

## KIGALI CITY v NDAKENGERWA GASANA

[Rwanda SUPREME COURT – RS/REV/INJUST/RAD00005/2018/SC (Kayitesi Z, P.J., Mutashya, and Cyanzayire J.) March 15, 2019]

*Administrative law – Disciplinary sanction – Criminal liability – The fact that the Prosecution closed the file against an employee in a criminal matter does not exonerate to be disciplinarily punished.*

*Administrative law – Gross misconduct – Aggravating circumstances of a fault – The fact that an employee who committed gross negligence is a leader, who must be an example to others in all acts that can defame his/her employer, it is an aggravative circumstance of disciplinary fault.*

**Fact:** Ndakengerwa was a director general of social affairs in Kigali city together with his driver was sued by the Prosecution for having committed the crime of kidnapping and extortion by violence against Twahirwa, this was committed by locking him in vehicle and carried him to Kigali Rehabilitation Transit Center, at Gikondo for detaining, due to the person problem they had but after reaching to that center, the employees refused to detain him because they are only authorized to detain those brought by the police. The prosecution found it unnecessary to continue with the case and hence closed the file.

Kigali city requests him for explanations on the faults he committed using his position, to absent at work without permission and for not complying with the instructions of construction while he was an employee in charge of building regulations in Kigali City; the latter was not satisfied with explanations he provided, after consulting Ministry in charge of public service, Kigali city dismissed him definitely due to the gross misconduct.

He appeared before the Public Service Commission, which replied to him that he was not unfairly treated. Ndakengerwa filed a claim to the Intermediate Court of Nyarugenge, requesting for the annulment of that decision because it was taken unlawfully and also requested for various damages. That Court found it with merit in part, ordered Kigali City to pay him damages for unfair dismissal and counsel fees.

Both parties were not contented and then appealed to the High Court, the Court held that the appeal of Ndakengerwa has merit in part and that of Kigali City lacks merit and the decision dismissing Ndakengerwa is nullified, ordered the Government of Rwanda to pay him the salary arrears and reinstate him on the job if not possible, it should give him damages.

Kigali City wrote to the Ombudsman Office requesting the review of that judgment due to injustice, after examining the issue of Kigali City, it wrote to the President of the Supreme Court requesting for a review of that judgment, based on the report of inspectorate general of the court, he decided to re-adjudicated the judgment. The Court examined firstly whether Ndakengerwa has committed the faults for which he was dismissed; if so, it examines whether he was imposed the appropriate sanction and if it was lawfully applied.

Regarding whether he has committed the faults for which he was dismissed, Kigali City states that for Ndakengerwa not have been found guilty for the offence he was accused of and the Prosecution closed the file, does not exonerate him for the disciplinary fault he was accused of

and that fault was to kidnap a person and there are irrevocable evidence proving the disciplinary fault he committed.

Regarding the fault of building in slums, Kigali City states that Ndakengerwa as a leader who was in charge of fighting the building in slums also did it as confirmed by the committee which went to the place where he was building after finding that he built another house after he was compensated.

In his defence, Ndakengerwa states that what Kigali City considers as disciplinary faults are not because the disciplinary committee examined it and found that they were not disciplinary faults, and ordered for his reinstatement and what he was sued for is not trying to detain persons in the center at his interest, rather it is the issue of contract between two persons, which was resolved to the police. He argues that even if it was a crime, he was not the one who would be punished for it, that is the reason why he was released by the Prosecution and he was given his belongs which were confiscated. Whereas, concerning the fact that he built in slums, he states that he did not build anything in slums after been given the compensation and the officer in charge of development in Kigali city visited that place and found that he did not build a house after being expropriated.

**Facts:** 1. The fact that the Prosecution closed the file against an employee in a criminal matter does not exonerate to be disciplinarily punished.

2. An employee who arrest and detain an innocent person by using his position of job, it is gross misconduct.

3. The fact that an employee who committed gross negligence is a leader, who must be an example to others in all acts that can defame his/her employer, is an aggravative circumstance of disciplinary fault.

