KK SECURITY v. HARERIMANA ET AL

[Rwanda SUPREME COURT – R.SOC.AA006/07/CS (Rugege, P.J., Ruyenzi and Mukanyundo, J.) January 11, 2008]

Labour laws – Dismissal for economic reasons – There is no proof that the employee who was dismissed or laid off was the actual one to dismiss or layoff in the Institution when the employer did not comply with the legal procedure in ranking those to be laid off according to the performance, professional qualification, seniority in the institution and family charges and that dismissal is qualified as unfair dismissal – Law N°51/2001 of 30/12/2001 establishing the labour code, article 29.

Labour laws – Salary – Burden to prove the payment of the salary – Interruption of time limitation of the claim relating to salary payment – If the employee does not admit that he was paid his or her salary and the employer fails to produce the document proving otherwise, the employer has to pay him or her – The period of prescription for the salary payment is interrupted where the employee's case is pending before the court or due to the fact that the labour inspectorate that was requested to settle the dispute is yet to take the decision – Law N°51/2001 of 30/12/2001 establishing the labour cod, article 102.

Labour laws – Employment certificate – The employer is not liable in case the employee had to collect the employment certificate but failed to do so – Law N°51/2001 of 30/12/2001 establishing the labour code, article 30.

Facts: KK Security dismissed some of its employees asserting that it was experiencing economic hardship as a result of termination of its contracts it had with SOGEA SATOM and ROKO Construction s.a.r.l. Harerimana and others among the dismissed employees, resorted to courts whereby they sued KK Security before the Intermediate Court of Gasabo claiming various damages. That Court ruled that KK security lost the case and was ordered to pay Harerimana and others various damages.

KK Security appealed before the High Court, that Court held that KK Security loses the case, and each one has to be paid the amount awarded by the previous court except for the damages for not being given the work certificate, the transport, accommodation and medical insurance fees.

Again, KK Security appealed before the Supreme Court asserting that the High Court disregarded the arguments of KK Security according to which the plaintiffs were awarded damages for overtime and leave yet they were included in their salaries and it also asserted that the claim was struck by the statute of limitation.

Harerimana and others raised a preliminary objection on inadmissibility of the appeal on the ground that KK Security appealed against 13 cases but it paid the court fees deposit for one case and also that in consideration of the damages awarded to each person who brought a case against it, it doesn't amount to the required amount for the Supreme Court to have pecuniary jurisdiction over it.

On the grounds of appeal of KK Security where it claimed that their dismissal relied on the loss incurred, they qualified it unfounded, because KK Security never demonstrated the loss incurred, and with regard to the salary which KK Security alleges to have paid them, they argue that the onus of proof is on the employer to prove that he or she paid their employee. They contest the document produced by KK Security on the ground that it was produced for

the first time in Court. They also lodged a cross appeal requesting to be awarded damages equal to six months' salary for each person for not being given a work certificate, transport allowance, accommodation and medical assurance allowance.

KK Security rebutted that the case started as a single case upon the request of the parties who requested the joining of their claims and as a result, the Intermediate Court of Gasabo registered the case on the single number. However, the Court recalled that the law provides for the "cases", not the "claim" and their advocate immediately submitted to the court that if that is the case they withdraw the raised objection.

Held: 1. When the employer does not comply with the procedure of ranking the employees to be dismissed or to be laid off in accordance with the performance, professional qualification, work experience in the enterprise and social charges of each worker, there is no proof that the dismissed employee is the one who ought to be dismissed among the employees of the institution hence it is qualified as unfair dismissal.

2. If the employee does not admit that he was paid his or her salary and the employer fails to produce the document proving otherwise, the employer has to pay him or her.

3. The period of prescription for the salary payment is interrupted by the employee's case pending before the court or due to the fact that the labour inspectorate that was requested to settle the dispute is yet to take the decision.

4. The respondents have to be awarded the counsel's fees for a single case because their counsel dealt with a single case and the submissions he made were meant for a single case.

