

MITIMITUJE v. BANK OF KIGALI Ltd

[Rwanda SUPREME COURT – RSOCAA 0010/12/CS (Mutashya, P.J., Rugabirwa and Gakwaya, J.) June 13, 2014]

Labour law – Termination of employment contract – Unfair dismissal – To dismisses one or more employees due to economic and technological reasons, without ranking the employees in accordance with the performance, professional qualification, time spent in the enterprise and social charges of each worker and that ranking is done without informing the labour inspector in writing, It is considered as unfair dismissal – Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, articles 1(21) and 34.

Labour law – The average salary – Computation of monthly average salary – The average monthly salary shall be obtained by dividing by twelve the total salary the worker has received for the last twelve months exclusive of allowances allocated to the worker to enable him/her to discharge his/her duties, therefore the balance sheet bonus, performance bonus, payments for leave are not included in the average salary since he/she gets them once a year; moreover, the contributions to the social security fund and those of supplementary pension are not computed while determining the average salary because these are savings made for the benefit of the employee – Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, articles 35 and 77.

Labour law – Damages resulting from unfair dismissal – Computation of those damages – Any unfair termination of the contract may result in damages; where the worker has worked for the employer for a period which is longer than 10 years, damages shall not go beyond the salary of nine months (9) – Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 33(3).

Labour law – Notice – Computation of compensation – In case of termination of an employment contract with prior notice, the notice period must be one month for a worker who has worked for one year or more and the employer must pay employment contract termination or dismissal benefits to an employee who has completed a period of at least twelve consecutive months of work – Employment contract termination accompanying allowance shall not go in any case below three times the average monthly salary for the worker with working experience of between ten and fifteen years in the same institution – Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 27(2).

Labour law – Employment leave – Leave allocation – The employer must pay the retiring worker an allocation equal to the average of salaries the worker received for the last twelve months and other benefits he/she is entitled to as provided for by the employment contract – Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 55.

Labour law – Work certificate – When the contract of employment expires, the employer must establish and put at the disposal of other worker together with his /her final due – A certificate of employment, showing exclusively the date of entry and exit and the nature of the employment or occupied post. The employer, who refuses to deliver this certificate of employment or omits one of the elements or delays to deliver this certificate, may be required to pay the damages determined by the competent Court – Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 38.

Labour procedure – Limit of the subject – Procedural costs and lawyer's fees – The subject matter of the claim shall be determined by the claims made by the respective parties and these claims shall be indicated in the plaintiff's and defendant's submissions – The judge

shall rule only and on all that which is referred to the court – A party who win the case in some of his claims is awarded the procedural and counsel fees at the Court's discretion – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 4 and 7.

Fact: Mitimituje concluded the open-ended employment contract with Bank of Kigali Ltd since 26 September 1995 and later on 23 October 2009 that Bank terminated the contract because Mitimituje does not have the professional qualification and competence required for the new posts which were established in its restructuring.

Mitimituje sued Bank of Kigali Ltd in the Intermediate Court of Nyarugenge after the failure of both parties to reach an amicable settlement before the labour inspectorate requesting to be paid various damages composed of those resulting from unlawful dismissal, dismissal compensation, dismissal notice, performance bonus of 2009, balance sheet bonus of 2009, leave allowance of 2009 together with its balance for 2008, employment certificate which is incomplete, procedural costs and counsel fees.

The Court ruled that Bank of Kigali Ltd dismissed unlawfully Mitimituje Gaëtan because it dismissed him without demonstrating the required diploma at the time of its restructuring and the new structure which was based on to dismiss him appeared on 27 October 2009 while it had already dismissed him from work on 23 October 2009. Moreover, it dismissed him without first ranking its employees according to their performance, professional qualification, experience within the same institution and social charges; therefore Bank of Kigali Ltd should pay him the damages by deducting what it paid him at the time of his dismissal and those damages must be computed on the average salary which comprises the basic salary plus housing allowances, transport allowances, family allocation, cash allowance, social security fund contribution fees, supplementary pension fees, as well as leave allowance; but it should pay him after deducting the employment income tax.

Bank of Kigali Ltd appealed in the High Court which ruled that it did not unlawfully dismiss Mitimituje because it could not include him on the list of the employees while he did not possess the requested diploma at the time of its restructuring; It also dismissed the damages he was awarded before except the damages resulting from incomplete employment certificate plus the amount which is not appealed for; namely leave allowance, procedural and counsel fees.

The same Court motivated that the average salary which must be considered comprises the basic salary, housing allowances, transport allowances, cash allowance, and family dependants' allowance. It added that the transport allowances should not normally be included in that salary but it must be included therein because his employer has so wanted while the social security fund contribution fees, supplementary pension fees as well as leave allowance should not be considered in computing the average salary because those are to help the employee in his/her work.

Mitimituje appealed in the Supreme Court stating that the High Court should have held that Bank of Kigali Ltd dismissed him unlawfully and ordered it to pay to him various damages which are calculated on the average salary which includes the balance sheet bonus, performance bonus, leave allowance, social security fund contribution fees, supplementary pension fees but, in the alternative, in case those fees may not be included in that salary, he should be paid them apart as fees he has right on.