**Ndakengerwa Gasana Aimable was fairly dismissed;  
Overturns the rulings of the judgment RADA00023/2017/HC/KIG-RADA  
00027/2017/HC/KIG rectified by the judgment RS/RECT/RAD  
00003/2017/HC/KIG;  
With the court fees to the public treasury.**

**Statutes and statutory instruments referred to:**

The constitution of the Republic of Rwanda of 2003 revised in 2015, articles 13 and 29.

Organic Law N°11/2013/OL of 11/09/2013 modifying and complementing the organic law N°61/2008 of 10/09/2008 on the leadership code of conduct, article 2 and 3.

Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 64.

Presidential Order N°65/01 of 4/3/2014 determining the sanction for public servants, article 5, 7 and 12.

Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service articles 3,76,78,80,81 and 98.

**No case referred to.**

**Authors cited:**

Georges Dupuis, Marie-Josée Guédon, Patrice Chretien, Droit Administratif, 10<sup>ème</sup> Edition, Sirey, 2007

## **Judgment**

### **I. BACKGROUND OF THE CASE**

[1] Ndakengerwa Gasana Aimable was director-general in charge of welfare in the Kigali City. Together with Nsengiyumva Gilbert his driver, they were accused by the Prosecution for kidnapping Twahirwa Oswald and extortion by violence, which was committed when they locked him up in the car, took him to the Kigali Rehabilitation Transit Center at Gikondo, because of the personal issues they had. The documents in the case file indicate that the employees of that center refused to detain him because they are only authorized to detain those brought by the police. The prosecution found it unnecessary to continue with the case and hence closed the file on 17/12/2015.

[2] Ndakengerwa Gasana Aimable was requested by Kigali City to defend himself on the faults he committed using his post, being absent from work without permission from 04 to 11/09/2015, for not abiding with building regulations when he constructed on plot N° 385 which is situated in the area not supposed to be built and whereas he is in charge of building regulations in Kigali City. The explanations of Ndakengerwa Gasana Aimable did not contend the Kigali City, he was suspended and later on the opinion of Labour and Public Service (MIFOTRA), he was definitely dismissed.

[3] On 29/01/2016, the City of Kigali dismissed him definitely due to grave faults, he appeared before the Public Service Commission, which replied to him that he was not unfairly treated, that he was given a proportionate sanction. Ndakengerwa Gasana Aimable sued in the Intermediate Court of Nyarugenge, requesting for the annulment of that decision because it was taken unlawfully and also requested for various damages. The case was given number RAD 00272/2016/TGI/NYGE, The Court found it with merit in part, ordered Kigali City to pay him damages worth of 11,520,738 Frw for unfair dismissal, and counsel fees of 1,000,000 Frw.

[4] The Intermediate Court of Nyarugenge in holding that he was unfairly dismissed based on the fact that the authorities of Kigali City knew that he was detained at the Police Station of Muhima since 04/09/2015 up to 11/09/2015 and for other faults for which he was dismissed did not prove it.

[5] Both parties were not contented and appealed in the High Court, the case was registered on N° RADA00023/2017/HC/KIG- N° RADA00027/2017/HC/KIG, and the judgment was rendered on 21/09/2017 whereby the Court held that the appeal of Ndakengerwa Gasana Aimable has merit in parts and that of Kigali City has no merit and the decision dismissing Ndakengerwa Gasana Aimable is nullified, ordered the Government of Rwanda to pay him the salary arrears of 26.820.060 Frw and reinstate him on the job if not possible, the Court ordered to give him damages of 8.046.018 Frw, he was also awarded procedural fees of 1.000.000 Frw. The

judgment was rectified where it was written the Government of Rwanda to be written Kigali City.

[6] The motivation of the High Court was that Ndakengerwa Gasana Aimable indeed committed faults as it had been observed by the disciplinary committee of Kigali City but they would have been sanctioned by delay in promotion instead of dismissing him as done by Kigali City.

