

SEBERA v. RWANDA DEVELOPMENT BOARD (RDB)

[Rwanda SUPREME COURT – RADA 0024/13/CS (Mukamulisa, P.J., Mukandamage and Gatete, J.) November 14, 2014]

Administrative law – Dismissal due to the job suppression – It is unlawful dismissal where an employer does not demonstrate the way reached the decision to provisionally suspend an employee and to dismiss him/her automatically on the position he occupied – Instructions n° 03/19.21 of 10/07/2009 relating to procedure of doing the performance for an employee, articles 4 and 11.

Administrative law – Temporally suspension due to job suppression – It is unlawful dismissal when temporally suspension stretching to six month – Law n° 22/2002 of 09/07/2002 of general statute for Rwanda public service, articles 68 -3 and 121.

Damages – The damages resulting from unlawful dismissal – Any act of man which causes damage to another obliges the person by whose fault it happened to repair it – Law of 30/07/1888 relating to contracts or obligations, article 258.

Facts: Sebera filed a case against RDB in the High Court claiming that he was unlawfully dismissed, hence prayed for diverse damages including salary of six months; moral damages, for being deprived of the opportunity to get to retirement, general damages for loss of employment, for being defamed and counsel's fees. The Court held that he was not unlawfully dismissed, to the contrary of law because he was interdicted due to the reform RDB underwent, and also it established job profile summary for various offices and the requirements for a person who had to occupy the office in charge of Human Resources, to which the plaintiff was attached. RDB found out that Sebera did not qualify for that post which led to his dismissal.

This Court also noted that he was dismissed after the expiration of the six months of temporally suspension, and at the expiry of that period then he was informed that his employment contract is terminated based on article 121 of the law instituting the General Statutes for Rwanda public service relating to dismissal due to working post suppression, and also the damages which Sebera prayed for failure to be issued with work certificate, cannot be awarded to him because he did not demonstrate the legal basis for his request.

Sebera was not satisfied with the rulings of the case and he appealed to the Supreme Court claiming that the Judge made contradictions when declaring that RDB made job profile summaries for various offices and the requirements for being appointed on the post of director for human Resources but the judge relied on article 121 of the General Statutes for Rwanda public service which provides for suppressing the post he occupied he finds that he was unlawfully dismissed because RDB did not evaluate him as provided for by Instruction established by MIFOTRA relating to the performance evaluation of employees.

RDB states that it dismissed Sebera lawfully after informing him that he did not fulfil the requirements and he was given all what the law provides for; concerning the performance evaluation, carried out in conformity performance which done, was comply with the Instruction of MIFOTRA because if such were not complied with the Law the cabinet meeting would have rejected it.

Held: 1. Given that RDB did not evaluate the employee in order to determine the marks he/she got which prove he/she has high performance or poor performance, because those would determine whether he would temporally be dismissed or should be terminated immediately as the ministerial instructions provides for and the fact he went beyond suspension period; it is considered as unlawful dismissal.

2. Any act of man which causes damage to another obliges the person by whose fault it happened to repair it.

**Appeal has merit in part;
With the court fees to RDB.**

Statutes and statutory instruments referred to:

Law of 30/07/1888 relating to contracts or obligations, article 258.

Lawn° 22/2002 of 09/07/2002 of general statute for Rwanda public service, article 68 -3, 121.

Instructions n° 03/19.21 of 10/ 07/ 2009 relating to procedure of doing the performance for an employee, articles 4 and 11.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Sebera Jean Damascène filed a case against RDB in the High Court claiming that he was unlawfully dismissed, he prayed for various damages including salary for six months amounting to 5,823,144Frw which is calculated from the day of temporary suspension up to the day he received the dismissal letter, 58,231,400Frw of the moral damages for RDB's failure to comply with the law governing civil servant which is equivalent to the salary of five years that remained in order to reach the retirement period; 2,693,052Frw of being deprived the opportunity to get the retirement benefits, 12,258,347Frw of being unemployed, 10,000,000Frw for defamation, 2,000,000Frw of the procedural and Counsel's fees.

[2] The Court held that the claim of Sebera had no merit, court further it motivated that he was not unlawfully dismissed because, in restructuring, RDB made job profile summary and the requirements for a person to occupy the post of a director of Human Resources, the required diploma for that post was a master's degree in human resources management or bachelor degree in it but with the experience on job, then RDB noted that Sebera did not fulfil them.

[3] The Court further found that he was dismissed after the expiration of the six months of temporary suspension because he received a letter that he had been temporally suspended effective on 05 April, 2010 and terminated since 15 October, 2010 citing among other provisions of law, including article 121 of the law instituting the General Statutes for Rwanda public service which stipulates in relation to dismissal of an employee due to working post suppression, therefore that was sufficient and it did not prevent him from seeking further explanations which may not have been contained in the letter.

[4] The Court motivated that the damages which Sebera prays for failure to be granted the work certificate for having worked with RDB would not be awarded because he does not demonstrate the provision on which he relies in requesting for them, as this would be the ground for the Court to determine whether RDB was late in issuing that certificate.