5. The employer is not liable when the employee failed to collect his/her employment certificate.

The appeal lacks merit except for the counsel fees;
Court fees are borne by KK Security.

Statutes and statutory instruments referred to:
Law N°51/2001 of 30/12/2001 establishing the labour code, articles 29, 30, 97 and 102.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] In 2004, the company known as KK Security dismissed some of its employees due to economic hardship. That company asserts that it was due to the termination of the contracts it had between ROKO CONSTRUCTION s.a.r.l and SOGEA SATOM, were many of its employees were deployed.

[2] Some of those dismissed employees were not contended with the procedure of that dismissal thus they resorted to courts claiming damages.

[3] This case begun in the Intermediate Court of Gasabo registered on N°R.SOC.0006/06/TGI/GSBO whereby Harerimana Enos, Munyaneza Jean, Safari

Théogène, Gasore Jean Baptiste, Munyanshongore Théodore, Harindintwari Augustin, Uwizera Sadock, Sebagabo Prince, Hagenimana Moussa, Setakwe André, Mwungura André, Mberwa Innocent and Sebasoni Jérôme were against KK Security. The judgment was rendered on 20/10/2006, and it held that KK Security loses the case and it was ordered to pay Harerimana Enos and others what had been awarded to each of them, that is to say, the bonus for extra-time, leave allocation, housing allowance, transport fee, medical fee, damages due to unfair dismissal, damages for not being given the work certificate and the counsel's fees.

[4] KK Security was not contended with the ruling and appealed before the High Court of the Republic on its headquarter in Kigali, and the appeal was registered on N°R.SOC.A0277/06/HC/KIG. That court rendered the judgment on 13/4/2007 and held that KK Security loses the case, and each plaintiff had to be paid the amount awarded by the previous court except the amount for non-delivery of the work certificate, transport fee, accommodation fee and medical expenses. The Court found that the total of amount that KK Security has to pay the plaintiffs is 21,102,528Frw and the prorated fees of 4% of that amount, which is 844,101Frw and other 21,450Frw of the court fee.

[5] Again KK Security was not contended with the ruling and appealed before the Supreme Court, the letter that was received in the registry of that court on May 9, 2007; the claim was registered on N° R.SOC.AA0006/07/CS. In that letter, the counsel for KK Security Rutabingwa Athanase mentioned the following as their grounds of appeal:

> The High Court of the Republic disregarded the explanations of KK Security since it held that the ground for the dismissal of those employees was just and fair but again it held that it is unfair dismissal due to the violation of article 29 of the law N°51/2001 of 30/12/2001 instituting the labour code.
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> The Court ordered that the plaintiffs must be paid allowances for extra-time and leave yet they were included in their salary. It was the onus of the plaintiffs to prove that they worked but they were not paid for that.
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> The Counsel should have been paid for one case file since he had a single task as the claims were joined together.
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> The amount claimed is computed from 1996 to 2004 yet there has been the prescription as provided for by article 102 of the Law N°51/2001 of 30/12/2001 instituting the labour code.
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> Thus, he finds that they are claiming what they are not entitled to.

[6] The appeal of KK Security underwent the screening and in his decision N°RSOC0004/07/Pré-ex/CS, the judge who pre-screened the case held that the appeal of KK Security submitted to the Supreme Court was instituted in accordance with the law and that it falls into the jurisdiction of the Supreme Court.

The hearing of the case R.SOC.AA0006/07/CS before the Supreme Court.

[7] The case was first summoned in the Supreme Court on August 07, 2007 but it was not heard because Counsel Rutabingwa Athanase assisting KK Security applied for its adjournment as he had misfortune. It was adjourned on October 30, 2007. On that date, all parties were present, Counsel Rutabingwa Athanase representing KK Security and Harerimana and others represented by Counsel Kayitare Serge.

[8] Counsel Rutabingwa Athanase was requested to explain the grounds of his appeal. After his explanations, Counsel Kayitare requested for the audience and raised a preliminary objection of inadmissibility of the KK Security's appeal. He argues that KK appealed against 13 judgments but paid the court fee for one claim only, thus the appeal is not in the jurisdiction of the Supreme Court.