[7] After that judgment, Kigali City wrote to the Ombudsman Office requesting the review of that judgment due to injustice. The issue of Kigali City was examined by that Office and found injustice in the judgment N° RADA00023/2017/HC/KIG- RADA00027/2017/HC/KIG which was rendered on 21/09/2017 and wrote to the President of the Supreme Court requesting for a review of that judgment.

[8] The office of Ombudsman stated that judgment RADA00023/2017/HC/KIG- N° RADA00027/2017/HC/KIG rendered on 21/09/2017 by the High Court is vitiated with injustice on the following grounds :

The Office of Ombudsman stated that the Court based on Presidential Order N° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public employees and it also based on the Organic Law modifying and complementing the Organic Law N° 61/2008 of 10/09/2008 on the leadership code of conduct to dismiss Ndakengerwa Gasana Aimable.

The Office of Ombudsman finds that the fact that the disciplinary committee of Kigali City had recommended that Ndakengerwa Gasana Aimable be sanctioned with a delay in promotion and also the High Court found that sanction appropriate it is because the fault was in the second category that means that the fault should be sanctioned severely than reprimand and warning.

The Office of Ombudsman explains that article 20 of the Law N° 61/2008 of 10/09/2008 on the leadership code of conduct was not amended or repealed by the Organic Law N° 11/2013 of 11/09/2013, that article provides for the sanctions on the leader who has been found at fault, those sanctions include written warning, written reprimand, dismissal and published dismissal, it is obvious that the heaviest sanction is dismissal; that is the reason why Ndakengerwa Gasana Aimable should have been dismissed which he has been given by Kigali City. Ndakengerwa Gasana Aimable was social affairs, thus, he is also governed by the organic law mentioned above, especially article 2(3)<sup>1</sup>.

The Office of Ombudsman states that to sanction Ndakengerwa Gasana Aimable should have been based on the Organic law on the leadership code of conduct instead of the Presidential Order determining modalities of imposing disciplinary sanctions to public servants, according to hierarchy of the laws, and also article 5 paragraph one of Presidential Order N° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants provides that based on circumstances that

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<sup>1</sup> Senior officials: Cabinet Ministers, Ministers of State, Members of Parliament, Judges of the Supreme Court and other officials appointed by a Presidential Order as well as those appointed by a Prime Minister's Order to the Director General and those falling in the same job classification level

aggravate the gravity of a fault, the competent authority may remove a sanction or impose a less or more serious sanction than the sanction provided for the fault.<sup>2</sup>

The Office of Ombudsman found that even if it had been based on that Presidential Order, nothing could prevent Kigali City to dismiss Ndakengerwa Gasana Aimable, in case there aggravative circumstances of the gravity of a fault he committed, because he committed a serious fault.

[9] Thereafter, the office of Ombudsman wrote to the president of the Supreme Court requesting for a review of the judgment N° RADA00023/2017/HC/KIG-RADA 00027/2017/HC/KIG due to injustice, he examined the issue and based on the report of inspectorate general of the court, the case was recorded in the relevant registry for it to be re-adjudicated. The case was recorded on RS/INJUST/RAD 00005/2018/CS.

[10] The hearing was conducted in public on 05/02/2019, Kigali city was represented by state attorney Cyubahiro Fiat while Ndakengerwa Gasana Aimable was represented by counsel MUSIRIMU Jean Claude. In this case, the main issue to be examined is to determine whether Ndakengerwa Gasana Aimable was lawfully dismissed.

## **II. ANALYSIS OF THE LEGAL ISSUE**

### **Determining whether Ndakengerwa Gasana Aimable was unlawfully dismissed.**

[11] For the Court to be able to determine whether Ndakengerwa Gasana Aimable was either fairly or unfairly dismissed, it is important to first determine whether he committed the disciplinary faults for which he was dismissed and if so whether he was given the appropriate sanction and if it was applied in the right procedure.

### **Whether Ndakengerwa Gasana Aimable committed the disciplinary faults for which Kigali City based on to dismiss him.**

[12] The counsel for Kigali City, Me Cyubahiro Fiat states that for Ndakengerwa Gasana Aimable not have been found guilty for the offence he was accused of and the Prosecution closed the file, does not exonerate him for the disciplinary fault he was accused of as provided by article 78 of the Law regulating civil servants.

