

INTERSEC SECURITY COMPANY Ltd v. NSENGIYUMVA

[Rwanda HIGH COURT – RSOCA0120/15/HC/KIG (Murererehe, P.J.) November 20, 2015]

Labour law – Unlawful dismissal – Gross negligence – It is unlawful dismissal when the employer dismisses an employee on the ground of gross negligence without respecting the time limit provided by the law – Gross negligence is a fault committed by the employee that constitutes a breach of the obligations arising from the employment contract or employment relationship to the extent that it renders it impossible to maintain the employee for the duration of the notice period – Law N°13/2009 of 27/05/2009 regulating labour in Rwanda, article 1 (21), 32.

Facts: In 2010, Nsengiyumva concluded an employment contract as a training officer with Intersec Ltd; he was dismissed in 2015 without notice on accusation that he committed a gross negligence of recruiting employees who did not pass the job exam.

Nsengiyumva filed a claim at Intermediate Court claiming that he was unlawfully dismissed, that Court found his claim with merit and awarded him the various damages.

Intersec Security Company Ltd appealed to the High Court on the ground that the previous Court held that Nsengiyumva was dismissed without respecting the 48 hours provided by the law and moreover they demonstrated that they had to first conduct an inquiry and in addition to that it awarded him damages for unlawful dismissal, compensation, notice and damages for being dragged into unnecessary lawsuits which he did not deserve because he was dismissed due to a gross negligence.

In his defence, Nsengiyumva argues that he continued to work during the period in which they allege that he committed a gross negligence, if at all he had committed it, he would have been immediately dismissed, regarding the damages he was awarded he argues that they were relevant because the Court found that he was unlawfully dismissed, thus he prays that the appealed judgment be upheld. He also filed a cross appeal arguing that the previous Court made an error in adding the damages he was awarded and consequently he was not awarded the full amount and finally he requests to be awarded counsel fees.

Concerning the total of damages which was wrongly added up, Intersec Security Company Ltd claims that it is groundless because he did not deserve it in the first place, since he was dismissed due to gross negligence. Regarding the counsel fees, it states that it is the one that deserves it since it was dragged into lawsuits.

Held: 1. Gross negligence is a fault committed by the employee that constitutes a breach of obligations arising from the employment contract or employment relationship to the extent that it renders it impossible to maintain the employee for the duration of the notice period, therefore the fact that Nsengiyumva was dismissed on 04/02/2015 after more than three months working that indicates that an employer did not consider it as a gross negligence. Gross negligence invokes immediate termination of the employment contract within 48 hours, because the employment relationship is no longer impossible, thus Nsengiyumva was unlawfully dismissed.

2. An employee unlawfully dismissed is awarded various damages that include damages for unlawful dismissal.

3. It is evident that there was an error in the addition of damages, therefore it must be corrected.
4. When the counsel fees requested is excessive it can be awarded in court's discretion.

**Appeal lacks merit.
Cross appeal has merit.
The Court fees deposits cover the expenses.**

Statutes and statutory instruments referred to:

Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 9.
Law N°13/2009 of 27/05/2009 regulating labour in Rwanda, article 1 (21) and 32.
Decree of 30/07/ 1888 relating to contracts or conventional obligations, article 258.

Cases referred to:

Euro Trade International Sarl v. Rwakirenga Pascal, RSOCAA 0027/11/CS, rendered by the Supreme Court on 13/3/2012.

Authors Cited:

J.Pélissier, A.Supiot and A.Jeamnaud, Droit du Travail, 22 éd., Paris, 2004, p.612.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 17 March 2010 Nsengiyumva entered into an employment contract with Intersec for the post of training officer, until 2015 when he was dismissed without notice on allegation that he committed a gross negligence, which he did not commit. In the judgment RSOC0026/15/TGI/GSBO, the Intermediate Court of Gasabo found the claim of Nsengiyumva with merit on some grounds and held that he was unlawful dismissed, hence it ordered Intersec to pay damages worth 2,401,800Frw and reimburse 50,000Frw he deposited for court fees.

[2] Intersec was not satisfied with the rulings and consequently appealed to this Court, Counsel Kayihura Didace and Kalimba, representing Intersec argue that their ground of appeal is the Court holding that Nsengiyumva was not dismissed within 48 hours despite the fact that they proved to the court that they had to first conduct the inquiries and also that Nsengiyumva was awarded various damages whereas he was not unfairly dismissed because he was dismissed due to a gross negligence.