[5] Sebera was not satisfied with the rulings of the Case and he appealed to the Supreme Court stating that the Judge made contradictions when declaring that RDB made job profile summaries for various offices and the requirements for being appointed to the post of the director for human Resources but the judge relied on article 121 of the General Statutes for Rwanda public service which provides for suppressing the post he occupied. The appellant also finds although the letter does not mention the requirements he did not fulfil, he fulfilled all the requirements for that post, as he holds a master's degree in social sciences and administration coupled with the required experience.

[6] Sebera further argues that he was unlawfully dismissed because RDB applied the procedure which is contrary to the Ministerial instruction n^o 03/19.21 of 10/07/2009 on performance evaluation of the public servant established by MIFOTRA.

[7] The hearing was conducted in public on 30 September, 2014, Sebera Jean Damascène represented by Counsel Nyiringabo Théoneste, RDB assisted by Counsel Zawadi Geoffrey.

II. ANALYSIS OF THE LEGAL ISSUES

Determine whether Sebera was unlawfully dismissed.

[8] Counsel Nyiringabo, states that the judge made contradictions in paragraph 28 and 30 of the judgment copy, he explained that in paragraph 28 he found that during the reform of professional categories in RDB, they made a job profile summary and the requirements for being appointed to the post of the Director for Human Resources, that job profile summary, indicating the professional categories and the requirements for a person who must be appointed to the post of a director for Human Resources management and it indicated also that the competent person must possess a master's degree in public or business administration, or human resources management or a related field or a bachelor's degree, but in paragraph 30 the judge actually declared that the letter dismissing Sebera did not provide any motive but also added that it is not enough to be termed as unlawful dismissal since he was informed of the reason for being suspended which was to reform RDB.

[9] Counsel Nyiringabo argues in addition that the judge based on article 121 of the general statute for Rwanda public service which stipulates about post suppression which he occupied, therefore to not possess the requested degree and the post suppression it cannot be applied at the same time as the reason for dismissing Sebera, to the contrary, it can be one of them.

[10] Counsel Nyiringabo, added that the Judge stated that according to what is provided for in paragraph 28 of the judgment on the issue of the qualification, what is evident this matter was farfetched as Sebera holds a bachelor's degree in economics and administrative science since 1981, particularly as the judge indicated (see paragraph 10 and 11 of the judgment) that there was no evidences relating to the performance evaluation mentioned by the counsel for RDB that were demonstrated except mere arguments that were raised, before ombudsman office and to the Court. He continued to argue how surprising it was for the Judge to base on the evidence which he earlier had disqualified, hence affirming that Sebera does not meet the

requirement, that is to say in relation to qualifications and work experience, and concluding that he was lawfully dismissed, while on the other hand the letter of dismissal does not state that he lack either qualifications or experience.

[11] Sebera and his counsel state that he was unlawfully dismissed because in the restructuring of public institutions, there are established rules which apparently were not complied with as demonstrated by the office of ombudsman in his letter dated 14 December, 2010, clearly indicating that the procedure which RDB employed in this exercise were contrary to the MIFOTRA Instructions N^o 03/19.21 of 10/07/2009 relating to procedure of carrying out performance appraisal for employees.

[12] Zawadi, Counsel for RDB indicated that after merging of eight (8) various public institutions into one institution of RDB in 2010 there was internal restructuring and reform of services and departments, and as a result of various employees merging at RDB, it happened that employees had same job descriptions and they could not all be maintained at RDB, some of them had to inevitably move.

[13] Counsel for RDB continued to argue that there was need to identify which employees would be maintained in employment and the criteria was in accordance with the performance evaluation, the qualification required for various posts, and the availability positions that were available on new RDB structure. It was in that context, that some employees lost their jobs, for either insufficient capacity, or their position were missing on the new structure, lack of the required qualifications and many others. Hence Sebera was dismissed because he lacked the required qualifications for the office he earlier occupied, as he did not have the master's degree, as for experience would be an added advantage.

[14] The counsel for RDB noted that Sebera was lawfully dismissed contrary to the harassment which he alleges, he was temporarily suspended during the reform process continued to be remunerated at 2/3 of his salary with right to all other benefits provided for by the law. He was later informed that he did not fulfil the requirement for the post he had earlier occupied and hence dismissed and be granted benefits provided for by the law, including the "work certificate".

[15] Counsel Zawadi further states that the performance evaluation was done in accordance with the instruction of MIFOTRA, besides, Sebera was issued with the results which were also confirmed by the Cabinet meeting, and said that if this had not conformed to the law, the Cabinet would have rejected it.

