

NIWEMUGENI v KCB RWANDA LTD

[Rwanda SUPREME COURT – RS/INJUST/RSOC 00001/2019/SC (Mukamulisa, P.J. Nyirinkwaya, Cyanzayire, Rukundakuvuga and Hitiyaremye, J.) January 31, 2020]

Contract law – Employment contract – Termination of an open-ended contract – An employee who is dismissed from work without notice, is entitled to the damages equivalent to the net salary after deducting the withholding tax and employee’s contribution for the social security fund.

Contract law – Termination of employment contract – Reasonable ground – Employee's conduct – The misconduct of the employee resulting from his conduct and ability is a reasonable ground for the termination of an employment contract.

Contract law – Termination of an employment contract – The onus of proof – In case of the disputes on the committed misconduct, the onus of proof is upon the employer.

Contract law – Misconduct of employee – The fact that an employee was not found guilty or not prosecuted for criminal action, does not exonerate the employee from the disciplinary sanction since the criminal action is different from the disciplinary sanctions which result from the committed misconduct.

Fact: Niwemugeni was an employee of KCB, it dismissed her on the ground that she used her medical insurance card of UAP Insurance Rwanda Ltd to cover the medical cost of someone who is not covered by her insurance, thereafter, she filed a case against KCB at the intermediate Court of Nyarugenge arguing that it unlawfully dismissed her, for that she requests for various damages. The court found her claim without merit.

Niwemugeni appealed to the High Court alleging that she was dismissed without the evidence that demonstrates the fault which was based on in dismissing her, that there is no competent court that confirmed she committed the fault, and she was not given the notice. The High court sustains the rulings of the appealed judgment, rather it orders Niwemugeni to pay KCB procedural and counsel fees.

Niwemugeni wrote to the president of the court of appeal stating that judgments that were rendered by the previous courts have injustice in them. After examining that injustice, the case was heard by the Supreme Court.

During the hearing, the plaintiff stated that the defendant dismissed her unlawfully because it did not give her notice, that she did not commit any fault and there is no competent court confirmed that she committed gross negligence.

The defendant explains that the plaintiff was not unlawfully dismissed because her dismissal was based on the ground which everyone can verify, the fact that she was not able to contradict the evidence which was produced, she should not have to wait for the court to pronounce on that fault, because those were done when an employee was dismissed due to gross negligence, while the plaintiff was dismissed due to reasonable ground.

Held: 1. An employee who is dismissed from work without notice is entitled to the damages equivalent to the net salary after deducting the withholding tax and employee's contribution to the

social security fund. (overruling of the jurisprudence). This position overrules the position which was taken in the cases rendered before this court, includes judgment RSOCAA 0003/15/CS rendered on 05/05/2016, RUGENERA Marc and Soras Assurances Générales Ltd (SORAS AG) and the judgment RSOCAA 0001&0002/16/CS rendered on 14/10/2016, NTUKAMAZINA Jean Baptiste and Prime Insurance Ltd (PRIME), whereby in those judgments, the court held that the allowances which were given to an employee in case he/she was dismissed on work are brut salary.

2. The misconduct of the employee resulting from his conduct and ability is a reasonable ground for the termination of an employment contract.

3 In case of the disputes on the committed misconduct, the onus of proof is upon the employer

4. The fact that an employee was not found guilty or not prosecuted for criminal action, does not exonerate the employee from the disciplinary sanction since the criminal action is different from the disciplinary sanctions which result from the committed misconduct

Application for reviewing a judgment on the ground of injustice has no merit.

Statute and statutory instruments referred to:

Law No 86/2013 of 11/09/2013 establishing the general statute of the public servants (repealed), article 78.

Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda (repealed), article 29 and 32.

Law N° 16/2005 of 18/08/2005 on direct taxes on income (repealed), article 4 and 13.

Presidential Order N° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants.

International Labour Convention no 158 of 1982 concerning the termination of employment an employment contract (not yet ratified by Rwanda).

Cases referred to:

Government of Rwanda v Nkongoli John, RADA 0012/07/CS rendered by the supreme court on 27/03/2009

Author cited:

François GAUDU et Raymonde VATINET, Droit du travail, 5e édition, Dalloz, 2013, p. 213-214.

Gilles AUZERO et Emmanuel DOCKES; Droit du travail, 30e édition, Dalloz, 2016, p. 610, 619.

Georges DUPUIS, Marie-Josée GUEDON et Patrice Chrétien, Droit administratif, 10^e édition, Editions SIREY, 2007, page 381.