[9] After hearing both parties, the Court went to deliberate on that objection. However, another issue came into limelight that among the judges who constituted the bench included the judge who screened the appeal on the admissibility and the jurisdiction of the Supreme Court, therefore the bench has to be changed and the hearing adjourned on the other date on which that objection will be examined. The case was adjourned on November 12, 2007. On that date, the hearing of the case resumed and was heard by a new bench.

[10] Counsel Kayitare took the floor to elaborate on the preliminary objection he raised. He averred that KK Security was sued by 13 persons where each one instituted his own claim. Those cases were joined together in lower courts. Before the Supreme Court, KK Security appealed against 13 judgments and paid the court fee for a single claim. Counsel Kayitare submitted that the judge who pre-screened the appeal should have considered each claim separately in regard to the court fee. The joining of those cases was not for turning them into a single case but it was that they be heard jointly.

[11] Counsel Rutabingwa rebuts that objection raised by Counsel Kayitare by asserting that the case started as a single case upon the request of the plaintiffs that their claims be joined. Even at the appellate level before the High Court of the Republic that case was given a single number and they accepted to plead without raising objection.

[12] The Court asked Counsel Kayitare his view on the law determining the jurisdiction of the Supreme Court Where he responded that it provides that when the subject matter of the case has a value amounting to or exceeding 20,000,000Frw then it falls in the jurisdiction of the Supreme Court, but in this instant case, the jurisdiction should be viewed on the value of each claim. The court reminded him that the law states "the case", not "the claim". Counsel Kayitare responded to the Court that if that is the case he withdraws his objection.

[13] The Court informed the parties that the case was going to be heard in its merits and asked Counsel Rutabingwa Athanase to reiterate the grounds of KK Security's appeal, since the bench had changed. Counsel Rutabingwa Athanase asserted that they appealed due the following grounds:

The Court disregarded the evidence and explanations submitted. The previous court held that those employees were dismissed because KK Security incurred a loss; but it contradicted itself where it stated that the provisions of article 29 of the law N°51/2001 of 30/12/2001 instituting the labour law were not respected. Article 26 of that law provides for damages when the cause of dismissal is unjust, it does not provide that damages are awarded when the procedure was not respected and article 29 does not provide for penalties;

The first instance Court did not take into consideration the explanations of KK Security with regard to extra-time and leave;

With regard to the counsel fees, 80,000Frw for each is excessive since it is a single case;

Article 102 of the law regulating labour was not considered. That article provides that the salaries that have exceeded the period of 5 years cannot be claimed before the court, and the case was instituted in 2004 on the facts that occurred in 1996.

[14] Counsel Kayitare argued that as indicated in the judgment rendered by the Intermediate Court of Gasabo (page 3, paragraph 4) and the judgment of the High Court (page 12, paragraph 5) KK Security admitted that it breached article 29 of the law governing labour, but there are no penalties provided for by this law. He further asserted that pursuant to article 110 of the law N°15/2004 of 12/6/2004 of evidence and its production, the admission makes its author lose the case.

[15] Counsel Kayitare further averred that the assertion that the employees were dismissed due to the loss is not true because KK Security never demonstrated the amount of that loss. However, even though there was a loss, according to the provisions of article 29 of the law regulating labour there is no single evidence indicating that his clients were the ones who would have been dismissed. Therefore, if they had not been dismissed, he wonders whether it can be considered as if they were unfairly dismissed. With regard to extra-time and leave allowances which KK Security asserts to have paid to employees, the reference should be made to article 97 of the Law regulating labour which provides that the onus of proof lies on the employer who asserts that he paid the employees who claims otherwise. For the counsel's fees, Counsel Kayitare asserted that he withdrew the objection he raised, without however admitting the case to be one, therefore as usual one negotiates with the plaintiff on his own. With regard to the prescription of the claim regarding the salary, he argued that the consideration should be given to article 102 of the Law regulating labour where it provides that the prescription is suspended when the matter is submitted to the organ that can settle it. He asserted that the complaint was made before the labour inspectorate, and he produced the written statement of 18/11/1998 which was even produced before the Intermediate Court of Gasabo.