[3] Counsel Kazayire, assisting Nsengiyumva submit that the appeal lacks merit because Nsengiyumva was not in charge of supervising exams because he was a training officer and also that he continued working even during the period they allege that he committed that a gross negligence which would not be the case because he would have been immediately dismissed; he prays that the appealed judgment be upheld. He also raise a cross appeal on the ground that the Court erred in adding up the total of the damages and consequently it awarded him insufficient damages and he also requests that his client be awarded the counsel fees.

[4] The following issues will be examined in this judgment :

The issue of the Court holding that Nsengiyumva was not dismissed within 48 hours despite demonstrating before it that inquiries had to be conducted first.

The issue of damages awarded to Nsengiyumva despite not having been unfairly dismissed, because he was dismissed due to a gross negligence.

Cross appeal

The issue of the Court awarding him insufficient damages due to error in adding up the sum.

Whether Nsengiyumva should be awarded the counsel fees

II. ANALYSIS OF THE LEGAL ISSUES

The issue of the Court holding that Nsengiyumva was not dismissed within 48 hours despite demonstrating before it that they had to first carry out an investigation.

[5] Counsel Kayihura Didace and Kalimba Daniel state that the Court held that the time limit of the 48 hours were not respected, while the committee made a report on 3 January 2015 indicating the staffs who committed the fault of recruiting employees who did not pass the exam and submitted to the Intersec administration, which also took a decision of dismissing them on 30 February 2015 and Nsengiyumva was dismissed on 4 February 2015 after an inquiry into a gross negligence of the fraudulent recruitment he committed. The Court disregarded that the investigation was carried out purposely to collect evidence proving that he received that bribe and also expose those that Nsenguyimva recruited who were not qualified, this conduct constitutes a gross negligence, thus the time limit was respected.

[6] Kazayire, the counsel for Nsenguyumva argues that the latter was not in charge of supervising exams because he was a training officer. And it is also not true that the fault was committed on 03rd because the list indicates that he conducted the training on 10th, and also that he continued working even during the period they allege that he committed that gross negligence which would not be the case because he would have been immediately dismissed. She further argues that the cited committee report of 30 January 2015 even though it was presented for the first time, it is of no use to them because they fabricated it with the purpose to dismiss him, therefore there is no gross negligence committed and even if it was committed the time limit of 48 hours were not respected.

[7] Article 32 of the Law N°13/2009 of 27/05/2009 regulating labour in Rwanda provides that “any termination of contract without notice or without having observed the notice period compels the responsible party to pay the other party an allowance corresponding to the salary and other benefits from which the worker would have benefited during the notice period that has not been effectively respected. However, a termination of contract may take place without notice in the case of gross negligence by one of the parties. In that case, gross negligence is notified to the other party within forty-eight (48) hours”

[8] The Court finds that the alleged lists on which the non-shortlisted candidates were included was made on 1/10/2014, and this is what the employer considers as a gross negligence because Nsengiyumva included on the list the candidates who did not pass the exam after receiving a bribe, nonetheless as it was motivated in first instance, Nsengiyumva was dismissed on 04/02/2015 after spending more than three months working, therefore, this implies that the employer did not consider it as a gross negligence because a gross

negligence instantly terminates the contract between the employee and the employer, since their employment relationship is no longer possible as explained by the law scholars that “serious (gross) negligence is an act or set of acts imputable to the employee that constitutes a breach of the obligations arising from the employment contract or labor relations of such importance that it renders it impossible to maintain the employee during the notice period”¹ and it was also explained by the judgment RSOCAA0027/11/CS rendered by the Supreme Court whereby it ruled that the gross negligence is a grave fault which renders the relationship between employer and employee impossible to the extent that it has to be terminated without waiting for the expiration of the contract ².

[9] Therefore, the fact that Intersec claims that it dismissed Nsengiyumva due to gross negligence but the employee remained in service demonstrates that there was procedural impropriety in the termination of his employment contract because the gross negligence is notified to the employee within 48 hours, which was not the case for Nsengiyumva because after 1/10/2014 on which the said lists which included those who did not pass the exam was done, remained in service; thus, this signifies that the employer did not consider it as a gross negligence since it would have immediately terminated the employment contract. This is the reason why the Court finds that his employment contract was unlawfully terminated.