N'Deye N'Doye, Le licenciement pour motif personnel en France et au Sénégal: [étude de droit comparé], Droit, Université de Strasbourg, HAL, 2012, p.59, 64.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Since 10/12/2013, Niwemugeni Jeannette was an employee of KCB Bank Rwanda Ltd, as a Sales Manager at Musanze branch. After six months of probation, she was given an indefinite contract. She was transferred to the headquarter on the post of Business Banker with a salary of 1,556,775Frw per month.

[2] She states that she was dismissed on 04/08/2016 due to the trumped-up case against her that she used her health insurance card of UAP Insurance Rwanda Ltd to cover treatment charges of Mukeshimana Mariam at Clinic Bien Naitre who is not an affiliate to her health insurance.

[3] Niwemugeni Jeannette filed a claim against KCB Bank Rwanda Ltd to the Intermediate Court of Nyarugenge for unlawful dismissal, she claims for damages for unfair dismissal of 9.340.650 Frw, 1.556.775 Frw for terminal benefits, 980.336 Frw which she was unfairly deducted, counsel, and procedural fees.

[4] On 13/02/2018, the Intermediate Court of Nyarugenge rendered a judgment RSOC 00250/2017/TGI/NYG and found without merit the claim of Niwemugeni Jeannette, it held that she was lawfully dismissed based on the grave misconduct and that she was given the terminal benefits, therefore they cannot be awarded again, that she does not deserve to be awarded the notice of 980,336Frw she requests for, it ordered her to pay KCB Bank Rwanda Ltd 500.000 Frw for the procedural fees and 1,000,000Frw of the counsel fees.

[5] Niwemugeni Jeannette appealed against the judgment to the High Court, she submitted the following grounds of appeal :

- a. that KCB Bank Rwanda Ltd did not produce the evidence to prove that she committed the alleged misconduct and she was not founded guilty by the competent court
- b. she was dismissed without notice
- c. that the person whom KCB Bank Rwanda Ltd alleged that she paid her medical bills was never produced.

[6] On 28/06/2018, High Court rendered the judgment N° RSOCA 00056/2018/HC/KIG and sustained the rulings of the appealed judgment RSOC 00250/2017/TGI/NYGE, it ordered Niwemugeni Jeannette to pay 100.000Frw of the procedural fees and 250.000Frw of the counsel fees to KCB Bank Rwanda Ltd

[7] Niwemugeni Jeannette wrote to the president of the Court of Appeal requesting for the review of the judgment N° RSOCA 00056/2018/HC/KIG because it was vitiated with injustice, After examining her request the latter wrote to the President of the Supreme Court that the judgment may have been vitiated with injustice, thus, it can be analyzed and confirm whether it should be reviewed due to injustice.

[8] In his decision n° 080/CJ/2018, the President of the Supreme Court ordered that the judgment be transferred to the registry of the Supreme Court and be recorded in the relevant register, to be reviewed.

[9] The hearing of the case was scheduled on 10/01/2020, held in public, Niwemugeni Jeannette was assisted by Counsel Bagaza Magnifique and Counsel Maguru Amir Ahmed whereas

KCB Bank Rwanda Ltd was represented by Counsel Bimenyimana Eric. The hearing was closed and the parties were notified that the judgment will be pronounced on 31/01/2020.

[10] The oral submissions of the parties during the hearing were to determine whether Niwemugeni was unlawfully dismissed, and it is the main legal issue in this judgment. The issue of the damages requested was also analysed.

II. ANALYSIS OF THE LEGAL ISSUES

i. Determining whether KCB Bank Rwanda Ltd unlawfully dismissed Niwemugeni Jeannette.

[11] Niwemugeni Jeannette states that the grounds supporting her claim that KCB Bank Rwanda Ltd dismissed her unlawfully are the following :

- a. she had an open-ended employment contract, but it dismissed her without notice,
- b. she was dismissed without committing any misconduct be it minor or gross because the charges against her that she used her insurance clear the medical bills of unauthorized person are trumped-up charges;
- c. no competent court convicted her of that misconduct as provided for by article 32 paragraph 3 of the law N° 13/2009 of 27/05/2009 regulating labour in Rwanda that was into force at the time of her dismissal.

[12] The advocates for Niwemugeni Jeannette argue that she was unlawfully dismissed because the courts applied only paragraph one of article 32, law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, instead of applying paragraph 2 which provides the termination of the employment contract without notice in case of gross misconduct.