Bank of Kigali states that it did not unlawfully dismiss Mitimituje; therefore it should not pay him any damages since it paid him money for the dismissal compensation at the time of his

dismissal, but in case the Court may find it otherwise, it should award him damages basing on the salary which was confirmed by the High Court.

Held: 1. It is considered as unfair dismissal when an employer dismisses one or more employees because of restricting the organization of the institution due to economic and technological reasons, without ranking the employees in accordance with the performance, professional qualification, time spent in the enterprise and social charges of each worker or without informing the labour inspector in writing.

2. The average monthly salary shall be obtained by dividing by twelve the total salary the worker has received for the last twelve months exclusive of allowances allocated to the worker to enable him/her to discharge his/her duties. Therefore the balance sheet bonus, performance bonus, payments for leave are not included in the average salary since s/he gets them once a year when s/he has got the grades indicating that s/he performed well and when Bank of Kigali has made profits; moreover, the contributions for the social security fund and those for supplementary pension are not included in the average salary because these are savings made for the benefit of the employee.

3. Any unlawful termination of the contract may result in damages. Where the worker has worked for the employer for a period which is longer than 10 years, damages shall not go beyond the salary of nine months (9) and this is why Mitimituje is awarded six (6).

4. In case of termination of employment contract with prior notice, the notice period must be one month for a worker who has worked for one year or more and the employer must pay employment contract termination or dismissal benefits to an employee who has completed a period of at least twelve (12) consecutive months of work. Employment contract termination accompanying allowance shall not go in any case below three (3) times the average monthly salary for the worker with working experience of between ten (10) and fifteen (15) years in the same institution.

5. The employer must pay the retiring worker an allocation equal to the average of salaries the worker received for the last twelve months and other benefits he/she is entitled to as provided for by the employment contract; therefore Bank of Kigali should pay that amount to Mitimituje but after deducting the amount it gave him at the time it dismissed him, concerning the leave allocation of 2009 Mitimituje should not get the payment because he was dismissed before the end of that year.

6. The money for performance bonus can be given to the employee once a year, but the employer is not obliged to pay it and the balance sheet bonus can be given out at least in the third month of the following year depending on the profit made by Bank of Kigali in the previous year.

7. When the contract of employment expires, the employer must establish and put at the disposal of other worker together with his /her final due a certificate of employment, showing exclusively the date of entry and exit and the nature of the employment or occupied post. The employer, who refuses to deliver this certificate of employment or omits one of the elements or delays to deliver this certificate, may be required to pay the damages determined by the Court.

8. The subject matter of the claim shall be determined by the claims made by the respective parties and these claims shall be indicated in the plaintiff's and defendant's submissions and the judge shall rule only and on all that which is referred to the court; the decision of deducting the income tax on the damages which awarded to Mitimituje by the Court must be overruled since that amount are not salary but it is the damages awarded by the court.

9. A party who win the case in some of his claims is awarded the procedural and counsel fees at the Court's discretion.

**Appeal has merit in parts.
Court fees to the defendant.**

Statutes and statutory instruments referred to:

Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, articles 21, 27(2), 29, 33(3), 34, 35, 38, 55 and 77.

Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 4 and 7.

No case referred to.

Authors cited:

Jean-Claude Javilier, Droit du Travail, 6ème édition, 1998, Paris, LDGJ, p.303.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 26 September 1995, Mitimituje Gaëtan concluded the open-ended contract with Bank of Kigali Ltd. On 22/10/2009 that Bank terminated the contract because Mitimituje Gaëtan does not have the professional qualification and competence required for the new posts which were established by in its restructuring.

[2] After both parties failed to reach an amicable settlement before the labour inspector, Mitimituje Gaëtan sued Bank of Kigali Ltd in the Intermediate Court of Nyarungenge requesting that it should pay him various damages which are mentioned above in the claim and It ordered Bank of Kigali Ltd to pay 3,043,458Frw in damages for unfair dismissal, 2,028,972Frw of dismissal compensation, but after deducting 1,840,572Frw which it paid him at the time of his dismissal and he should be paid thus 188,400Frw and it should pay him also 338,162Frw of the notice allowance minus 306,762Frw which it paid him and should thus be paid 31,400Frw; moreover it should pay him also 511,270Frw for performance bonus of 2009; 511,270Frw for balance sheet bonus of 2009; 533,585Frw for leave allowance of 2009 and the difference of the leave allowance of 2008; 2,028,972Frw for being given incomplete employment certificate; 200,000Frw of the procedural costs and 500,000Frw of the counsel's fees, all making the total of 7,548,355Frw; but Bank of Kigali Ltd should pay this money after deducting the employment income tax therefrom (TPR).