[10] The counsel for Intersec state that the reason Nsengiyumva was not immediately dismissed was because they had to first carry out the investigation which was concluded by the management meeting on 03/02/2015; that decided to dismiss him on 04/02/2015, therefore the time limit of 48 hours was respected.

[11] The Court findings the statements of Intersec with no merit because a gross negligence as explained by the law scholars is a grave fault which renders the relationship between the employee and employer impossible and have to be terminated immediately. Therefore accordingly this Court finds that when Intersec realised that it had to first carry out an inquiry, it had not to exceed the 48 hours to notify the employee about it thus spending over three months on the basis that it was still carrying out the inquiry, the court should not rely on it to consider it a gross negligence because the legal procedure were violated. The reason it is called gross negligence is because the committed fault is so grave to the extent that the employer could not continue to relate with the employee, but if the Intersec kept working with Nsengiyumva for more than those three months it means that his fault was not taken as a gross negligence since not every faults at work is considered as gross negligence. And also to allege that after carrying out the investigation there was a management meeting on 03/02/2015 in which it was decided to dismiss him and he was effectively dismissed on 04/02/2015, this Court finds that those should have been done immediately after realising that the employee committed that gross negligence, but the fact that they waited for that period without proving that it is the management meeting which had to confirm that gross negligence so that he be temporary suspended in order to wait for that meeting which should also not take long like this without making a decision. Consequently, the grounds of Intersec lack merit.

[12] Basing on the motivations above, the Court is of the view that if at all Nsengiyumva was dismissed due to gross negligence the time limit of 48 hours in which he should have notified of that gross negligence had to be respected, since it was not complied with that is

¹ J.Pélissier, A.Supiot et A. Jeammaud, Droit du Travail, 22 éd., Paris, 2004, p.612.

² Supreme Court, judgment, RSOCAA 0027/11/CS, Euro Trade International S.a.r.l in the name of its representer v. Rwakirenga Pascal, p.6, 13/3/2012.

why it is considered that he was unlawfully dismissed as provided by article 1(21) of the Law N°13/2009 of 27/05/2009 regulating labour in Rwanda which states that unfair dismissal is the termination of employment contract by the employer without justifiable reason or observance of procedures established by law.

[13] On the issue concerning gross negligence in this case, the counsel for Intersec argue that Nsengiyumva was dismissed due to gross negligence which resulted from receiving a bribe and falsification of the document at the time he supervised the exam and included those who obtained 0 marks on the list of those qualified for the job. In his defence, Nsengiyumva argue that he working as a training officer not as an exam supervisor.

[14] The Court finds that as indicated by the employment contract, Nsengiyumva was a training officer for the new recruits. Therefore, the Court finds that the allegation that he supervised the exam and included those who failed the exam on the list groundless, because Intersec does not produce evidence to prove it even the exam copies of those who failed does not indicate that it was Nsengiyumva who supervised that exam and even there is no administrative document to prove that he was the one put in charge of supervision, so that it can be established that he was the one who included them on the list, because it is obvious that it was not in his duties. In addition to that also to allege that in his testimony of 8/1/2015, he agreed that he used to supervise exams, it is different from the exams which Intersec is talking about because in that document he demonstrated that when he was training the newly recruited personnel he gave them an exam and found out that eighteen (18) of them are illiterate, which is different because he did not supervise the job examination rather he conducted a training for those who were already put on the recruitment list and it is at this juncture that he indicated that he notified the Deputy operations, who asked him his hidden motivation as they were already recruited, therefore this emphasises that they did not produce evidence proving that Nsengiyumva was one who recruited those who failed the exam because it is not among his responsibilities.

[15] Furthermore, the allegation that Nsengiyumva was bribed in order to recruit those who failed exams and also falsified the document, the court finds that they did not produce any evidence proving the modalities he received that bribe or falsified the document, especially that during his interrogation on 1/06/2015 after her dismissal he never admitted what he was being questioned that he recruited some people who were not qualified after receiving a bribe, he denied all those allegations and demonstrated that he never recruited any employee as there is a committee in charge of that and after recruiting them their files were kept in HR Officer, he only remained with the list of those confirmed by the committee in charge of recruitment, who are the ones he trained. Therefore Intersec's allegations are groundless because they are not substantiated as article 9 of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides that every plaintiff must prove a claim.