[13] They further state that the misconduct should have been confirmed by the competent court before terminating the contract as provided by paragraph 3 of the above-mentioned article and the party which wants to terminate it provides the notice of 48 hours. They explain that misconduct must be proven and be informed to the employee in 48 hours, after informing her, the employer files a claim to the competent jurisdiction to declare the misconduct, thereafter the employee is dismissed.

[14] Furthermore, they state that KCB Bank Rwanda Ltd dismissed Niwemugeni Jeannette on 04/08/2016, before lodging a criminal case for the offense for which she was dismissed because it was filed on 01/12/2017 after more than a year, this means that they dismissed her without concrete evidence that she really committed that fault.

[15] KCB Bank Rwanda Ltd states that Niwemugeni Jeannette was lawfully dismissed due to the following grounds:

- a. That fact that she was dismissed on the ground anyone can investigate,

- b. The fact that she did not contradict the elements of evidence which includes the document of UAP Insurance Rwanda Ltd of 30/06/2016¹, testimonies of those who saw her at the hospital seeking medical treatment for the person who is not insured by KCB Bank Rwanda LTD;
- c. The fact that the criminal file includes the testimonies of the doctors who received Niwemugeni Jeannette who confirmed that she tried to seek medical treatment of someone else, as is emphasized by their minutes. Those are Dr. Murindwa Patrick, Diane Mudahogora Rwigirira, and Mukambungo Amerberg
- d. Provisional document of closing the file which Niwemugeni Jeannette bases on in demonstrating that there is no court which convicted her, should not be based on because of the basis of the principle that a criminal prosecution is different from a disciplinary fault, as it was emphasized in the judgment N° RADA 0002/16/CS rendered by the Supreme Court on 23/02/2018 (page 5-6). In that judgment, the court found that nothing can prevent Salimini Saidi to be prosecuted and be disciplinary sanctioned even if he was not sued in a criminal case. This is also emphasized by the legal scholar Jean Rivero, in the book named “Droit Administratif”, whereby he explained that a single action can lead an employee to be prosecuted both criminally and disciplinary, and the decision in a criminal case can not prejudice the decision that can be taken in disciplinary sanctions, except on those related to the actions which the judge in the criminal case have been approved definitely that they happened or not.

[16] Bimenyimana Eric, the counsel for KCB Bank Rwanda Ltd states that it should not have to wait for the court to confirm the fault, because those are done in case an employee was dismissed due to gross negligence, but Niwemugeni Jeannette was dismissed on reasonable ground that is why she was given notice and she did not deny that she did not receive it. He states that nothing wrong with filing a complaint to judicial police after dismissing her, considering the faults Niwemugeni Jeannette has committed, there is no other sanction that could be taken against her considering her level.

[17] Concerning the elements of evidence proving the misconduct for which Niwemugeni Jeannette was dismissed, counsel Bimenyimana Eric states that in order to be revealed, the physician who was in the consultation room called the one who was on the reception and told her that there is a woman dressed as a Muslim, make for her a receipt so that she can pay, the one on reception answered that the one who comes to pay was not a Muslim. He states that after Niwemugeni realizing that she has been exposed she paid by using a fingerprint, and the one she was paying her medical bills paid cash, that is the reason why there are two receipts.

¹ That document stipulates that:” On 23rd 2016 evening she visited CLINIQUE BIEN NAITRE for medical attention. She used her fingerprint and allowed a bill for 19, 500 Rwf to be deducted from her benefits. In the process of approving the bill, the nurses at the hospital noted that the person who was actually examined and treated by Doctor is not her but somebody else. Hence she was using her card to give service to an unauthorized beneficiary. On this noticing, the hospital questioned her and requested that she pays the bill in full. She paid the bill as requested and but also mentioned to them that she has done this several times before and therefore they shouldn't bother her”.

DETERMINATION OF THE COURT

[18] Article 29 of the law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, stipulates 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 a prior notice given by the party that takes the initiative to terminate the contract.

[19] The law does not explain the justifiable grounds that can lead to the termination of an open-ended contract. The International Labour Organization (ILO) Convention on termination of employment, explains the justifiable ground for terminating an open-ended contract. Even if this convention is not binding in Rwanda because it is not yet ratified, but its provisions are persuasive. Article 4 of that convention provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service². In the Democratic Republic of Congo (DRC), the labour code provides that the reasonable ground that can lead to the termination of an open-ended contract is the ground which is basing on the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service³. Basing on those motivations, it is clear that the conduct of the worker, especially the faults he/she can commit in terms of work, is one of the justifiable grounds that can lead to the termination of the contract.