[16] Counsel Kayitare raised also a cross appeal, on the ground that his clients request to be awarded damages equal to the salary of six months of each person since KK Security did not give them the work certificate. And they request for the transport allowance, accommodation fee and medical expenses as provided under Ministerial Order N°10/19 of 14/3/2003.

[17] Counsel Rutabingwa again requested for the floor and argued that KK Security did not concede that it violated the law, but in the analysis of article 29 of the law regulating labour, they asserted that it does not provide for penalties in case of irregularities in the procedure and the court cannot provide for penalties since that would be usurping in the legislative power.

[18] With regard to the prescription of the claim relating to the salary, Counsel Rutabingwa Athanase asserted that he does not accept the written statement of 18/11/1988 raised by Counsel Kayitare, because it does not bear the names of its signatories and this is his first time to see it.

[19] With regard to the cross appeal lodged by Counsel Kayitare, Counsel Rutabingwa asserted that the ruling of the High Court on these issues is clear since every employee who came to collect his/her work certificate received it. With regard to the transport allowance, accommodation and medical fees, article 5 of the contract they concluded with KK Security stipulates that the salary includes all indemnities of transport, accommodation and medical

fees and the Ministerial order invoked by Counsel Kayitare does not provide that those indemnities are paid separately.

[20] With regard to the question he was asked by the Court if he is of the view that article 29 stated above was respected, Counsel Rutabingwa asserts that he is of the view that it was complied with except that they did not convene the meeting with employees.

II. ANALYSIS OF THE LEGAL ISSUE

(a) The issue of unfair dismissal

[21] In its appeal, KK Security claimed to have experienced injustice from the decision of the High Court where it held that the ground of dismissal has merit due to the loss incurred and the loss of clients, and at the same time it compelled KK Security to pay damages due to irregularities in the procedure provided for under article 29 of the Law regulating labour.

[22] Article 29 of the law N°51/2001 of 30/12/2001 instituting the labour code provides that:

> "When the employer plans to dismiss more than one employee, for economic reasons, he/she must inform, before implementing his/her decision, the staff's delegates about the causes of projected dismissals, retained criteria, as well as the date of dismissal and consult with them as regards measures that could be taken to prevent or limit the projected dismissals.
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> The company's employee dismissals' order is set up taking into account the professional qualification, the seniority in the establishment and the family charges.
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> The written statement of that meeting and the list of workers who were laid off, date and grounds justifying that decision are sent to the Minister in charge of labour within 15 days from the day of that meeting".

[23] That article of 29 was enacted for the purpose of protecting employees, so that the employer could not prejudice them in case of the restructure in the institution that may lead to lay off some of employees due to just economic reasons. As stated above, that article commands that the employer has to hold the meeting with the staff's delegates in the institution so that he can notify them the causes for the projected layoff, its basis, its date and requests for their advice that would prevent or reduce it. That is to say that there must be negotiation aiming at finding solution of how the workers can continue their work without layoff and without being detrimental to the employer. This means that the layoff should not be the first alternative, rather it can be opted for as a last resort. In case it is inevitable to lay off the workers, it has to be done according to the provisions of the law, without sentiment or injustice. This makes those who were laid off feel that what took place was in transparency, fair and it was inevitable. Those criteria are set under article 29, paragraph 2 which states that *"the employees to be laid off is set up taking into account the professional qualification, the seniority in the establishment and the family charges…"*. As far as this case is considered, there is no single evidence indicating that KK Security based on these criteria.