[13] He also argues that Ndakengerwa Gasana Aimable was not being probed for the agreement of payment as he alleges but for the kidnapping of a person and there is evidence proving the disciplinary fault he committed even the Police who are stationed at the center he was going to detain him stated that he went there and requested them to detain him and they refused, he also does not deny that he did not go there.

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<sup>2</sup> Basing on circumstances that mitigate or aggravate the gravity of a fault as provided for in Articles 6 and 7 of this Order, the competent authority may remove a sanction or impose a less or more serious sanction than the sanction provided for the fault

[14] Regarding the fault of building in slums, Counsel Cyubahiro Fiat states that Ndakengerwa Gasana Aimable as a leader who was in charge of fighting the building in slums also did it as confirmed by the Committee which went to where he was building after finding that he built another house after he was given compensation.

[15] Ndakengerwa Gasana Aimable states that there is no injustice in the judgment rendered by the High Court and what the counsel for Kigali City considers as disciplinary faults are not as the disciplinary committee examined it and found that they were not disciplinary faults, and ordered for his reinstatement. On the issue of attempting to detain a person at Kigali Rehabilitation Transit Center, at Gikondo he denies it and states that he went there to request for the report from a lady who was employed there called Kayitesi because she had spent many days without getting it.

[16] Ndakengerwa Gasana Aimable argues that the people they allege that he was going to detain those who were in his car, he had just given them a ride. He explains that he first met Twahirwa Oswald and gave him a ride and then met Nsengiyumva Gilbert and he also boarded and later he found that they had some issues of a loan, thus he had not kidnapped them as alleged by the counsel for Kigali City. He was asked if the employees at Kigali Rehabilitation Transit Center has any grudge against him and responded that there is none apart from that they lied.

[17] Counsel Musirimu Jean Claude assisting Ndakengerwa Gasana Aimable argues that his client was unfairly dismissed because he did not commit the disciplinary faults which were based on by Kigali City to dismiss him as they were also confirmed by the Committee against the injustice in Kigali City on 11/12/2015 and also the extraordinary meeting of Kigali City on 13/12/2015.

[18] He argue that the fault which Kigali City accuses Ndakengerwa Gasana Aimable of using the employees he leads of Kigali Rehabilitation Transit Center in his interests never happened because there is no evidence produced before the court to prove it, therefore the motivation of the Court in paragraph 35 should not be considered as injustice instead it's the motivation of the Judge. He states that Ndakengerwa Gasana Aimable was not accused of attempting to detain people at the Center in his interests but it was an issue of the contract concluded by two people, and those people settled the payment and the file was closed at the Police. He also adds that even if it was an offense he is not the one to be penalized that is the reason he was released by the Prosecution and he was given his property which had been confiscated.

[19] Counsel Musirimu Jean Claude adds that the Kigali Rehabilitation Transit center is not an institution of civilian employees to the extent that it should be in the responsibilities of Ndakengerwa Gasana Aimable as alleged by the counsel for Kigali City. On the issue of the witness who testified that his client wanted to detain people, Counsel Musirimu Jean Claude argues that their testimony should not be considered because there is no written statement of their testimony.

[20] Ndakengerwa Gasana Aimable states that he did not build in a slum, he did not build any other building after he was compensated after the road had destroyed his house. He adds that two houses which are there are the ones which existed before in which he stored the materials got

from where he was expropriated. His counsel state that the employee in charge of development in Kigali City visited that place and found no building constructed after being expropriated.

## **COURT'S DETERMINATION**

[21] Article 80 of the Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service provides that no sanction can be applied before the accused is proved guilty. The Court, therefore, finds that its necessary to first determine whether Ndakengerwa Gasana Aimable is guilty of the disciplinary faults on which Kigali City based on to dismiss him.