[20] A law regulating labor in Rwanda does not enumerate the faults that can lead to the termination of an employment contract due to their gravity, which is different in some other countries⁴, or the general statutes for public service laws in Rwanda⁵. The termination of the contract must be preceded by the notice or damages in absence of the notice, except if the fault which was committed is gross negligence (article 29 and 32 of Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda)

[21] In case of the dispute regarding whether the fault was committed as a valid reason that can lead to termination of the contract, Law N° 13/2009 of 27/05/2009 mentioned above does not provide who has a burden of proof, but borrowing from countries and International Labour Organization (ILO) Convention on termination of the contract, the onus of proof is upon the employer⁶.

² Article 4 de la Convention de l'OIT n ° 158 sur le licenciement, 1982 : « *Un travailleur ne devra pas être licencié sans qu'il existe un motif valable de licenciement lié à l'aptitude ou à la conduite du travailleur ou fondé sur les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service* ».

³ Article 62 du Code du travail de la RDC: “ *Le contrat à durée indéterminée ne peut être résilié à l'initiative de l'employeur que pour motif valable lié à l'aptitude ou à la conduite du travailleur sur les lieux de travail dans l'exercice de ses fonctions ou fondé sur les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service* »

⁴ In SENEGAL, they differ " *simple fault, serious fault, gross negligence*" whereas, in FRANCE, they differ " *serious fault, serious misconduct, gross negligence*" cfr N'Deye N'Doye, *Le licenciement pour motif personnel en France et au Sénégal :[étude de droit comparé]*, Droit, Université de Strasbourg, HAL, 2012, p.59, 64

⁵ Article 76 of Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service, and Presidential order no 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants

⁶ Aux termes de l'article L 63 al.3 du nouveau code du travail Sénégalais : « En cas de contestation, la preuve du motif légitime incombe à l'employeur ».

[22] The motivations provided in previous paragraphs implying that:

- a. the open-ended contract can be terminated if there is a justifiable ground;
- b. faults committed by an employer in terms of work is among the justifiable ground that can lead to the termination of an employment contract;
- c. if the contract is terminated due to the faults, the one who took the initiative to terminate it provide the notice or it's equivalent, apart from gross negligence;
- d. in case of disputes, the employer who terminated the contract bears the burden of proof that the fault was committed.

[23] The defense of Niwemugeni Jeannette and her counsel is premised on three main grounds to prove that she was unlawfully dismissed :

- a. The fact that she was dismissed when she did not commit either a fault or a gross negligence
- b. The previous courts did not comply with the provision of article 32 of law N° 13/2009 of 27/05/2009 regulating labour in Rwanda ;
- c. No competent court confirmed that she committed gross negligence and the fact that KCB Bank Rwanda Ltd did not wait for the rulings on the criminal case before dismissing her.

The court will examine these grounds, one by one.

ii. Concerning the claim that Niwemugeni Jeannette did not commit any fault that is sanctionable by dismissal

[24] The dismissal letter dated 04/08/2016 which KCB Bank Rwanda Ltd wrote to Niwemugeni Jeannette, informed her that the reason for the termination of the contract is because of her fraudulent conduct, of wrongly using her health insurance, card to pay for someone who is not included on that insurance.

[25] The elements of evidence that KCB Bank Rwanda Ltd produced to the court to prove that NIWEMUGENI Jeannette committed the fault which led to her dismissal, are the following :

- a. In the letter dated 30/06/2016, UAP Insurance Rwanda Ltd wrote to KCB Bank Rwanda Ltd informing it of what transpired at *Clinique Bien Naitre*, that Niwemugeni Jeannette used her fingerprint to pay 19.500Frw for someone who is not insured ;
- b. The document indicates that the receipt for medical treatment was paid using a health insurance card, after being revealed that the patient was not among the insured, she paid again the receipt by cash ;
- c. The testimonies of physicians and employees of *Clinique Bien Naitre* who saw her when she was seeking medical treatment for someone who is not among the insured, including :
 - i. Dr. Mulindwa Patrick received Niwemugeni Jeannette ;
 - ii. Mudahogora Diane Rwigirira ;
 - iii. Mukambungo Amerberg.