[3] That Court motivated that Bank of Kigali Ltd dismissed unlawfully Mitimituje Gaëtan because it dismissed him without showing the required diploma at the time of its restructuring and that the new structure which was based on to dismiss him appeared on 27 October 2009 while it had already dismissed him on 23 October 2009 and it has done so without first raking its employees according to their performance, professional qualification, experience within the same institution and social charges as provided for by article 34 of Law no13/2009 of 27/05/2009 regulating labour in Rwanda and article 58 of the Statute of 30/12/2003 regulating the employees of that Bank.

[4] In addition, the same Court explained that Bank of Kigali Ltd should pay to Mitimituje Gaëtan damages calculated on the average salary comprising 142,739Frw of the basic salary + 94,578Frw of housing allowance + 30,845Frw of transportation allowance + 3,500Frw of wife and children allowance + 35,100Frw of cash allowance + 8,173Frw equals to 3% of social security fund contributions + 11,332Frw of supplementary pension equal to 3% of 226,647Frw and on top of that 11,895Frw of leave allowance must be added to that salary leave allowance and all totaling 338,162Frw.

[5] Bank of Kigali Ltd appealed in the High Court which held that Bank of Kigali Ltd did not dismiss Mitimituje Gaëtan unlawfully, dismissed the following damages he was awarded before: 3,043,458Frw for unfair dismissal; 511,270Frw of performance bonus; 511,270Frw of balance sheet bonus; 31,400Frw of the notice allowance and 188,400Frw of the dismissal compensation and ordered Bank of Kigali Ltd to pay 1,227,048Frw of the damages for giving him an incomplete employment certificate which is with also the fees which were not appealed for which are: 533,585Frw of leave allowance, 200,000Frw of the procedural costs and 500,000Frw of the counsel fees.

[6] The High Court motivated that Bank of Kigali Ltd did not unlawfully dismiss Mitimituje Gaëtan because it could not include him on the list of employees in case he did not possess the required diploma at the time of its restructuring; but that the damages he is entitled to must be calculated on the average salary of 306,762Frw indicated on payment slip drafted for him by his employer instead of 338,162Frw he was awarded by the previous judge.

[7] That Court motivated that the average salary which must be based on is 306,762Frw comprising the basic salary, housing allowance, transport allowance, cash allowance, wife and children allowance and that the transport allowance should not normally be included in that salary but it must be included therein because his employer has so wanted; but for the social security fund contributions fees; supplementary pension fees and leave allowance should not be included in the average salary because those allowances are meant to help the employee in his work duties according to provisions of article 35 of Law n°13/2009 of 27/05/2009 regulating labour in Rwanda.

[8] Mitimituje Gaëtan appealed to the Supreme Court stating that the High Court should have ruled that Bank of Kigali Ltd dismissed him unlawfully and ordered it to pay to him various damages calculated on average salary which includes the balance sheet bonus, performance bonus, leave allowance, social security fund contributions, supplementary pension fess, but, in the alternative, in case those fees may not be included in that salary, he should be paid them apart as fees he has right on.

[9] Bank of Kigali Ltd states that it did not dismiss Mitimituje Gaëtan unlawfully and it cannot therefore pay to him any damages and on top of that it paid to him the dismissal compensation which is calculated on the average salary of 307,762Frw, but in case the Court may find it otherwise, It should calculate damages basing on that salary.

[10] The case was heard in public on 13 May 2014 where Mitimituje Gaëtan was represented by Counsel Karongozi André Martin whereas Bank of Kigali Ltd was represented by Counsel Rutembesa Phocas.

II. ANALYSIS OF THE LEGAL ISSUES

1. Whether Bank of Kigali Ltd unlawfully dismissed Mitimituje Gaëtan.

[11] The Counsel for Mitimituje Gaëtan states that the High Court decided that Bank of Kigali Ltd did not dismiss him unlawfully because it could not include him on the list of their employees before dismissing him from the post of cashier he occupied allegedly because he did not possess the required diploma at the time of its restructuring to continue working disregarding that it did not demonstrate the basis of its ruling whereby it held that Mitimituje Gaëtan did not fulfill the requirements because the new structure and the communication informing all its staff of its restructuring that was planned in the two following months were published on 27 October 2009 while he had already been dismissed on 23 October 2009. Moreover, he was not dismissed because he did not hold the bachelor degree because the dismissing letter states that he is dismissed because he does not have the performances, qualifications and competencies for work notwithstanding that Bank always gave him the good performance marks, performance bonus and promoted him due to his good performance.

[12] In addition, he submitted that even if Mitimituje Gaëtan did not fulfill all requirements for continuing his work as that Court ruled, it should have decided that he was unlawfully dismissed because Bank of Kigali Ltd dismissed him without establishing the list ranking its employees according to their performance, professional qualification, time spent in the enterprise and social charges of each worker before dismissing him as that Bank was obliged by article 34 of Law no13/2009 of 27/05/2009 regulating labour in Rwanda and article 58 of the Statutes of 30/12/2003 regulating its staff.