[22] In the letter of 29/01/2016, the Mayor of Kigali City dismissed definitely Ndakengerwa Gasana Aimable, it states that he was dismissed for the following three disciplinary faults :

- a. For spending more than a week not reporting at work without informing his superior and when he reported at work, he did not inform in writing the reason for not fulfilling his duties ;
- b. Attempting to use employees of Kigali Rehabilitation Transit Center in his personal interests ;
- c. Violating the laws and regulations relating to building in Kigali City while he is a leader in charge of preventing building in slums.

### **Concerning the fault of being absent at work for a week without informing his superior.**

[23] In the Judgment RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG, rendered by the High Court, paragraph 11, indicates that Ndakengerwa Gasana Aimable was detained by the police on 04/09/2015, and was provisionally released on 11/09/2015. The report made by the Disciplinary Committee in Kigali City on 27/11/2015 indicates that Ndakengerwa Gasana Aimable produced to them SMS he sent to the Mayor of Kigali City informing him that after being detained by the police last Friday he has been temporarily released and he will have to report to the police every Friday.

[24] The Court finds that it is obvious that seven days which Ndakengerwa Gasana Aimable was not at work (from 04/09/2015 up to 11/09/2015), was detained by the Police and he also immediately informed his superiors when he was released. The Court, therefore, finds that he is not guilty of that fault because he wouldn't go to work while he is detained by the competent organ.

### **Concerning the fault of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his personal interests**

[25] It is indicated in the dismissal letter of Ndakengerwa Gasana Aimable that he carried a person in his vehicle and dropped him to this center, he requests its employees to detain him because he is a thief. Those employees who interrogated or met with Ndakengerwa Gasana Aimable were heard by the disciplinary committee of Kigali city, they provided testimony which is indicated in the report of 27/11/2015, and it was signed on by all members of the committee.

[26] The four employees of RTC who were interrogated including the chief commander, all concurred that Ndakengerwa Gasana Aimable asked them to detain the person whom they were together in his car, saying that he is a thief but they refused. The statement of Ndakengerwa Gasana Aimable's advocate that nothing proves that the declarations which are in the report belong to them because they did not sign on the statement, the court finds it without merit because there is no reason for six persons who signed on the report of the disciplinary committee of Kigali city to lie.

[27] Among the pieces of evidence Ndakengerwa Gasana Aimable produces, proving that he did not commit that fault, there is a receipt document that is between Nsengiyumva Gilbert and Twahirwa Oswald (the one he was accused of trying to detain in RTC). That document indicates that Nsengiyumva Gilbert paid 400,000 Frw in damages to Twahirwa Oswald, the court finds it with no use in this case because apart from not explaining the reason of those damages, it cannot exonerate the fault he was dismissed for.

[28] The arguments of Ndakengerwa Gasana Aimable that the Prosecution prosecuted him due to that receipt, and then it released him after finding that it is civil matters, this is another element of evidence of proving that he did not commit a fault. The court finds it without merit because the crime for which he was prosecuted, is to detain a person illegally not the payment. The court finds further the fact that the file was closed by the Prosecution is of no use to him, because if a person was not sued for criminal matters does not exonerate to be sanctioned professionally basing on what provided by article 78<sup>3</sup> of the law N° 86/2013 of 11/09/2013 establishing the general statutes for public service. The provision of this article concurs to the explanation of the legal scholars Georges Dupuis, Marie-Josée Guédon and Patrice Chretien<sup>4</sup> who confirm that the professional fault may be disciplinary and criminal sanctioned.

[29] The other pieces of evidence which Ndakengerwa Gasana Aimable produces for proving that he did not commit the fault of using his subordinates in his personal interests, it is a report of commission against the injustice in Kigali city of 11/12/2015 and the minutes of the extraordinary meeting of the council of Kigali City that took place on 13/12/2015. The report of the commission against injustice indicates that organs that detained Ndakengerwa Gasana Aimable were the ones of his motive of being absent at work and found him not guilty. Therefore, the Court finds, the fact that the organs which prosecuted him closed the file, does not