[26] The letter of UAP Insurance Rwanda Ltd explains that on 23/06/2016, Niwemugeni Jeannette went to *Clinique Bien Naitre*, and used her fingerprint to pay 19,500Frw for someone who is not among the insured, the employees of that clinic found it out and requested her to pay the bill without using the health insurance card. In that letter, UAP Insurance Rwanda Ltd requests KCB Bank Rwanda LTD to act upon that issue react to it, and informed it that it has immediately deactivated her medical card to prevent further abuse.

[27] The court finds that the content of this letter, collaborated with the payment receipts that were submitted to the court, it is obvious that on 23/06/2016, Niwemugeni Jeannette paid using online 19.500Frw to *Clinique Bien Naitre* that had to be paid by UAP Insurance Rwanda Ltd. On the same day, 19.500Frw was paid on the ordinary receipt (completed by handwriting) by Mukeshimana Mariam who sought medical treatment on behalf of Niwemugeri Jeanette. Mukeshimana Mariam says that she did not seek medical treatment from *Clinique Bien Naitre*, while Niwemugeni Jeannette says that she was treated on 23/06/2016, but that statement was contradicted by the receipt mentioned above which Mukeshimana Mariam paid, together with the statement of the hospital employees who received and handled the issue.

[28] Mukambungo Amerberg, the nurse from « *Clinique Bien Naitre* » explained before the Prosecution that Mariam came together with Jeannette and pretended that the latter was the one who came for treatment, but it was Mariam who received the consultation. She stated that after she met the doctor, she gave the appointment to Jeannette as if she is the one who has been in consultation, while it was Mariam who had been treated in the place of Jeannette. She explained that she telephoned at the reception requesting them to take a medical test for that Muslim lady, and the replied her that she was not the one who got the medical consultations, rather she was Jeannette, this led her to call the doctor and inform him that the woman whom he has examined was not the owner of the insurance card, thus even the appointment was canceled.

[29] Mudahogora Dianne Rwigirira, the cashier explained before the Prosecution that Niwemugeni Jeannette came for medical treatment with Mukeshimana Mariam, after receiving her she left her insurance card there and went to see the doctor. After her treatment, Niwemugeni Jeannette came to collect her card. Meanwhile, Mukambungo Amerberg called her requesting that they carry out the medical test for that Muslim lady, implying, mukeshimana Mariam and she replied that she was not the one who was treated instead she is Niwemugeni Jeannette. She explained that because they were near to them they asked them who was treated, Niwemugeni Jeannette replied to them that she sought medical treatment for Mariam on her insurance card because people do so anywhere. Mudahogora Dianne Rwigirira further explained to the Prosecution that they requested them to pay for themselves and informed immediately to UAP Insurance Rwanda LTD because Niwemugeni Jeannette had already used fingerprint so that it does not pay that money.

[30] The statements of the witnesses collaborate with the letter UAP Insurance Rwanda Ltd wrote to KCB Bank Rwanda Ltd, after being informed about the issue at *Clinique Bien Naitre*, and when read together with the documents which indicate that on 23/06/2016 Niwemugeni Jeannette paid 19.500Frw using the insurance of UAP Insurance Rwanda Ltd, and the same amount was also paid using an ordinary receipt in the names of Mukeshimana Mariam, this implies that Niwemugeni Jeannette committed the fault of paying the medical bills for someone not covered by the insurance that is given to the employees of KCB Bank Rwanda Ltd. The court finds that the

fault committed by Niwemugeni Jeannette of paying the medical bills of a person who is not covered by the insurance, by using the insurance of UAP Insurance Rwanda Ltd, is a justifiable ground that led to the termination of the employment contract that she had with KCB Bank Rwanda Ltd.

iii. Regarding the claim that the previous courts did not comply with the provisions of article 32 of Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda

[31] Article 32 of the law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, which was into force at the dismissal of Niwemugeni Jeannette provides that any termination of the contract without notice or without having observed the notice period compels the responsible party to pay the other party an allowance corresponding to the salary and other benefits from which the worker would have benefited during the notice period that has not been effectively respected.

