



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

DIABAGATE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Miles Hastie, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant commenced employment as a Security Officer with the United Nations Organization Mission in the Democratic Republic of Congo (“MONUC”, as it then was) on 31 March 2004. On 16 March 2007, he was deployed to Kamina, Democratic Republic of Congo (DRC), as Officer-in-Charge of MONUC Security until he was redeployed to Kinshasa in mid June 2008.

2. On 6 October 2010 the Applicant was summarily dismissed from service for serious misconduct. On 17 January 2011, he filed an Application challenging the decision to summarily dismiss him. The Respondent’s Reply was filed on 17 February 2011.

3. The Tribunal commenced hearing the case in Kinshasa, at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) Headquarters offices on 14 July 2011. On 15 July 2011, the Tribunal in accordance with articles 17(6) and 19 of its Rules of Procedure ordered the appearance of certain witnesses. The hearing was then adjourned to 19 July 2011 during which the Tribunal received evidence from the Complainant and the alleged victim in the complaint which had led to the Applicant’s summary dismissal. The hearing of the case was subsequently adjourned to 23 January 2012.

Facts

4. On 31 March 2004, the Applicant joined MONUC on a 100-series contract. On 16 March 2007, he was deployed to Kamina, as Officer-in-Charge of Security.

5. Approximately one to two months after the Applicant’s arrival in Kamina, in May or June 2007, he met a Congolese girl (V01) when the Applicant went to visit V01’s uncle, referred to as the “Grand Chief” in Kamina.

6. The Applicant met V01 a second time when he went to play volleyball with one Alaim Kakudji. On that occasion, the Applicant gave V01 some money.

7. The Applicant met V01 a third time, on the road, after a party organized by the Indian contingent of MONUC. He was with a colleague, Mr. Brown Lusimanadjo. It was raining heavily, so the Applicant offered to drop off V01 and her friend at the compound of the Grand Chief.

8. On or about 24 December 2007, the Applicant had a party at his house attended by staff members in his section. One Ms. Hughette Piongo approached V01's mother ("W01") and requested her to allow V01 to attend a party organized by UN staff members.

9. V01 did not return home after the party. Ms. Piongo and V01 informed W01 that they had stayed at W01's brother's house after the party.

10. Sometime in 2008, a complaint that Ms. Piongo was using V01 for prostitution with UN staff members was made to Kamina police by W01.

11. On 29 April 2008, the Applicant was summoned to appear in Court in Kamina regarding sexual exploitation and abuse claims involving V01. He neither attended court nor informed his supervisors.

12. On 5 May 2008, OIOS received a report from the Conduct and Discipline Unit of MONUC that the Applicant had sexually exploited and abused a 14 year old Congolese girl (V01) and had sexual relations with several Congolese women, including prostitutes.

13. On 30 May 2008, the Applicant received a second summons to attend Court. He appeared in Court on 31 May 2008.

14. OIOS conducted an investigation of the matter following which it delivered its report dated 1 July 2009. In the said report, OIOS concluded that: the Applicant had engaged in sexual activity with V01 and also engaged in sexual relationships with local women, conduct that was strongly discouraged; he had failed to report his Court summons to his supervisor and had conveyed non-UN personnel in UN vehicles without the requisite authorities and waivers. OIOS recommended that appropriate administrative action be taken against the Applicant.

15. By memorandum dated 13 August 2009, the Director, Department of Field Support, referred the Applicant's case to the Assistant Secretary-General, Office of Human Resources Management (OHRM) for appropriate action.

Charges and Applicant's comments on the charges

16. By memorandum from the Chief, Human Resources Policy Services, OHRM, dated 5 March 2010, the Applicant was charged with misconduct, specifically with:

- a. Engaging in sexual activity with a Congolese female, who was, at the time under the age of 18.
- b. Exchanging money and/or goods and/or services for sex from known prostitutes.
- c. Engaging in sexual relationships with beneficiaries of United Nations assistance, namely, local Congolese women.
- d. Failing to honour his obligations to the local Court.
- e. Engaging in the unofficial and unauthorized use of UN vehicles.

17. The Applicant was requested to provide comments in response to the allegations against him which he did on 27 June 2009.

18. In his response to the charge letter, the Applicant stated, *inter alia*:

- a. The allegations that he engaged in sexual activity with V01 were false.
- b. He had only met V01 once during a visit to the Grand Chief.
- c. None of the women he had engaged in sexual activity with were prostitutes and the Organization must separate the private from the professional lives of its staff members.