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<sup>3</sup> “The disciplinary sanction of a public servant shall be independent from criminal liability and punishment as provided by the criminal code to the extent that the same fault may cause both disciplinary procedure and criminal procedure/ *La sanction disciplinaire est indépendante de la responsabilité pénale et de la répression prévue par la législation pénale à tel point qu'un même fait peut déclencher des poursuites disciplinaires et pénales* »

<sup>4</sup> “*Une faute professionnelle d'un fonctionnaire peut entraîner, à la fois, une répression disciplinaire et une répression pénale. Dans les deux cas, il s'agit d'édicter une sanction en réponse à une faute. Il existe toutefois une réelle indépendance des deux procédures. L'autonomie de la répression disciplinaire tient à son lien avec l'exercice d'une fonction : la faute est fonctionnelle et la peine l'est aussi, alors que la répression pénale concerne tous les individus pour des faits qui ne sont pas liés à une fonction, et que la sanction pénale ne vise pas le coupable dans sa fonction mais dans sa liberté ou sa propriété. Pratiquement, la décision de l'autorité disciplinaire ne lie jamais le juge pénal : de nombreux agissements sont des fautes disciplinaires sans être, pour autant, des délits.*

*De même, l'autorité disciplinaire n'est pas liée par la décision du juge pénal, sauf lorsque ce dernier s'est prononcé sur l'existence ou l'inexistence de certains faits : ses constatations matérielles s'imposent à l'autorité administrative* » ; Georges DUPUIS, Marie-Josée GUÉDON, Patrice CHRETIEN, *Droit Administratif*, 10<sup>ème</sup> Edition, Sirey, 2007, p. 381.



exonerate to be punished for disciplinary fault as it was explained, thus, this report is of no use in demonstrating whether the disciplinary fault was or not committed. The court also finds of no use the conclusions of the extraordinary meeting of the council of Kigali city because what is mentioned in it is that the council and the executive committee have first to talk on the issue of Ndakengerwa Gasana Aimable for one conclusion but the decision was not taken.

[30] Furthermore, the court finds without merit the arguments of Ndakengerwa Gasana Aimable that he could not provide the orders in RTC because it was not in his attribution, according to Organizational Chart of Kigali city, this center is one of the organs which he was Director General of Social Development. Ndakengerwa Gasana Aimable does not refuse that he went with Twahirwa Oswald and Nsengiyumva Gilbert in his car to RTC on the day in which they allege that he committed a fault. His arguments before the court that he went there to take the daily report which issued to the head of the department, the deputy of the center, the court finds it meaningless while he says that he is not related to RTC, in addition to that, he could request that report without going there.

[31] The court also finds that the arguments of Ndakengerwa Gasana Aimable's counsel that the fact Kigali city accepted to execute the judgment emphasizes that he did not commit a fault; is groundless because the application of the review of the judgment due to injustice does not prevent its execution basing on the provision of article 64, paragraph 1 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts.

[32] Basing on the motivation provided above, the court finds that Ndakengerwa Gasana Aimable has committed the fault of trying to use the employees of Kigali Rehabilitation Transit Center”(RTC) in his personal interest.

### **The fault of violating the laws and instruction related to constructing and urban planning in Kigali City**

[33] Among the case file includes the report of 24/11/2015, taken by the group which was established by Kigali city to inspect the house located on plot N° 385 of Ndakengerwa Gasana Aimable. In that report, there is a photo of a small house of two doors which is constructed by old materials, the group members asked Ndakengerwa Gasana Aimable to demonstrate the authorization to build that house mentioned being a warehouse, if not he must remove it. The court is finding that the group members did not confirm whether the house was built after Ndakengerwa Gasana Aimable being expropriated due to the public interest, or it was there before and be placed the materials which were on the expropriated houses as he uses in his pleadings.

[34] The report of 27/11/2015, the disciplinary committee in Kigali city, there is one named Muhinda Arthur, the officer in charge of construction in Gasabo district informed that committee that Ndakengerwa Gasana Aimable did not build the house, that it was there before the expropriation, it contains the materials of expropriated houses. The court finds that based on the report mentioned, Ndakengerwa Gasana Aimable did not commit the fault of violating the laws and instructions related to constructing and urban planning in Kigali city.