However, termination of the contract may take place without notice in the case of gross negligence by one of the parties. In that case, gross negligence is notified to the other party within forty-eight (48) hours. The gross negligence is left to the appreciation of the competent jurisdiction

[32] This article has 4 main elements :

- a. First, it is applied when no notice was given or the period was not respected (article 29 of the Law N° 13/2009 of 27/05/2009 mentioned above)
- b. Second, in case the contract was terminated without notice or the period of notice was not respected, the responsible party shall pay the other party the allowance corresponding to the salary and other benefits from which the worker would have benefited during the notice period that has not been effectively-respected
- c. Third, in case of the termination of the contract due to gross negligence, there is no notice, the allowance to replace the notice, rather the responsible is obliged to notify the other party within forty-eight (48) hours.
- d. Fourth, The gross negligence is left to the appreciation of the competent jurisdiction (This will be analyzed by examining the third issue of the submissions)

[33] The letter dated 04/08/2016 which KCB Bank Rwanda Ltd wrote to Niwemugeni Jeannette, informing her that it has terminated the employment contract they concluded, it further informed her that it has the immediate effect, which means that the notice was not given. As it was demonstrated above, in case the notice was not given, there will be given an allowance corresponding to the salary and other benefits from which the worker would have benefited during the notice period. This is not the particularity of the Organic law regulating labor in Rwanda, according to the law scholars François GAUDU and Raymonde VATINET, as well as Gilles AUZERO and Emmanuel DOCKES⁷

⁷ « *Le préavis est en principe une période de travail, le salarié devant rester à la disposition de l'employeur. L'employeur peut cependant dispenser le salarié de l'exécution du préavis, en lui versant alors l'équivalent du salaire sous forme d'une indemnité de préavis* ; François GAUDU et Raymonde VATINET, Droit du travail, 5^e édition, Dalloz, 2013, p. 213-214.

[34] In the letter of 04/08/2016 of dismissing Niwemugeni Jeannette on work, KCB Bank Rwanda Ltd informed her what she is entitled to such as one month salary instead of notice. The letter of 12/08/2016 which KCB Bank Rwanda Ltd wrote to Niwemugeni Jeannette again which she signed that she received, indicates all she is entitled to, including the notice allowances of one month salary of 1.556.775Frw. NIWEMUGENI Jeannette acknowledged that she received that money during the hearing, the problem she has is 980,336Frw which was deducted, KCB Bank Rwanda Ltd states that it was withholding tax.

[35] Law N° 16/2005 of 18/08/2005 2005 on direct taxes on income which was into force at the dismissal of Niwemugeni Jeannette, explains the source of the taxable income. Article 4 of that law, provides in its one litera that income generated from services performed in Rwanda, including income generated from employment. Article 13 of that law, explains the elements of the income from employment, it's litera 5 provides that payments for redundancy or loss or termination. These articles demonstrate ko among what shall be taxed includes what an employee is given at the termination of an employment contract, like the amount of money that replaces the notice when it was not given.

[36] The court finds that the motivations mentioned in the previous paragraph demonstrate that the money which is given to the employee at his/her dismissal, they are not gross as claimed by Niwemugeni Jeannette and her counsels, rather it is net salary after reducing taxes on income. It is the same for the social security funds even if it was not pleaded upon. This is also the position of the law scholars⁸. This decision overlures the prior decision rendered by this court in the following cases :

- a. The judgment N° RSOCAA 0003/15/CS, between Rugenera Marc and Soras Assurances Générales Ltd (SORAS AG) rendered on 05/05/2016;
- b. The judgment N° RSOCAA 0001&0002/16/CS, between Ntukamazina Jean Baptiste and Prime Insurance Ltd (PRIME) rendered on 14/10/2016. The decision taken in those cases was that the allowances which an employee is entitled to at his/her dismissal are gross salary, however, no legal basis was given.

[37] Regarding the pleadings of the counsels for Niwemugeni Jeannette which state that the Court emphasized on paragraph one of article 32 which provides notice, while they had to rely on paragraph 2 and 3 which provide for gross negligence, the court finds that KCB Bank Rwanda Ltd did not consider the fault that led Niwemugeni Jeannette as gross negligence, and chose to give her the replacement of notice, it is not understandable why counsels for Niwemugeni Jeannette want that the paragraph which provides for gross negligence of article 32 be the one to be applied.

