Social Security Board (RSSB)* rendered by the this Court on 06/06/2014, the Court finds that so long as there is no proof produced by Semali Alfred indicating that he had ever took an oath during his employment with Rwanda Energy Group, he cannot invoke his seniority of 18 years for him to refuse to comply with the instructions of the Minister of Public Service and Labor providing that all civil servants and those who are already in public service without having taken an oath due to various reasons must take an oath, in case of failure, they shall be dismissed. [21] And also as held in the case RADA 0062/12/CS stated above, the Court finds that the fact that Semali was dismissed due to the refusal take the oath in cannot be as misconduct that would require the consultation of the Public Service Commission so long as the employer has complied with all procedures provided for by the instructions of the Minister of Public Service and Labor stated above before his dismissal. [22] Further to that, the Court finds that his recourse before that commission yielded since its executive secretary addressed to him a letter of 01/04/2011 notifying him that he cannot change the decision taken by his employer to dismiss him as long as that it is obvious that he did not respect laws and orders relating to the swearing in of civil servants ordering every civil servant to take an oath holding the flad of the Republic of Rwanda.

2. Whether Semali Alfred should be awarded the damages for unfair dismissal [23] Counsel Nkurunziza François Xavier the counsel of Semali Alfred asserts that Rwanda Energy Group Ltd must award him various damages relating to his unfair dismissal which include the notice compensation provided under article 32 of the law No 13/2009 of 27/05/2009 governing labor in Rwanda since it did notify him that he committed a gross misconduct within 48 hours as provided for by the law, damages due to unfair dismissal provided under article 33 of that Law and the accompanying allowance provided for by article 35 of that Law. [24] The attorney of Rwanda Energy Group Ltd asserts that it cannot pay to Semali Alfred damages he claims since he was dismissed due to his refusal to take an oath as indicated above, but it paid him 295, 294 Frw of accompanying allowance as indicated in the certificate of 07/03/2011 in the file Semali himself submitted to the Court. VIEW OF THE COURT 1 Judgment RADA 0065/12/CS, *Nyirasafari Xavéra v Public Service Commission*, rendered by this Court on rwaciwe 12/12/2014; Judgment RADA 0067/12/CS, *Niyonsaba Jean Claude v RSSB* renderd by this Court on 22/07/2014. 2 Article 1, paragraph one of the Constitution of the Republic of Rwanda provides that “ The State of Rwanda is an independent Republic and the origin of all powers, it is democratic, it aims at the development of citizens and it is secular”, and article 16 provides that “all persons are equal before the law. The law protects them on equal footing without any discrimination whatsoever”

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- [25] Article 258 of the Civil Code Book III provides that “Any act of the person that causes damage to another compels the author of the fault arising therefrom to repair the damage caused” [26] According to the provisions of that article, the Court finds that Rwanda Energy Group Ltd should not award Semali Alfred damages due to unfair dismissal which include the notice compensation, indemnities, and accompanying allowance since it did not dismiss him in violation of the law as explained above.
3. Whether Semali Alfred be awarded damages for not being issued the work certificate [27] Me Nkurunziza asserts that the High Court held that Rwanda Energy Group Ltd cannot award Semali Alfred for it did not give him the work certificate because he did not request it and the employer refuses to deliver it to him, in disregard that according to article 38 of the law No 13/2009 of 27/05/2009 governing labor in Rwanda, Rwanda Energy Group Ltd as his employer, it was the one with the duty to give him that work certificate concurrently with his final dues. [28] He further argue that the Court contradicted itself when it held that Semali Alfred was a public servant governed by the general statute of public service, but in examining the issue relating to damages for not being given the work certificate it based on the law governing labor. [29] The attorney of Rwanda Energy Group asserts that it should not award damages to Semali Alfred damages he claims for it did not give him the work certificate since there is no evidence he produced indicating that he requested it to Rwanda energy and the latter denies it to him. THE VIEW OF THE COURT. [30] The Court find that in case the general statute of public service does not provide for the way of determining damages for an employee due to not being of the work cerificate concurrently with the final dues, nothing would prevent the court from basing on the law governing labor in Rwanda to determine the quantum of damages to be awarded to that employee. [31] Article 38 of the law No 13/2009 of 27/05/2009 governing labor in Rwanda provides that “when the contract of employment expires, the employer must establish and put at the disposal of the worker together with his/her final dues a certificate of employment, showing exclusively the date of entry and exit and the nature of the employment or occupied posts.” Its second paragraph provides that “The employer, who refuses to deliver this certificate of employment or omits one of the elements stipulated in the preceding paragraph or who delays to deliver this certificate, may be required to pay damages determined by the competent court.” [32] The Court finds that the fact that Rwanda Energy Group as an employer did not give Semali Alfred the work certificate the day it dismissed him of the 11/02/2011as even its attorney admits that, and so far in the dossier, there is no proof that Rwanda Energy Group Ltd delivered to him that certificate, it must qualified as the employer who refused to deliver it according to the provisions of article 38, paragraph 2 of the law No 13/2009 of 27/05/2009 governing labor in Rwanda, which provides that the employer who dismisses the employer immediately deliver to him that certificate, thus it was Rwanda Energy Group Ltd that had to prove that it immediately delivered it to him. [33] The Court thus finds that Rwanda Energy Group Ltd must pay Semali Alfred damages due to the non-delivery of the work certificate, and he is therefore awarded damages equal to his one month salary according to the