[35] Basing on the analysis conducted on all three faults that were filed against Ndakengerwa Gasana Aimable, the court finds that he commits one fault of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his personal interest.

**Whether the sanction of dismissing Ndakengerwa Gasana Aimable definitely was fair and lawful applied**

[36] Cyubahiro Fiat, the counsel of Kigali City state that Ndakengerwa Gasana Aimable was sanctioned on the bases of Presidential Order determining the sanction for public servants and on organic law regulating the conduct of public officials because he is a Director General in Kigali city. He states that in paragraphs 35, 36 and 37 of the judgment subjected to the review of judgment due to injustice, the High Court found Ndakengerwa Gasana Aimable guilty of the fault of trying to use the employees whose he was their superior in his personal interest, but it ruled that he should have been given the sanction proposed by the disciplinary committee, which is delay in promotion, provided by article 12 litera 5 of Presidential Order N°65/01 of 4/3/2014 determining the sanction for public servants, it disregarded that even if the disciplinary committee found it like that, nothing can prevent the competent authority to find it differently according to the gravity of the committed fault.

[37] He further states that article 5 of Presidential Order N° 65/01 of 4/3/2014 mentioned above provides that according to the gravity of a disciplinary fault, the competent authority shall impose a disciplinary sanction more serious than the sanction provided for the misconduct ; whereas article 7 provides for aggravating circumstances. He explains that for Ndakengerwa Gasana Aimable, the gravity bases on concomitance of the faults he committed and on the fact that he attempted to detain a person illegally while he was a superior leader who has in his attribution to supervise the center which he wants to use in his personal interest. Counsel Cyubahiro Fiat states that all those motives aggravate the fault to the extent that Ndakengerwa Gasana Aimable was imposed the sanction of dismissing him definitely.

[38] Counsel Cyubahiro Fiat adds that Mayor of Kigali city gave the sanction based on the advisory opinion of the disciplinary committee on the sanction which should be imposed, and he sought for an advisory opinion to MIFOTRA which replied him that according to the gravity of the committed fault, that employee must be definitely dismissed. He states that Ndakengerwa Gasana Aimable wrote to the Public Service Commission, and it replied to him that he was lawfully sanctioned.

[39] Musirimu Jean Claude, the counsel for Ndakengerwa Gasana Aimable states that the High Court motivated that his client should not have been dismissed, rather, he should have been sanctioned by the sanction provided by Presidential Order N°65/01 of 4/3/2014 determining the sanction for public servants, article 12 paragraph 2, even if he does not admit that fault.

[40] He further states that Kigali city applies wrongly the laws because for determining the aggravative circumstances, It applies the Presidential Order but for giving the sanction It applies the organic law regulating the conduct of public officials. He adds that even if his client does not admit the fault, the sanction of delaying to promote proposed by the disciplinary committee should have been given as the High Court ruled.

## **COURT'S DETERMINATION**

[41] Article 98 of Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service provides that dismissal shall refer to a measure, pronounced in writing by a competent authority, of definitive expulsion of a public servant from public service as a result of gross misconduct. It provides also that gross misconduct shall be punished by a competent authority after consultation with the Minister.

[42] Article 3 of the mentioned law explained that gross misconduct is misconduct which depends on the seriousness of the act committed, omission or behavior displayed, circumstances, impact on public service, service delivered and beneficiaries of service.

[43] Basing on article 76 of law N° 86/2013 of 11/09/2013 mentioned above, gross misconduct shall be sanctioned by the sanctions of the second degree. Article 81 of that law indicates that the second degree sanctions shall be imposed by the competent authority who appointed the public servant after consultation with the Minister. The mentioned Minister is Minister in charge of public service.

[44] Basing on these motivations provided by the Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service, to dismiss a public servant, he/she must commit gross misconduct. To decide that the committed fault is gross misconduct, the seriousness of the fault must be considered, the way it was committed and its consequences. Dismissal is one of the second degree sanctions, that are imposed by the authority who appointed the public servant after consultation with the Minister in charge of public service, that shall be done in writing form.