⁸ « Bien que le salarié ne fournisse pas de prestation de travail, il a droit à une rémunération et à des avantages identiques à ceux qu'il aurait obtenus s'il avait travaillé jusqu'à l'expiration du préavis.L'indemnité compensatrice de préavis est assimilée juridiquement à un salaire ; elle est soumise au régime juridique du salaire aussi bien au regard des garanties de salaire....qu'au regard des cotisations sociales » ; Gilles AUZERO et Emmanuel DOCKES, Ibidem, p. 620

« Le montant de l'indemnité compensatrice de préavis est égal au montant du salaire qu'aurait perçu le salarié s'il avait pu travailler pendant la durée de son préavis Cette indemnité est versée à la date de rupture du contrat de travail et est considérée comme un salaire. A ce titre, elle est soumise à l'impôt sur le revenu et aux cotisations sociales » ; Article publié par jurifiable.com, <https://www.jurifiable.com/consel-juridique/droit-du-travail/indemnité-compensatrice-de-préavis>, consulté le 27/01/2020

[38] Basing on the motivation provided above, the court finds that article 32 of Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda was respected.

iv. The claim that there is no competent court that confirmed that Niwemugeni Jeannette committed gross negligence and also that KCB Bank Rwanda Ltd had to first wait for the rulings of the criminal case before dismissing her

a. The claim that there is no competent court that confirmed that Niwemugeni Jeannette committed a gross negligence

[39] Paragraph 3 of article 32 of the law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, provides that the gross negligence is left to the appreciation of the competent jurisdiction. Even if the gross negligence which is mentioned in this article was not the fault which KCB Bank Rwanda based on for dismissing Niwemugeni Jeannette as it was explained, the court finds it is necessary to clarify it. Because the legislator did not list the acts or conducts which would be considered as gross negligence that leads to the dismissal of an employee without notice, but he stated who must decide that the fault committed was gross negligence in case the employee and the employer disputes on it. Therefore, it is clear that power was given to the competent court, which was seized when the disputes arose.

[40] The court finds that it is impossible that the opinion of the legislator was that the court must first confirm that the gross negligence was committed before an employer dismisses an employee, that he provides in the previous paragraph that the gross negligence terminates the employment contract without notice, and be notified to an employee within 48 hours (from the time an employer knew it). The reason why there is not notice is that the gross negligence is the fault that it is impossible for an employer maintains an employee in the company⁹. It was not necessary to add that gross negligence is left to the appreciation of the competent jurisdiction in paragraph 3 of article 32 in case of the dispute, as it is indicated in laws from some countries like France¹⁰, since the way article is written is well understandable.

[41] Basing on the motivations above, the court findings that the gross negligence should not have been first confirmed by the court for Niwemugeni Jeannette to be dismissed from work.

b. Whether KCB Bank Rwanda Ltd had to first wait for the rulings of the criminal case before dismissing her

⁹ Article 11 de la Convention de l'OIT n ° 158 sur le licenciement, 1982 : « *Un travailleur qui va faire l'objet d'une mesure de licenciement aura droit à un préavis d'une durée raisonnable ou à une indemnité en tenant lieu, à moins qu'il ne se soit rendu coupable d'une faute grave, c'est-à-dire une faute de nature telle que l'on ne peut raisonnablement exiger de l'employeur qu'il continue à occuper ce travailleur pendant la période de préavis* ».

« *La faute grave est toute faute qui rend impossible le maintien du salarié dans l'entreprise durant le préavis* » ; Cass. Soc., 16 juin 1998, Dr. Soc.1998, p.949 (NB : La faute grave est assimilable à la faute lourde dans certaines législations dont la nôtre

¹⁰ Article L1235-1de la loi portant réglementation du travail:” En cas de litige,le juge, à qui il appartient d'apprécier la régularité de la procédure suivie et le caractère réel et sérieux des motifs invoqués par l'employeur, forme sa conviction au vu des éléments fournis par les parties après avoir ordonné, au besoin, toutes les mesures d'instruction qu'il estime utiles » ; legifrance .gov.fr

[42] In the Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, there is no provision on that issue unlike law N° 86/2013 of 11/09/2013 establishing the general statute of the public servants which provides for it. The court finds that nothing prevents it to be guided by the provisions of this law on employees governed by the law regulating labor, in case the latter is silent.

[43] Article 78 of the Law N° 86/2013 of 11/09/2013 mentioned above, stipulates that the disciplinary sanction of a public servant shall be independent of 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. The provisions of this article were emphasized by case laws whether for the employees who are governed by the general statutes for the public servant or those governed by the employment contracts.

[44] In the judgment N° RADA 0012/07/CS between the Government of Rwanda and Nkongoli John, rendered by the Supreme Court on 27/03/2009, the court held that the fact that Nkongoli John was not found guilty does not mean that he should have not been disciplinary sanctioned in terms of work, on the basis that the criminal action is independent of disciplinary sanction that resulted from the fault and it should not be considered as the same. Its rulings were based on the opinions of the law scholars who include Georges DUPUIS, Marie Josée Guedon na Patrice Chretien¹¹. The court also used the opinions of these legal scholars¹², indicating that there is an exception in case a judge in criminal matters found guilty an employee for the actions is suspected to commit without any doubt. This is also the opinion of the legal scholar Emilie MAIGNAN, considering the decision taken by the courts¹³.