[13] He explains that if Bank of Kigali Ltd established that list, it could not dismiss Mitimituje Gaëtan because it would have found that he fulfilled requirements spelled out in the law to continue working for the former because he has not yet reached the retirement age since he was born in 1966 and was dismissed in 2009 while he was not in probation but rather he had spent 14 years working for it and he never received any professional disciplinary sanction and he was rather being promoted in grade and given the performance bonus each year because of good performance. He finds that the fact that Bank of Kigali disregarded all this and dismissed him, it unlawfully dismissed him and should therefore pay him the various damages including those resulting from unfair dismissal.

[14] The counsel for Bank of Kigali Ltd states that it did not unlawfully dismiss Mitimituje Gaëtan as the High Court ruled but it dismissed him from work on 23 October 2009 because he did not hold the bachelor degree which was required for the post of cashier because he rather possesses a diploma in carpentry which was no longer befitting for that post according to new structure approved by the Board of Directors of that Bank on 30 September 2009.

[15] He states, in addition, that the fact that Mitimituje Gaëtan did not possess the bachelor degree required at the time of the restructuring of Bank of Kigali Ltd was enough for the latter to dismiss him from work without including him on the list of its employees who would keep the positions and communicating the that list to the labour inspector because the criteria for establishing that list like the professional performance, level of education and the experience provided for by article 34 of Law no 13/2009 mentioned above are not considered as cumulative conditions to be assessed to determine whether the employee should remain or be dismissed; but rather failure to fulfill one of those conditions is enough for an employee to be dismissed.

[16] Furthermore, he argues that the fact Bank of Kigali Ltd did not inform the labor inspector of that list before dismissing Mitimituje Gaëtan from work cannot be considered as it unlawfully dismissed him from work because the purpose of communicating that list to the labor inspector is solely to inform him/her of the changes within the restructured institution.

VIEW OF THE COURT

[17] Article one, paragraph 21 of Law n°13/2009 of 27 May 2009 regulating labor in Rwanda provides that “unfair dismissal is a termination of an employment contract by the employer without justifiable reason or observance of the procedure established by the law”. Article 29 of that Law provides that “an open-ended contract may always be terminated by the will of either of the parties but for legitimate motives. This termination is subject to prior notice given by the party that takes initiative of termination.” Whereas article 34 of the aforementioned Law provides that “the employer may proceed to dismiss individual or collective worker(s) due to economic reason, internal reorganization or consecutive restructuring for economic difficulties or technological transfers with the aim of protecting the competitiveness of the enterprise. In such case the dismissal ranking shall be done in accordance with performance, professional qualification, time spent in the enterprise and social charges of each worker. The employer informs the competent labor inspector in written form”.

[18] The legal scholar named Jean-Claude Javilier, in his book titled *Droit du Travail* says that the employer may dismiss an employee from work when there exists a real and serious cause justifying the dismissal. He explains that a cause is real if it is significant and is objectively assessed while it is serious if it has a certain gravity that makes it impossible for the employee to continue working, and makes the dismissal a must without damage to the company¹.

[19] For the purpose of this case, the file indicates that Mitimituje Gaëtan concluded an open-ended employment contract with Bank of Kigali Ltd on 26 September 1995. On 23 October 2009, that Bank terminated that contract because Mitimituje Gaëtan does not possess the professional performance and qualification required for the for the new posts in the new structure adopted during its restructuring (This is to inform you that your performance, your qualifications and competencies did not match the requirements of the job profiles given in the new structure. Therefore, you are hereby informed that Banque de Kigali Ltd would like to terminate you services with effect from Friday, 23rd October, 2009).

[20] There is also, in case file, a Communication which Bank of Kigali addressed to all its staff on 27 October 2009 informing them that the Board of Directors meeting held on 30 September 2009 adopted the new job structure to improve service to their customers and that, apart from its Heads of Departments (Chefs des Départements) and their Managers (Gérants) who were already placed in the new posts by the same Board, other employees will be progressively placed in the new positions in period of the two following months and that those who will be placed in those new posts will start receiving the new salary effective from 01 January 2010.

¹ “The existence of a real and serious cause justifying dismissal, a cause is real if it presents a character of objectivity, which excludes the prejudices and personal convenience. The cause is serious as it has a certain gravity that makes it impossible, without damage to the company, the continuation of work and necessitates dismissal” by Jean-Claude Javilier, *Droit du Travail*, 6ème édition, 1998, Paris, LDGJ, p.303.

[21] Moreover, there are, in the case file, the Statute regulating the employees of Bank of Kigali Ltd of January 2004 which stipulates that at the end of each year, its employees will be appraised basing on the following criteria: disciplinary sanctions imposed on the employee in that year, his/her behaviour in general, professional performance and skills (aptitudes professionnelles: sens d'organisation et connaissances techniques) and the his/her concern for its improvement (souci de perfectionnement).