THE VIEW OF THE COURT

[16] Regarding the performance evaluation and the placement of public servants after public service's institution restructuring approved by the cabinet meeting on 26 June, 2009, article 4 of Instructions N^o03/19.21 of 10/ 07/ 2009 of the Minister of the public Service and Labour provides for that the performance evaluation calculated out of 100 marks, based on:

Performance assessment of 2006, 2007 and 2008 (50%);

The overall conduct of an employee manifested since January 2009 up to June 2009 (50%)

Whereas article 11 of the Ministerial instructions provides that after the performance evaluation, each institution shall submit to MIFOTRA:

List of the employees' names who exhibited the high performance and the posts which they are requesting to occupy in the new structure;

List the employee's names who have the high performance but who did not get the posts on the structure due the mis-match between their profile and the new job profile or due to the suppression of the work;

List the employee's names who exhibited the low performance and should be temporally suspended from the public institutions;

List the employee's names who exhibited the poor performance and should be automatically dismissed and not be granted the dismissal compensation;

The amount of terminal benefits and such other benefits granted to the employees who should be temporally dismissed.

[17] The document which is in the file on page 36 demonstrates that for a person to occupy the post of Head of Human Resource at RDB, had to have a Master's degree or equivalent in public or business administration, human resource management or related area, or a first class university degree with a combination of relevant academic qualifications and experience may be accepted in lieu of advanced university. The document indicated that Sebera had a bachelor degree in economics and administrative science, had had various training, relating to human resource management, he had one year of experience on that post and had other 11 years as the director of administration and finance but took a decision that he lacks qualification and experience required.

[18] A dismissal letter written to Sebera dated 25 January 2011, RDB based on articles 68-3 and 121 of Law n° 22/2002 of 09/07/2002 of general statute for Rwanda public service concerning suppression of the work and the automatic dismissal, and however it is not the case because that position was still available. Besides, it could not have been feasible that Sebera be dismissed at the same basing on the ground that he lacks qualification and experience required as demonstrated above, and on the fact that there had been suppression of the post he occupied as the counsel for RDB alleged. To this effect, he ought to have been given clear explanations underlying his dismissal.

[19] Court finds therefore, that RDB does not demonstrate how it reached the decision to provisionally suspend Sebera and the subsequent automatic dismissal from the post he occupied, because he was not evaluated as to determine whether he had high performance, low performance or he had poor performance, which would have been the basis to assess whether he should be temporally dismissed or should be automatically dismissed as the ministerial instructions mentioned above provides.

[20] Court finds that Sebera was suspended from job on 09 April, 2010 for a period of six months, but dismissed on 25 January 2011, and be informed that his dismissal began to run on 15 October,2010, he received the dismissal letter on 15 April, 2011, this shows that he spent some time in total dilemma, which did not comply with article 65 of the law n°22/2002 of 09/07/2002 mentioned above, which provides that the period of provisional suspension must not exceed six months.

[21] Given the preceding statements, Court finds that Sebera's dismissal was unlawful.

b. The damages requested by Sebera.

[22] Nyiringabo, the counsel for the appellant prays that the Court should change the decision made by the High Court, and then it confirms that he was unlawfully dismissed, and be given the damages as he filed against them.

[23] Zawadi, the counsel for RDB states that the appeal of Sebera has no merit, that the Court could not award him the damages and the other requested money because they have no basis.

THE VIEW OF THE COURT

[24] Court finds that as demonstrated above, Sebera was unlawfully dismissed which led him to be unstable in both employment and in his private life, he deserves to be awarded damages for this.

[25] However, Court finds that law n^o 22/2002 of 09/07/2002 establishing the general statute for Rwanda public service which was in force during Sebera's dismissal, like Law 86/2013 of 11/09/2013 which is in force now and which replaced the previous one, they did not provide the procedure to award damages on the issue of an employee who is unlawfully dismissed, to that effect, article 258 of the CCB.III which stipulates that any act of a person which causes damage to another obliges the person by whose fault it happened to fix it, would apply in this case, and in the opinion of court, he is awarded damages amounting to six months of his last salary which is remunerated by RDB, it means 970,524Frw x 6 =5,823,144Frw.

[26] Concerning the general damages, the Court finds that the damages for the period he spent in provisional suspension, Sebera cannot file against them because he was remunerated 2/3 of the salary as the law provides, so he could not be remunerated the whole salary, whereas the damages regarding with the remaining period to be retired and the fact that he was deprived of the opportunity to be retired, to be unemployed, and for defamation, the Court finds that he should not be awarded them because what he effectively lost, was compensated, as a result of unlawful dismissal, regarding defamation, he did not adduce the evidences to the effect.

[27] Regarding damages resulting from the procedural and counsel fees, the Court finds that he must be awarded them, but since he has not demonstrated how he computed the 2,000,000Frw which he has prayed for, he is awarded 1,000,000Frw in Court discretion on both level they pleaded in.

III. THE DECISION OF THE COURT

[28] Decides that the appeal of Sebera Jean Damascène has the merit in part;

[29] Orders RDB to pay Sebera Jean Damascène the damages amounting to 5,823,144Frw and 1,000,000Frw of the procedural and the counsel fees, all together is 6,823,144Frw;

[30] Orders RDB to pay the Court fees.