- d. He had appeared before the Kamina Court on 26 April 2008 as requested and he had also informed his supervisor that he had been requested to appear before the said Court. His supervisor told him to consult the human rights office.
- e. Upon arrival at the Court he found the Prosecutor with V01. The Prosecutor stated that V01 had alleged that the Applicant had given him (the Prosecutor) one car battery, four new tyres, one barrel of oil and some monthly cash. Right there in his presence, V01 denied that she had said this.
- f. Before departing on leave in April 2008, he scanned a copy of the invitation to appear before the Congolese Court and sent it to his Assistant. When he returned, his Assistant informed him that the matter had been resolved and that all was okay.

19. After reviewing the entire dossier including the Applicant's comments, the Respondent imposed upon the Applicant the disciplinary measure of summary dismissal on 6 October 2010. The sanction was based on the following three charges which the Respondent concluded had been substantiated.

- a. Engaging in sexual activity with a Congolese female, who was at the time, under the age of 18.
- b. Engaging in sexual relationships with beneficiaries of United Nations assistance, namely, local Congolese women.
- c. Engaging in the unofficial and unauthorized use of UN vehicles.

20. On 17 January 2011, the Applicant filed the present Application. The Respondent filed a Reply on 17 February 2011.

21. The Tribunal commenced hearing the case in Kinshasa, MONUSCO Headquarters offices on 14 July 2011. On 15 July 2011, the Tribunal issued Order No. 76 (NBI/2011) requiring Counsel for the Respondent to avail the personal

appearance of certain witnesses at the hearing. Counsel was directed to inform the Tribunal regarding his compliance with the Order by 19 July 2011.

22. The Tribunal received evidence from the following witnesses:

- a. Ms. Martha Kilimo, MONUC Security (on 13 July 2011).
- b. The Applicant on 14 July 2011.
- c. V01 on 20 July 2011 and on 23 January 2012.
- d. W01 (mother of V01) on 20 July 2011 and on 23 January 2012.
- e. Mr. Freedom Segabo, one of the OIOS Investigators, on 23 January 2012.

23. During the hearings on 20 July 2011, Counsel for the Applicant was unable to participate as he had departed from Kinshasa. The Tribunal was still sitting in Kinshasa hearing other cases. On that day, the Tribunal received evidence from V01 and W01 in closed proceedings. Counsel for the Applicant was informed to appear via teleconference but was unable to do so ostensibly due to technical problems. Counsel for the Applicant was subsequently provided with the audio recordings of the hearing and was given an opportunity to cross-examine the said witnesses on 23 January 2012.

24. Ms. Kilimo's testimony is summarized below.

- a. She has been a Security Officer with MONUSCO since 2004 and was the Applicant's colleague.
- b. The Applicant is a gentleman who treated women with respect and there had never been any sexual allegations made against the Applicant when she worked with him. She only came to know about the Applicant's troubles when he was summarily dismissed.
- c. She has been a victim of false sexual harassment allegations herself.

- d. Under cross examination, the witness said she had never worked in the same location with the Applicant but only knew him during the trainings conducted by their unit in which they both participated.

25. V01's testimony is summarized below.

- a. She was born on 30 June 1993. She knew the Applicant but it was through another girl who took her to him. The girl's name is Ms. Piongo. She had met the Applicant only once at a party in his house when she accompanied Ms. Piongo.
- b. Ms. Piongo told her to lie to investigators. Her interview with the investigators lasted between three and five days and Ms. Piongo gave her advice throughout.
- c. She could not recall what she told the investigators.
- d. It is true that she told the investigators that she had visited the Applicant when she was fifteen years old. She told them that the Applicant offered to give her money. She told investigators that she attended a party at the Applicant's house. She told the investigators that she had sex with the Applicant at that party.
- e. She told the investigators that the Applicant gave her an envelope with USD150 and telephone numbers. She gave them the envelope.
- f. She told the investigators that as she left the Applicant's house, she ran into her mother. Her mother took her to the police station in Kamina where she admitted to the police officer that she had sex with the Applicant.
- g. She never went to the police station at any time at all. She met with a Prosecutor and the Applicant over this matter.
- h. Ms. Piongo told her that before the Applicant left Kamina, they had to extort money from him. Ms. Piongo sent her to the Prosecutor. She could not remember everything that she told the

Prosecutor but recalled telling him that she had sex with the Applicant.