[22] In light of the above legal provisions and the explanations, the Court finds that Bank of Kigali Ltd unlawfully dismissed Mitimituje Gaëtan because it dismissed him without showing that he doesn't possess the required diploma for the new post of cashier he used to occupy in order to make it clear that he does not have the professional skills and competencies to continue working for it in the same position. Moreover, the new structure and the Communication to all staff were published on 27 October 2009 while Bank of Kigali Ltd had already dismissed Mitimituje Gaëtan on 23 October 2009.

[23] In addition, the Court finds that another evidence demonstrating that Mitimituje Gaëtan was unfairly dismissed is that Bank of Kigali Ltd dismissed him without proving that it has ever written to him reprimanding his performance and dismissed him without drawing up the list of its employees and communicating it to the labor inspector, as provided for by article 34 of the Law mentioned above, in order to determine whether he was really to one to be dismissed at that time due to failure to fulfill the requirements. Therefore, Bank of Kigali Ltd must pay damages to him for this; but the Court has to first examine the issue of the average salary which must be based on to compute those.

2. Determining elements of the average salary which should be based on for calculating damages for Mitimituje.

[24] The Counsel for Mitimituje Gaëtan states that the High Court ruled that he is entitled to damages calculated basing on the average salary of 306,762Frw and it disregarded that balance sheet bonus, performance bonus, leave allowance, social security fund and supplementary pension contribution fees which his employer was paying for him should have been added on that salary.

[25] He explains that the balance sheet bonus and the performance bonus must be included in the average salary because since these are benefits provided for by article 76 and 77 of the Statute regulating the employees of Bank of Kigali Ltd that the employer paid its employees every year when Bank of Kigali Ltd had made profits (balance sheet bonus) and also paid them performance bonus for their good performance.

[26] He continues to argue that another thing showing that the balance sheet bonus fees and performance bonus he was paid must be included in the average salary is that the legal scholar named Nsengiyumva Métusera wrote in his book *Droit Social*, Manuels de Droit Rwandais, pp.81-82, that the performance bonus is considered as a part of the salary when the employer decides that it will be paid in general, with consistency and on permanent basis (généralité, constance et fixité) and Raymond Guillien and Jean Vincent explained in their book titled *Lexique des termes juridiques*, Dalloz, 12ème édition, 1999, p.476, that supplements such as performance bonuses and gratuities are often added on the basic salary performance bonus.

[27] In addition, he requests to include leave allowance in the average salary by considering 142,739Frw for 2008 he was paid in 2009. He, furthermore, requests that the

salary should include 5% of the money for social security fund as well as supplementary pension fees monthly paid by his employer instead of 3% considered by the previous judge

[28] The Counsel for Bank of Kigali Ltd states that it should not pay to Mitimituje Gaëtan any other damages because it paid him the dismissal compensation calculated on the average salary of 307,762Frw when it dismissed him as held by the High Court.

[29] He explains that the balance sheet bonus and the performance bonus should not be included in the average salary because according to the provisions of article 76 and 77 of the Statute regulating the employees of Bank of Kigali Ltd, Mitimituje Gaëtan has no absolute right on them because he could get them or not at the end of the year depending on whether he performed well or not and whether Bank of Kigali Ltd made profits or not.

[30] Regarding leave allowance, he states that they cannot be included in the average salary because it is not the salary he got every month; but rather it is money which he received when he took leave.

[31] He submits, in addition, that Mitimituje Gaëtan was paying himself 3% of 272,417Frw for contributions to social security fund whereas his employer was paying for him 5% of in the same amount as contribution to the social security fund and in SONARWA which should not be included in the average salary because it is money saved for the employee which he gets when appropriate time comes; he should not therefore be paid them as damages and it cannot pay him supplementary pension fees because he was already paid them.

VIEW OF THE COURT

[32] The last paragraph of Article 35 of Law n° 13/2009 of 27/05/2009 regulating labor in Rwanda provides that “the average monthly salary shall be obtained by dividing by twelve the total salary the worker has received for the last twelve months exclusive of allowances allocated to the worker to enable him/her to discharge his/her duties” whereas article 77 of that Law provides that “the salary on the basis of which the leave payment, the notice period payment and damages shall be obtained by making the average for the last twelve months the worker worked for”.

[33] In this case, Mitimituje Gaëtan requests that the balance sheet bonus, the performance bonus, leave allowance, 5% of social security fund contributions and supplementary pension contributions which his employer paid for him should be included in the average salary which must be based on for calculating the damages he is entitled to.

[34] Basing on the laws mentioned above, the Court finds that the balance sheet bonus and the performance bonus could not be included on the average salary because they do not constitute the salary he was paid monthly; but he was rather paid them once per year when Mitimituje Gaëtan got good performance appraisal results and when Bank of Kigali Ltd had made profits.

[35] The Court finds that leave allowances cannot be included in the average salary since they are paid to the employee once per year when he/she takes leave.

[36] The Court finds that the money paid for Mitimituje Gaëtan as contributions to social security fund and supplementary pension cannot be included in the average salary because they are among elements of the salary, but rather money saved for the employee.