provisions of article 38, paragraph 2 of the aforementioned law, that is 137, 319 RwF3.

4. Whether the cross appeal of Rwanda Energy Group Ltd has merit. 3This salary is indicated in the court submission of 27/07/2011, on which Semali Alfred based claiming damages before the High Court.

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[34] Ntaganda Kabare Festo the counsel of Rwanda Energy Group Ltd asserts that he instituted the cross appeal requesting that Semali Alfred pays it 2,000,000 RwF of damages for unnessessarily dragging it into lawsuits ‘according to article 258 of the Civil Code Book III and 1,000,000 Frw of procedural fee and the counselfees, which in total is 3,000,000 Frw n addition to what it was awarded at the first instance. [35] Counsel Nkurunziza François Xavier asserts that Semali Alfred cannot award Rwanda Energy Group Ltd damages as he did not sue it groundlessly, but he instead sued it for the purpose of proving that it unfairly dismissed him. VIEW OF THE COURT [36] Article 162 of the Law No 21/2012 of 14/06/2012 relating to civil, commercial, labor and administrative procedure provides that “Any person who was a party to the proceedings in the first instance may appeal the judgement if he/she has an interest therein, except when the law provides otherwise.” [37] And article 258 of the Civil Code Book III provides that “Any act of the person that causes damage to another compels the author of the fault arising therefrom to repair the damage caused” [38] Pursuant to the provisions of article 258 stated above, the Court finds that Semali Alfred should not pay damages claimed by Rwanda Energy Group Ltd due to abuse of procedure, since there is no evidence indicating that he sued it maliciously, but instead according to article 162 of the aforementioned law, he has the right to appeal against the judgment so long as he not satisfied with the ruling therein. [39] The Court also finds that Semali Alfred should not pay Rwanda Energy Group Ltd the legal counsel’s and proceedings fees since each party has lost and won on some points in this case. [40] The Court thus finds that Semali Alfred must award Rwanda Energy Group Ltd 162, 681 RwF equal to the difference between 300,000 RwF of damages he was condemned to pay it at the first instance and 137, 319 RwF of damages due to non-delivery of the work certificate it had to pay him. III. DECISION OF THE COURT [41] It holds that the appeal instituted by Semali Alfred is founded on some points; [42] It holds that the incidental appeal of Rwanda Energy Group Ltd has no merit; [43] It ordered Semali Alfred to pay Rwanda Energy Group Ltd 162, 681 Frw; [44] It ordered that the ruling in the judgment n° RAD 0090/11/HC/KIG rendered by the High Court is changed in some points; [45] It ordered Semali Alfred and Rwanda Energy Group Ltd to jointly pay court fees equal to 100,000 Rwf, that is to say that the half equal to 50,000 RwF each.

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