26. W01's testimony is summarized below.
- a. She is V01's mother. She reported the matter to both the police in Kamina and to MONUC. She reported because Ms. Piongo had told her that V01 was in the Applicant's house. At that time V01 was 15 and a half or about 16 years old.
 - b. She sued Ms. Piongo because she used to pick V01 from school and roam around with her.
 - c. She remembered being interviewed by UN investigators. The interview lasted about five days. She did not state to the Investigators that she saw her daughter leaving the Applicant's house.
 - d. She recalled her daughter telling her that she had sex with the Applicant. She then brought a report to the Prosecutor and the matter ended there.
 - e. The Applicant has never visited her or offered her any money regarding this matter.
 - f. She could not remember how long her daughter had been missing from home in 2007. She searched for her for five days. She went to the Applicant's house but did not find her daughter there. She stood outside and did not get into the premises.
 - g. Ms. Piongo told her to make reports about this matter to get money.
 - h. She doesn't know what the Applicant looks like. She never spoke to anyone in the Applicant's office regarding this matter. She told the investigators that she found an envelope with her daughter on which phone numbers were written.

- i. Her daughter was not physically examined by a female police officer when she took her to the police station. Ms. Piongo was arrested because she took her daughter V01 away for many days. She did not speak to Ms. Piongo after her daughter returned and has not spoken to her since.
- j. It is Ms. Piongo who brought the clothes that she showed to investigators as having been bought for her daughter by the Applicant. When her daughter returned, she told her that she was with Ms. Piongo at the Applicant's residence.
- k. It was Ms. Piongo who told her the Applicant's first name.
- l. Ms. Piongo requested her permission to take V01 to a party. They thereafter told her that they had stayed at W01's brother's house.

27. Mr. Segabo's testimony is summarized below.

- a. He has experience as an investigator having served as a police officer for 16 years.
- b. The case against the Applicant arose from a report received from the Conduct and Discipline Unit that the Applicant had allegedly engaged in prohibited sexual conduct involving a female minor and several local women in Kamina.
- c. He interviewed the Applicant, V01, W01 and other witnesses.
- d. V01 provided an account as to what transpired between herself and the Applicant. She told him that she met the Applicant at a party at his house where the two had sexual intercourse.
- e. V01's age was established by verifying her date of birth from her school records.
- f. V01 gave investigators an envelope which had handwritten phone numbers scribbled on it. The investigators verified that the

numbers on the envelope belonged to the Applicant by calling both numbers. One of the numbers was a UN number belonging to the Applicant. No money was found in the envelope and OIOS was not able to determine who wrote on the envelope.

- g. V01 took the investigators to the Applicant's residence. W01 was also present and she told the investigators that she had found V01 coming from that house. No inquiries were made of the school from which a school note was purportedly required to take off.
- h. He did not interview the Applicant's neighbours who were alleged to have emerged when they heard a shouting match between V01 and the Applicant.
- i. The alleged bribes to the Prosecutor, in the form of car repairs were not investigated as they were not considered relevant.
- j. He interviewed Congolese Police officers who confirmed that W01 had filed a report that V01 had sexual intercourse and that the Congolese officers had examined V01 and had identified evidence of recent sexual intercourse.
- k. W01 provided a detailed account of what transpired between her daughter and the Applicant. W01 told the Investigators that she had filed a report with the police because V01 was missing for several days.
- l. The Applicant told the investigators that he had met V01 but denied having sex with her.
- m. All the statements taken from each interviewee were recorded in a record of conversation. The interviewees were not required to sign the record of conversation pursuant to OIOS procedures applicable at that time. Instead, investigators took notes and read them back to the witnesses. A typed version followed.

- n. There was a lapse in time between when the notes were taken and the interview conducted and when they were typed up. Sometimes the typed record was prepared when the Investigators returned to their hotels.
- o. He could not recall whether commentary in the record of conversation for the Applicant concerning an incident with his guards happened on the same day.
- p. He could not remember whether any witnesses were interviewed twice.
- q. OIOS did not interview the aunt, uncle (“Grand Chief”) or cousins of V01 because he believed that her story was fabricated, insofar as it concerned them.
- r. The investigation report was drafted by a team of officers within OIOS and the draft investigation report was then transmitted to the UN headquarters in New York for further review and finalization.

Applicant’s case

28. In his evidence before the Tribunal and in his pleadings, the Applicant frames his case as follows:

Charge 1 - Engaging in sexual activity with a Congolese female, who was, at the time under the age of 18 years.

29. The Applicant denied having had sex with V01. It is part of the Applicant’s submissions that W01 denied having seen V01 emerge from the house of the Applicant, or ever seeing V01 at the house of the Applicant. V01, W01 and the Applicant all attribute misinformation to Ms. Piongo. There is no other direct evidence of a sexual relationship between the Applicant and V01.