[16] The Court further notes that those elements which Intersec alleges that constitute a gross negligence comprising of receiving a bribe and falsification of the document which are offences punishable by Rwanda criminal laws however they do not demonstrate that Nsengiyumva was prosecuted and convicted of those offences, in order to be relied on as an evidence proving that a gross negligence was indeed committed. Therefore, the fact that there is no judgment convicting him of those crimes, also emphasises that gross negligence was not substantiated.

[17] Therefore, the Court finds that besides the procedural flaw in the dismissal of Nsengiyumva due to the gross negligence as motivated above, when he continued working after accusing him of gross negligence for over a period of three months, on which the court based its ruling that the 48 hours were not respected, also the Intersec do not have evidence to support the alleged gross negligence as it was motivated above, hence this ground of appeal lacks merit.

The issue of damages awarded to Nsengiyumva despite not having been unfairly dismissed, because he was dismissed due to a gross negligence.

[18] Counsel Kayihura Didace and Kalimba Daniel argue that Nsengiyumva was awarded damages for unlawful dismissal, compensation, notice and those for being dragged unnecessary into lawsuits despite the fact that they proved that his dismissal was due to a gross negligence he committed, thus those damages should not have been awarded.

[19] Kazayire, the counsel for Nsengiyumva states that those damages are relevant since the Court found that he was unlawfully dismissed.

[20] The Court finds that the damages for unfair dismissal, compensation, notice and those for being dragged into lawsuits awarded to Nsengiyumva are pertinent since the Court found that he was unlawfully dismissed and this Court finds the same; therefore, he had to be awarded damages resulting from that dismissal as are provided by the labor law.

[21] With regards to the issue that he claimed for 450,000Frw in damages for unfair dismissal but instead the Court awarded him 1,200,000Frw which exceeds what he prayed for; the Court finds that is not true because in his additional submission he indicated that he is requesting for damages worth 1,813,800Frw which is equivalent to his salary multiplied six times, but the Court awarded him damages equivalent to his salary multiplied 4 times which is 1,209,200Frw, therefore, the damages he was awarded were conformity with article 33 of the aforementioned labour law, thus their arguments are groundless.

Cross appeal

The issue of the Court awarding him insufficient damages due to wrong addition of the total amount.

[22] Kazayire, the counsel for Nsengiyumva states that the Court miscalculated the total amount of the awarded damages and consequently was given little amount because he was supposed to be given 2,513,800Frw instead of 2,401,800Frw, which should be rectified.

[23] Counsel Kayihura Didace and Kalimba Daniel argue that the claim should not be considered since the damages he was awarded had no basis because he was dismissed due to a gross negligence.

[24] The Court finds merit in the arguments of Nsengiyumva because the damages he was awarded are 1,209,200Frw, for unfair dismissal, 302,300Frw for compensation, 302,300Frw for notice and 700,000Frw of the procedural and counsel fees all amounting to 2,513,800Frw instead of 2,401,800Frw, it is obvious that the Court wrongly added the total, therefore it should be rectified so that Nsengiyumva be awarded all damages worth 2,513,800Frw instead of 2,401,800Frw.

Whether Nsengiyumva should be awarded counsel fees.

[25] Kazayire, the counsel for Nsengiyumva argues that he should be awarded counsel fees worth 800,000Frw.

[26] Counsel Kayihura Didace and Kalimba Daniel state that instead Intersec should be the one awarded damages because it was dragged into lawsuits.

[27] The Court finds that the appeal of Intersec has no merit and Nsengiyumva hired the service of the counsel. It is the reason why his claim should be granted basing on article 258 of the Civil code book III which provides that “any act of man, which causes damage to another obliges the person by whose fault it happened to repair it”, however, it awards 500,000Frw in the discretion of the Court on this instance of appeal because the amount he requests is excessive.

III. DECISION OF THE COURT

[28] Finds the appeal of INTERSEC SECURITY COMPANY Ltd in the name of its managing director without merit.

[29] Holds that the cross appeal of Nsengiyumva Ndekezi J. Damascene has merit.

[30] Overturns in part the appealed Judgment RSOC0026/15/TGI/GSBO.

[31] Orders that the total amount of the damages which Nsengiyumva Ndekezi J. Damascene should be paid is 2,513,800Frw instead of 2,401,800Frw as had been held at the first instance.

[32] Orders INTERSEC SECURITY COMPANY to pay 500,000Frw of the counsel fees on the appeal level to Nsengiyumva Ndekezi J. Damascene.

[33] Holds that the Court fees deposits covers the expenses of the case.