[24] During the proceedings before the Supreme Court, regarding the question asked to Counsel Rutabingwa concerning whether he confirms that KK Security respected article 29, he replied that what KK Security did not respect was to hold a meeting with the workers, as if it is of no importance. The meeting bringing together the employer and employees or their

representatives is not a mere formality, but it helps employees as stakeholders in the institution to understand why there must be a layoff. As stated by legal scholars *"Important decisions, such as that to retrench, should be subject to the greatest possible degree of consultation with employees or their representatives, not merely for reasons of procedural fairness but as part of establishing whether substantive grounds for dismissal are present and, if so, the most appropriate manner of mitigating the consequences"*[1]. Those scholars further state that: *"The statutory requirement to seek alternatives to dismissal indicates that dismissal should be avoided if reasonably possible and that alternatives put forward by consulting parties should be considered seriously, even though the employer retains a broad discretion in taking final decision".*

[25] With regard to the meeting between the employers and employees before taking the decision to lay off the employees, this issue was examined by courts in other forum for several occasions. The South African Court of Appeal, in *Atlantis Diesel*[2], examined the provision of the law of that country that is similar to that of Rwandan law, it held that: "*The* purpose *of the duty to consult is to give the employer an opportunity to explain the reasons for the proposed retrenchments, to hear representations on possible ways of avoiding or minimising the effects of retrenchments and to discuss and consider possible alternatives*". It is obvious that this procedure aims at the protection of employees and the failure to respect it is considered to be an unfair dismissal. Thus, the Court has the duty to oversee the respect of the law, and render justice to those who are oppressed.

[26] The allegation by Counsel Rutabingwa that the law did not provide for penalties for non-compliance with article 29, lacks substance as this is not a criminal case. If there has been injustice due to the non-compliance of the law, the victim has to get justice. As the High Court of the Republic held in 7th paragraph of motivation on page 12, "if KK Security had respected the provisions of the law in selecting those who were to be laid off according to the *professional qualification, the seniority in the establishment and the family charges* there is no evidence that those employees who were laid off were the one who had to be laid off among all KK Security employees. That is to say that the plaintiffs were dismissed due to the non-compliance of the law on the side of KK Security, and this caused them a loss thus they are entitled to damages.

[27] Concluding on this ground of appeal that KK security has suffered injustice from the High Court of the Republic, the Supreme Court finds that KK security did not comply with the procedure provided for under article 29 stated above, and such conduct led to the unfair dismissal of the plaintiffs and the Court holds that this should be considered to be an unlawful dismissal (*licenciement abusif*). KK Security did not face in lower courts. Thus, this ground of appeal of KK Security is dismissed.

(b) Extra-time and leave.

[28] Another ground of appeal that Counsel Rutabingwa, representing KK Security raised is that relating to extra-time and leave. He asserted that the High Court of the Republic upheld that damages have to be paid for the extra-time and the four days of leave, but it disregarded that they were included in the salary. However, no evidence produced by KK Security indicating that they received those indemnities of extra-time. And as article 97 of the

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[1] Du Toit, D. Woolfrey, J. Murphy, S. Godfrey, D. Bosch and S. Christie, *Labour Relations Law: A Comprehensive Guide*, Butterworths, 3rd Edition, p.382.

[2] National Union of Metalworkers of S.A v. Atlantis Diesel Engines (Pty) Ltd (1994) 15 ILJ 12 47(A).

law N°51/2001 of 30/12/2001 provides "In case of an employee contests payment of the salary, and when the employer is not in a position to show the document indicating that he paid him/her [...] the employer must pay the employee". The Supreme Court finds that the ruling of the High Court of the Republic on this ground of appeal should be upheld.