30. Insofar as hearsay evidence is concerned, Mr. Segabo related accounts told him by others. Mr. Segabo’s evidence is no better than the written record.

31. There was a considerable delay between interviews and the composition of the records of conversation. The Interviewees were not asked to review and sign the typed records. After interviewing two witnesses and upon discerning conflict in the evidence, OIOS did not re-interview anyone. A number of obvious leads were not pursued. Most of the witnesses interviewed were not available for cross-examination. The sworn evidence indicated that these investigation statements were inaccurate or concocted by witnesses including V01, who had already reversed her story several times.

32. There is no credible physical or circumstantial evidence supporting the Administration's account. W01 indicated that she did not see V01 emerge from the Applicant's house, which account was based upon hearsay. The Administration's version of this incident presupposes an entire morning being packed into a series of events that purportedly transpired before 6.00 a.m. upon a review of V01's record of conversation.

33. The fact that the Applicant was reported to the police or summoned to Court are equally consistent with a 'shake-down' (or false information provided by Ms. Piongo) as any misconduct. Local charges alone cannot constitute evidence of guilt—much less if those charges are dropped.

34. Any errors that the Applicant made in reporting his difficulties are equally consistent with shame from simply being named a sex offender. The alternative inference displays classically dangerous "consciousness of guilt" errors.

35. The gifts that purportedly came from the Applicant were said to have been supplied by Ms. Piongo.

36. The Administration's account of an envelope which had handwritten phone numbers scribbled on it is not believable. There was no physical evidence of where the envelope came from, who wrote on it, or what its contents may have once been. But the Administration invites the inference that, because the Applicant's phone numbers appear on it, he wrote his phone numbers, multiple times on an item that he was employing as a bribe to conceal his identity and that this constitutes evidence that he slept with V01.

37. The Administration has not supplied clear and convincing evidence of misconduct. This charge is not made out.

Charge 2 - Engaging in sexual relationships with beneficiaries of United Nations assistance, namely, local Congolese women.

38. Two issues arise in the context of this charge. The first is whether all nationals of a country in which the UN has a mission (or peacekeeping mission) constitute “beneficiaries of UN assistance”. The Applicant submits that such an interpretation would be perverse. Plainly, many men and women in countries where the UN operates would not face, by their nationality alone, “inherently unequal power dynamics”. It would be absurd to suggest that no such persons are capable of validly consenting to sexual activity. A policy designed to protect a particularly vulnerable local population and uphold the sexual integrity of that population, would be transformed into a policy that infantilizes it.

39. There is no reason to believe that a romantic relationship between a UN staff member and a member of the local population, not characterized by any evidence of exploitation, would in any way undermine the credibility and integrity of the work of the United Nations.

40. The second issue is whether the sanction of summary dismissal can be assigned for conduct that is only strongly discouraged. The Applicant submits that it cannot. There is no reported case where a staff member had been disciplined upon such a charge alone.

41. The Applicant had a consensual sexual relationship with an adult Congolese woman. No aggravating circumstances are in evidence. No misconduct has been made out.

Charge 3 - Engaging in the unofficial and unauthorized use of UN vehicles.

42. The Applicant submits that there is no dispute concerning the regulations governing proper use of UN vehicles and that the issue is proportionality in this regard.

43. A staff member's intention and harm to the Organization are two principal considerations in examining proportionality. Another consideration is parity of sanction. To the Applicant's knowledge, no staff member has been separated for unauthorized use of a UN vehicle alone. There is no evidence that the Organization suffered any harm from any unauthorized use of its vehicles.

44. Without denying some knowledge of the Organization's rules concerning vehicle use, the Applicant's motives were innocent. Separation from service, a sanction never before imposed for such an offence, would be grossly disproportionate.

Entitlement to Appear

45. The Applicant submits that Parties or their representatives must be given notice of a hearing, reasonable notice of its expected agenda, the opportunity to appear and that attendance gives the parties the opportunity to assess courtroom demeanour, raise points of order and enjoy the same opportunity to ask their own questions to substantively test or clarify the evidence.

46. If neither party is present, the truth-serving function of the adversarial system is impaired. If only one party is present, the other faces significant and potentially incurable unfairness. If the courtroom is further sealed to the public and there is no clear record of the proceedings, accessible to the excluded party (or not accessible until the close of evidence), the problem is further aggravated.

47. Where the testifying witness was summoned by the Tribunal, to provide potentially important evidence concerning extremely serious allegations, and was fully examined by both the Tribunal and the Respondent, a reasonable apprehension of injustice arises.