[37] According to those explanations, the Court finds, therefore, that the average salary which must be based on for calculating the leave allowance, notice allowance and damages is composed of money computed in the following way: basic salary of 142,739Frw + 94,578Frw of housing allowance + 35,100Frw of cash allowance + 3,500Frw of wife and children allowance whereas 30,845Frw of transport allowances should not normally be included in that salary but shall be included since his employer has so wished, all make the total of 306,762Frw as ruled by the High Court and agreed by Bank of Kigali Ltd itself.

3. Regarding damages requested in this case.

3.1. Regarding unlawful dismissal damages.

[38] The Counsel for Mitimituje Gaëtan states that Bank of Kigali Ltd must pay him 3,859,398Frw for unlawful dismissal damages as explained above and which are computed on the average salary comprising balance sheet bonus, performance bonus, leave allowance, 5% of social security fund contributions and supplementary pension fees paid for him by his employer because the High Court did not demonstrate the laws it based on in dismissing 3,043,458Frw of unlawful dismissal damages he was awarded at the first instance even if it was calculated on the basis of the wrong average salary.

[39] The Counsel for Bank of Kigali Ltd states that Mitimituje Gaëtan should not be awarded those damages because Bank of Kigali Ltd did not commit any fault by dismissing him and he cannot be awarded those damages since he calculated on the wrong average salary.

VIEW OF THE COURT

[40] Regarding the unlawful dismissal damages, article 33 paragraphs one and three of Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda provides that “any unlawful termination of the contract may result in damages. Where the worker has worked for the employer for a period which is longer than 10 years, damages shall not go beyond the salary of nine months”.

[41] For the purpose of this case, the documents available in the case file indicate that Mitimituje Gaëtan worked for Bank of Kigali Ltd for 14 years, which is from 26 September 1995 up to 23 October 2009 when it unlawfully dismissed him as explained above.

[42] Basing on those explanations, the Court finds that since Bank of Kigali Ltd dismissed Mitimituje Gaëtan unlawfully, it must pay moral damages to him equal to the average salary of six months which is calculated in the following way: 306,762Frw x 6 = 1,840,572Frw.

3.2. Concerning the notice allowance and dismissal compensation.

[43] Regarding the notice, the Counsel for Mitimituje Gaëtan states the High Court dismissed 31,400Frw of the notice allowance he was awarded by the previous Court without any reasonable ground ignoring that he must be paid notice allowance is calculated on the average salary which includes the balance sheet bonus, performance bonus, leave allowance and 5% of contributions to the social security fund deposited by his employer, and he should

be paid the notice allowance calculated in the following way: 31,400Frw he was awarded at the first instance + 90,660Frw he requested in the High Court which make the total of 122,060Frw.

[44] Regarding the dismissal compensation, the Counsel for Mitimituje Gaëtan states that the High Court dismissed 188,572Frw of dismissal compensation he was awarded by the previous judge without providing any ground, ignoring that he had to be paid the dismissal compensation calculated on the average salary which he claims as explained above. He requests to be paid the dismissal compensation calculated in the following way: 188,572Frw of the dismissal compensation he was awarded at the first instance + 543,960Frw he requested in the High Court which make together the total of 732,523Frw.

[45] The Counsel for Bank of Kigali argues that Mitimituje Gaëtan should not be awarded the notice allowances and dismissal compensation he is requesting in this case because it is based on the wrong average salary; but rather Bank of Kigali Ltd paid him 1,542,176Frw of notice allowance and dismissal compensation calculated on the average salary of 307,762Frw when it dismissed him as confirmed by the High Court.

VIEW OF THE COURT

[46] Regarding the notice allowance, article 27 (2) of Law n° 13/2009 of 27/05/2009 regulating labor in Rwanda provides that “if it is necessary to terminate a contract of employment with prior notice, duration of this notice must be at least equal to one month, if the worker has worked for a period of one year or more”.

[47] For the purpose of this case, the case file demonstrates that Mitimituje Gaëtan worked for Bank of Kigali Ltd for 14 years. Therefore, the Court finds that Bank of Kigali Ltd should have paid him 306,762Frw of the notice allowance which is equivalent to his average salary of one month; but Mitimituje Gaëtan cannot be awarded that money because he was paid it at the time of his dismissal as proved by the document named “severance pay” as well as the bank statement of his account n° 0031593-01 in Bank of Kigali Ltd, Cyangugu branch.

[48] Concerning the dismissal compensation, article 35 paragraph one and two of Law n° 13/2009 of 27/05/2009 regulating labor in Rwanda, provides for that “the dismissal or an employment contract termination for a worker who has completed a period of at least twelve consecutive months of works entails the payment to the latter by the employer or dismissal benefits. The accompanying allowance shall not go below three times the monthly salary for the worker with working experience of between ten and fifteen years in the same institution”.