(c) With regard to the prescription of the claim

[29] Counsel Rutabingwa also invoked another ground of appeal that the amount claimed was computed from 1996 up to 2004 yet there has been prescription as provided under article 102 of the labour law. Article 102 provides that: "Prescription in a salary payment suit expires after five years. Prescription is effective as from the date at which the salary is due. But it goes further to state that "It is suspended in case of [...] where the employee's case is still waiting for trial or where the Labour Inspectorate has not yet settled the dispute". The document that is in the file under paragraph 1 up to 6, indicates that before the claim of the plaintiffs against KK Security reached the courts, it was initiated in the Labour inspectorate on 18/11/1998. On that date, there was a meeting that brought together the labour inspector in the prefecture of Kigali City, the administration of KK Security and the guards, and the written statement of that meeting was signed by the then labour inspector. The fact that the counsel of KK Security asserts that they do not accept that written statement, should not be considered, since they did not contest it in lower courts, moreover, there is no evidence they put forward that would lead the court to doubting on the occurrence of that meeting. Besides, no evidence was produced to prove that those who are mentioned in the written statement to have been present were not. Thus, the Supreme Court finds that the resort to the labour inspectorate suspends the prescription of the judicial action to recover the salary as provided under article 102 stated above.

(d) The counsel's fees.

[30] Another ground against which Counsel Rutabingwa appeals is the counsel's fees awarded by the Judge of the High Court of the Republic. Counsel Rutabingwa argues that 80,000Frw for each person is excessive since there is a single case. The Supreme Court finds that this ground is founded since the case heard is single as explained and Counsel Kayitare withdrew his objection where he tried to indicate that they are 13 cases. Another point is that, Counsel Kayitare submitted one court submission and he pleaded a single case. Upon its discretion, the court finds that it has to award him the counsel fees equal to 300,000Frw.

(e) Cross appeal

[31] Counsel Kayitare, on behalf of his clients, lodged a cross appeal. He asserted that the first ground of that appeal is to request that his clients be awarded damages equal to their respective salaries of six months because KK Security did not give them their work certificates. Article 30 of the Law N°51/2011 of 30/12/2001 instituting the labour code provides that: "When the employee's contract of employment [...] his/her employer immediately gives him/her a certificate showing exclusively the period and which kind of work he/she has been carrying out in the establishment. The certificate is given to the employee along with his/her final discount. Every employer who deliberately refuses to provide his/her former employee the certificate must compensate it with a sum not exceeding the employee's monthly salary times six". However, there is no evidence produced indicating that any one approached KK Security requesting the work certificate and then it refused to give it to him, and the article stated above concerns the employer who refused to award that certificate. It is obvious that the last salary of those employees was deposited on their account. In that case, those employees had to go take their work certificates at KK Security,

the fact that they did not go there to pick it, KK Security should not be held answerable. Thus, this ground of cross appeal lacks merit; hence the decision of the High Court of the Republic is upheld.

[32] Another ground of cross appeal invoked by Counsel Kayitare relates to transport, accommodation and medical allowances. However, the employment contract that KK Security concluded with employees who sued it stipulated how those indemnities should be awarded and no one raised an issue of irregularity of that contract. Clause 5 of that contract, in its paragraph 4 stipulates that: “The basic salaries of employees cover non-taxable bonuses”:

The bonus of accommodation of 15%;

The bonus of being transported in the vehicle of 10%;

The bonus of medical care of 8%.

Pursuant to the aforementioned provisions of this clause, the Court finds that those bonuses were paid to them alongside their salaries as they agreed. Thus, this ground of cross appeal also lacks merit.

III. COURT DECISION

[33] The Supreme Court:

Admit the appeal of KK Security as it was instituted in accordance with the law, but upon its examination it finds that it lacks merit except for the counsel’s fees.

Admits the cross appeal lodged by Harerimana Enos and others for it was instituted in accordance with the law, but lacks merit.

[34] The Supreme Court holds that KK Security lost the case. Declares that the ruling in the judgment N°R.SOC.A0277/06/HC/KIG is reversed only with regard to the counsel’s fees.

[35] The Supreme Court:

Orders KK Security to pay 300,000Frw of the counsel’s fees; thus the whole amount totalling 20,362,528Frw instead of being 21,102,528Frw ordered by the High Court of the Republic.

Orders KK Security to pay the proportional tax of 4% of that amount which is equal to 814,501Frw.

[36] The Supreme Court orders KK Security to pay 33,800Frw of court fee, to be paid in the period provided for by the law, the failure of which will lead to the forceful recovery by the government coercion.