[45] In judgment N° 2622 of 13/12/2017 rendered by the cassation court in French, it was ruled that the disciplinary sanctions are different from the sanction in criminal matters, to the extent that an employer can sanction an employee for the faults he/she is being accused of in the criminal court, without prejudicing the principle that a person is presumed innocent until found guilty by the court.¹⁴

¹¹ *“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 »*; Georges DUPUIS, Marie-Josée GUEDON et Patrice Chrétien, Droit administratif, 10^e édition, Editions SIREY, 2007, page 381

¹² *« 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 GUEDON et Patrice Chrétien, ibidem

¹³ *« ... Ce n’est en effet que lorsque la relaxe repose sur l’inexistence de la matérialité des faits que le juge disciplinaire sera soumis à l’autorité de la chose jugée »*; Emilie MAIGNAN (Master II Droit des affaires), article publié dans la RJOI numéro 16, p.61, consulté le 27/01/2020. L’Auteur cite l’arrêt de la Cour de cassation française, chambre Sociale, 12/7/1989, D.1990.132

¹⁴ *« La procédure disciplinaire est indépendante de la procédure pénale, de sorte que l’exercice par l’employeur de son pouvoir disciplinaire ne méconnaît pas le principe de la présomption d’innocence lorsque l’employeur prononce une sanction pour des faits identiques à ceux visés par la procédure pénale »*

[46] The motivations above imply that:

- a. The fact that an employee was not found guilty or not prosecuted for criminal action, does not prevent disciplinary sanction to be taken against that employee because the criminal action is different from the disciplinary sanctions which result from the faults committed.
- b. There is an exception in case a judge in criminal matters found that the acts for which the employee is accused were committed or not committed without a doubt.

[47] In this judgment, it is clear that there is a complaint which KCB Bank Rwanda Ltd filed to the prosecution against Niwemugeni Jeannette and Mukeshimana Mariam, then the file was closed by the Prosecution on the ground that they are no irrevocable evidence against the suspects. As it was motivated in previous paragraphs, the fact that an employee was not prosecuted in the criminal court, does not prevent an employer to take disciplinary sanction against that employee when there is evidence that the employee committed that fault. This means that the fact the Prosecution closed the file against Niwemugeni Jeannette, does not stop KCB Bank Rwanda Ltd from disciplinary sanction her for the fault for which it has the evidence that it was committed. The exception which was mentioned in the previous paragraph cannot be applied in this case, because there is no final ruling by the court that the acts for which Niwemugeni Jeannette has been accused did not exist.

[48] Basing on the motivation provided above, the court finds that KCB Bank Rwanda Ltd did not have to wait for the ruling of the criminal case before dismissing Niwemugeni Jeannette

General conclusion

[49] Basing on the motivations above, and on the Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda which was into force when Niwemugeni Jeannette was dismissed from work, the Court finds that KCB Bank Rwanda Ltd dismissed Niwemugeni Jeannette lawfully.

v. Examining damages requested by KCB Bank Rwanda Ltd in the counterclaim

[50] KCB Bank Rwanda Ltd requests to order Niwemugeni Jeannette to pay 1,000,000Frw for the counsel fees.

[51] The counsel for Niwemugeni Jeannette state that the damages requested by KCB Bank Rwanda Ltd are groundless because if it did not unlawfully dismiss her, there would not be lawsuits.

DETERMINATION OF THE COURT

[52] The court finds that the counsel fees requested by KCB Bank Rwanda Ltd have merit, but because what it requests for is excessive and it has no evidence for it, in the court's discretion it is awarded 500,000Frw on this instance.

III. DECISION OF THE COURT

[53] Finds without merit the claim of Niwemugeni Jeannette for reviewing the judgment N° RSOCA 00056/2018/HC/KIG rendered on 28/06/2018 by the High Court of Kigali on the ground of injustice ;

[54] Finds with merit the counterclaim of KCB Bank Rwanda Ltd

[55] Sustains the rulings of the judgment N° RSOCA 00056/2018/HC/KIG rendered by the high court of Kigali on 28/06/2018 ;

[56] Orders Niwemugeni Jeannette to give to KCB Bank Rwanda Ltd 500,000Frw of the counsel fees.