[49] For the purpose of this case, the Court finds that the that Mitimituje Gaëtan has the work experience of 14 years as explained above and it obvious that Bank of Kigali Ltd should have paid him the dismissal compensation equal to six (6) times the monthly average salary computed in the following way: 306,762Frw x 6 = 1,840,572Frw of the accompanying compensation but Mitimituje Gaëtan cannot be awarded that money because he was paid it at the time he was paid employment termination benefits as proved by the document named “severance pay” as well as the bank statement of his account n° 0031593-01 in Bank of Kigali Ltd.

3.3. Concerning leave allowance.

[50] The Counsel for Mitimituje Gaëtan states that the High Court ruled that he must be paid 533,585Frw of leave allowance he was awarded by the previous judge, but disregarded that it should have been added on this the amount 181,320Frw calculated on the requested average salary mentioned above which make together the total of 714,905Frw.

[51] The Counsel for Bank of Kigali Ltd states that Mitimituje Gaëtan cannot be awarded that money because it miscalculated basing on the wrong average salary and he must rather be paid 533,585Frw he was awarded at the first instance.

VIEW OF THE COURT

[52] Article 55 of Law n° 13/2009 of 27/05/2009 regulating labor in Rwanda, provides that “the employer must pay the worker an allocation equal to the average of salaries the worker received for the last twelve months and other benefits he/she is entitled to as provided for by the employment contract.”

[53] For the purpose of this case, the payroll and the document named severance pay available in the case file demonstrate that Bank of Kigali Ltd paid to Mitimituje Gaëtan leave allowance equal to 142,739Frw for 2008 but he was paid them in January 2009 and 55,775Frw of leave allowance it paid when it dismissed him which make all together the total of 198,514Frw.

[54] Basing on provisions of article 55 of the Law mentioned above, the Court finds that Bank of Kigali Ltd would pay to Mitimituje Gaëtan 306,762Frw equal to his average salary of one month as leave allowance of 2008; but he must be paid 533,585Frw which he was promised by his employer minus 198,514Frw which it paid to him as explained above, thus it has to pay him 335,071Frw.

[55] The Court finds that Bank of Kigali should not pay Mitimituje Gaëtan the leave allowance of 2009 because it dismissed him completing that year.

3.4. Concerning the balance sheet bonus and the performance bonus of 2009.

[56] The Counsel for Mitimituje Gaëtan states that the High Court dismissed 511,270Frw of balance sheet bonus of 2009 and 511,270Frw of performance bonus for 2009 which were awarded by the previous judge without any reasonable ground, and disregarded that he would have been paid them because he was dismissed at the end of 2009 and Bank of Kigali made profits to the extent it got exclusively 82% of the profits made by all banks in Rwanda as it declared it itself in Umuvugizi newspaper, Vol. 65 of 28/11-12/2009 and be demonstrated also by the fact that it paid to Uwamariya Sekaziga Vestine the balance sheet bonus of 2009.

[57] The Counsel for Bank of Kigali Ltd argues that it cannot pay to Mitimituje Gaëtan that amount of money because he has not proved to this Court that Bank of Kigali made profits at the end of 2009 or he would get good performance appraisal results to be paid performance bonus because he was dismissed before the end that year.

VIEW OF THE COURT

[58] Concerning the balance sheet bonus and the performance bonus, article 76 and 77 of the Statute regulating the employees of Bank of Kigali Ltd provide that the performance bonus can be awarded once per year, but the employer is not obliged to pay them and the

balance sheet bonus can be awarded at least in March of the following year and are calculated by basing on profits made by Bank of Kigali Ltd previous year but the employer is not also obliged to pay that money.

[59] Basing on article 76 and 77 of the aforementioned Statute, the Court finds that Mitimituje Gaëtan could not be awarded performance bonus and those of balance sheet bonus money of 2009 because he did not have absolute right on them because he was paid them when Bank of Kigali had got profits and when Mitimituje Gaëtan has got good performance appraisal results for the whole year. Therefore, as Mitimituje Gaëtan was dismissed from work in before thr end of year 2009it obvious that he did not fulfill the requirements already mentioned in this paragraph to be awarded them as ruled by the High Court.

3.5. Concerning the damages for incomplete employment certificate.

[60] The Counsel for Mitimituje Gaëtan states that the High Court awarded him 1,227,048Frw in damages at its discretion since Bank of Kigali Ltd gave him incomplete employment certificate because it does not indicate the work which he performed for it during 14 years. He requests to be awarded 2,572,572Frw in damages because they were calculated on the average salary he claims mentioned above.

[61] The Counsel for Bank of Kigali Ltd states that it should not pay to Mitimituje the damages he requests because they were calculated basing on wrong average salary he must be paid instead 1,227,048Frw which he was awarded by the High Court at its discretion.

VIEW OF THE COURT

[62] Article 38 of Law n° 13/2009 of 27/05/2009 regulating 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 due a certificate of employment, showing exclusively the date of entry and exit and the nature of the employment or occupied post. The employer, who refuses to deliver this certificate of employment or omits one of the elements (...), may be required to pay the damages determined by the competent Court”.