[45] As it was motivated above, Ndakengerwa Gasana Aimable committed a fault of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his interest, whereby he requested them to put in prison the person he called a thief. The Rwandan constitution law, in its article 13 provides that a human being is sacred and inviolable. Article 29 of this law also highlights the principle that the person is subjected to imprisonment when he/she committed a crime that is provided and punished by the law. The fact that Ndakengerwa Gasana Aimable tried to detain the innocent person, in a place which does not serve as prison, the court find that it is violating and bothering a person without considering the principles which are in his/her favour, that are highlighted by the Constitution of Rwanda, thus, this is gross misconduct. The court finds further that the fact that he committed that fault when he was a superior authority who must be an example for others and he had to prevent against any act which can defame a government as his employer, this is an aggravative circumstance of a fault.

[46] According to the provisions of article 76 of the law N° 86/2013 of 11/09/2013 mentioned above, the gross negligence is sanctioned by a second degree sanction. The second degree shall be composed of the following sanctions : 1° delay in promotion ; 2° suspension from duties for a period not exceeding three (3) months without being paid ; 3° dismissal. The court finds that Ndakengerwa Gasana Aimable was under this statute as a public servant, but especially the organic law N° 11/2013/OL of 11/09/2013 modifying and complementing the Organic Law N° 61/2008 of 10/09/2008 on the leadership code of conduct, due to the position of Director General of social affairs he occupied. Article two and three of this organic law provide that leaders who are under this law are director general and the others who are on that level.

[47] Court finds the statements of Ndakengerwa Gasana Aimable's counsel that if he was guilty, he would have been sanctioned of delay in promotion, this should not be given the merit because this sanction is not among those provided by the organic law N° 11/2013/OL of 11/09/2013 on the leadership code of conduct and also this law had to be applied according to this principle of specialia generalibus derogant. His statements again that it would have been applied the orders of the disciplinary committee of Kigali city, which is to delay in promotion Ndakengerwa Gasana Aimable, the court finds it without merit because the final decision should be taken by the competent authority to sanction.

[48] Basing on the provision of article 20 of the mentioned organic law, the second degree sanction shall be imposed to the authority who is guilty of gross negligence is dismissal or dismissal and be published in case it is of general interest. Therefore the Court finds that Ndakengerwa Gasana Aimable was given a sanction appropriate to the grave fault he committed.

[49] Court finds further that the sanction of dismissal that was imposed to Ndakengerwa Gasana Aimable was lawfully applied because it was imposed by the authority ( mayor of Kigali city) who appointed him on position in writing according to the letter of 29/01/2016, and he did it after consulting the Minister in charge of public service as it was indicated by the letter of 11/12/2015<sup>5</sup> and that of 27/01/2016<sup>6</sup>.

[50] Basing on motivations provided above, the court finds that Ndakengerwa Gasana Aimable has committed gross misconduct of trying to use the employees of Kigali Rehabilitation Transit Center (RTC) in his personal interest, the sanction he was imposed of being dismissed, was the right sanction and it was lawfully imposed. Therefore, the court finds that it is not necessary to examine the damages he requested.

### **III. DECISION OF THE COURT**

[51] Finds with merit the application of reviewing a judgment RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG rendered by the High Court on 07/11/2017 due to injustice ;

[52] Decides that Ndakengerwa Gasana Aimable was lawfully dismissed ;

[53] Sustains the decision of dismissing Ndakengerwa Gasana Aimable ;

[54] Overturns the rulings of the judgment RADA00023/2017/HC/KIG-RADA00027/2017/HC/KIG rendered on 21/09/2017 by the High Court, that was rectified by the judgment N°RS/RECT/RAD 00003/2017/HC/KIG on 07/11/2017;

[55] Orders that the court fees be on the public treasury.

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<sup>5</sup> The letter of Mayor of Kigali city for consulting the Minister in charge of public service on the proposed sanction

<sup>6</sup> The letter of Minister in charge of public service which advising on the sanction of dismissing Ndakengerwa Gasana Aimable