[63] For the purpose of this case, the case file shows that Bank of Kigali Ltd gave the employment certificate to Mitimituje Gaëtan which is not show the nature of the employment or post he occupied. Therefore, the Court finds that Bank of Kigali committed a fault for which it must pay moral damages to him basing on article 38 of the Law mentioned above; those damages should be calculated on 306,762Frw of his monthly average salary, but he must be paid 1, 227,048Frw of the damages he was awarded by the High Court at its discretion because he was given incomplete employment certificate which is as also accepted by Bank of Kigali itself.

4. Whether the employment income tax (TPR) should be deducted from the damages awarded to Mitimituje Gaëtan in this judgment.

[64] The Counsel for Mitimituje Gaëtan argues that the previous judge ordered Bank of Kigali Ltd to pay him the damages he is awarded in this judgment after deducting the amount of employment income tax (TPR); but the High Court did not overrule that decision because no tax related claim was submitted to it disregarding that that decision had to be overturned because it was unlawfully taken since no litigant applied for it was not, moreover, heard and examined at the first instance. He requests this Court to overrule those two decisions so that

the damages he will be awarded in this judgment are not subject to employment income tax deductions.

[65] The Counsel for Bank of Kigali Ltd states the High Court examined that ground and found it with merit as seen under paragraph 20 of the judgment appealed against in this Court and that this ground of appeal is therefore groundless.

VIEW OF THE COURT

[66] Article 4 of Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provides that “the subject matter of the claim shall be determined by the claims made by the respective parties. These claims shall be indicated in the plaintiff’s and defendant’s submissions”. Whereas article 7 of that Law provides that “the judge shall rule only and on all that which is referred to the court”.

[67] For the purpose of this case, the case file shows that the Intermediate Court of Nyarugenge ordered Bank of Kigali Ltd to pay 7,548,355Frw to Mitimituje Gaëtan in damages he won in that Court but it must first deduct employment income tax therefrom (TPR). That decision led Bank of Kigali Ltd to deduct 660,933Frw of TPR from 2,203,109Frw of the dismissal compensation which it had granted Mitimituje Gaëtan when it dismissed him from work and it paid him 1,542,176Frw of the dismissal compensation as proved by the document called severance pay as well as bank Statement of his account n° 0031593-01 opened with the same Bank.

[68] Moreover, the case file indicates that either in the document of 30 July 2010 or that of 19 August 2010 whereby Mitimituje Gaëtan filed the claim with the Intermediate Court of Nyarugenge or even in the defence submissions of Bank of Kigali Ltd in that Court, no party claimed that the amount of money which Mitimituje Gaëtan would be awarded in that judgment would be subject to employment income tax deduction; but that issue was submitted to the High Court which ruled that it cannot take any decision on that issue because no tax claim was filed with it. Therefore, the Supreme Court should consider that issue.

[69] The Court finds that the decision taken by the Intermediate Court of Nyarugenge to deduct employment income tax from damages Mitimituje Gaëtan was awarded by the Court should be overruled because it was made in contradiction with article 4 and 7 of the Law mentioned above because no party filed for it as motivated above.

[70] The Court finds that another ground why the amount Mitimituje Gaëtan is awarded in this case should not be subject to employment income tax deduction is because that amount is not the salary but rather damages he is awarded by this Court.

5. Concerning the procedural cost and counsel Fees.

[71] The Counsel for Mitimituje Gaëtan states that Bank of Kigali Ltd must pay 2,707,199Frw of the counsel and procedural fees.

[72] The Counsel for Bank of Kigali Ltd states that it should not pay to Mitimituje that amount because he is the one who continues involving it into unnecessary lawsuits.

VIEW OF THE COURT

[73] The Court finds that Bank of Kigali Ltd must pay 300,000Frw to Mitimituje Gaëtan of the procedural fees and 400,000Frw of the Counsel fees which are awarded at its discretion because what he is requesting is excessive, this will be added on 200,000Frw of the procedural costs and 500,000Frw of the counsel fees he was awarded at the first instance, which make all together the total of 1,400,000Frw because he sought the assistance of the lawyer and also he wins partly this judgment.

[74] Therefore the Court finds the total of the money which Bank of Kigali should pay to Mitimituje Gaëtan is 1,840,572Frw in damages for unlawful dismissal, 335,071Frw of leave allowance of 2008; 1,227,048Frw in damages for incomplete employment certificate, 660,933Frw which it has withheld as deductible employment income tax from the dismissal compensation money, 1,400,000Frw of the procedural and lawyer's fees which make the total of 5,463,624Frw.

III. THE DECISION OF THE COURT

[75] Decides that the appeal of Mitimituje Gaëtan has merit in part;

[76] Orders Bank of Kigali Ltd to pay 5,463,624Frw to Mitimituje Gaëtan;

[77] Declares that the ruling of the judgment RSOCA 0001/12/HC/KIG rendered by the High Court on 09 April 2011 is overturned in part;

[78] Orders Bank of Kigali Ltd to pay the Court fees of 24,800Frw, if it fails to do so in eight days, that amount will be deducted from its asset by government coercion.