48. In view of the foregoing, the Applicant submits that the hearing on 20 July 2011 generated these issues and requests the Tribunal not to entertain any inculpatory or prejudicial inferences that might be drawn from the 20 July 2011 evidence.

49. The Applicant requests rescission of the disciplinary decision or, in the alternative, compensation equivalent to the salary lost from the date of his dismissal to trial. He also requests 3 months' non-pecuniary damages.

Respondent's case

50. The Respondent frames his case as follows:

51. The evidence before the Respondent made it highly probable that the Applicant had engaged in sexual activity with V01 who was, at the time, a minor.

52. There was also evidence before the Respondent that the Applicant had engaged in several sexual relationships with local Congolese women, gave them money and/or favours and, on at least one occasion, had non-consensual sexual intercourse with a local woman and thereafter offered her money.

53. The Applicant has given differing versions of events. When interviewed by the Investigators, his account was that:

- a. He met V01 in May or June 2007. V01 subsequently visited him at his residence and remained there for several hours consuming alcoholic beverages.
- b. V01 visited his house about five times and beeped him constantly.
- c. He might have given V01 about 200 Congolese francs.
- d. W01 had filed a complaint against him for sexual exploitation of V01 in relation to which he appeared in Court on 31 May 2008.
- e. He went to W01's residence in relation to the complaint against him with Mr. Lusimanadjo and another UN staff member and talked with V01.
- f. He knew Ms. Piongo and that she approached him in January 2008 asking for money as she had been arrested for taking V01 to him to be "raped" and that he met with her to discuss her arrest but refused her request.

- g. Ms. Mounkaila, his housemate, told him that she had admonished V01 after hearing of allegations that he had had sexual intercourse with her.

54. When he responded to the allegations of misconduct, the Applicant sought to retract his original statement to OIOS and to proffer a different more favourable version of the events.

- a. The Applicant first distinguished Congolese women from European women and stated that the former lack honesty, integrity and a sense of responsibility.
- b. He claimed that he was vulnerable and a target. He claimed V01 had concocted a story for profit.
- c. He stated that he met V01 only once when he went to visit her father, a Chief. He claimed that V01 was born on 18 December 1990 which would have made her 16 at the time of their alleged sexual encounter.
- d. He claimed that V01 did not exhibit the typical reaction of a victim of a sexual attack, namely, she did not feel sufficiently dirty or ashamed.
- e. He did not deny that he gave V01 money and dismissed the amount of 200 Congolese francs as inconsequential.
- f. He claimed not to know Ms. Piongo.

55. The Applicant gave evidence before the Tribunal which is summarised as follows:

- a. V01 never went to his house.
- b. He did not have sexual intercourse with V01.

- c. He met V01 on three occasions: at the house of the Chief following his initial arrival in Kamina; at a volleyball game; and on the street returning from a party.
- d. He never met W01 and denied having gone to her house to offer her money.
- e. V01 did not appear to be a minor at the time he first met her.
- f. He knew Ms. Piongo. Ms. Piongo and V01 tried unsuccessfully to extort money from him. He reported the attempted extortion to the Mission Chief of Human Rights but he could not explain why he did not report the attempted extortion to the police or his supervisors.
- g. Ms. Piongo had visited his office in Kamina upon her release from jail. She asked him to reimburse her brother who had posted her bail bond. The Applicant could neither explain why Ms. Piongo would personally visit his office to seek reimbursement from him for her bail bond nor could he explain why Ms. Piongo was not re-arrested on the spot if he had in fact reported her attempted extortion to the relevant authorities.
- h. Part of his duties as Officer-in-Charge of Security, as recorded in his performance evaluation, was to uphold UN policy against Sexual Exploitation and Abuse (SEA). He understood the conduct covered by the UN's SEA policy.
- i. He received notifications to appear before the Kamina Magistrate's Court concerning an SEA matter involving V01 but could not explain why he did not inform his supervisors about this.
- j. The investigation was poorly conducted and the investigation report is factually incorrect. The statements that are attributed to the Applicant in OIOS' record of conversation are incorrect. He was not asked by the investigators to review and sign the record of conversation or investigation report before it was finalized and his due process rights were violated.

56. At the time that V01 was sexually assaulted by the Applicant, she was a minor and he was an authoritative UN figure in the small community of Kamina, DRC. The Applicant held a position of trust in relation to the small community in which he served in Kamina and he flagrantly abused that trust.

57. Given the traumatic nature of sexual exploitation and abuse, a victim's failure and reluctance to recall, before a judicial body, precisely what occurred, is not unusual. The emotional reactions of victims can vary tremendously and should not affect the probative value of their factual recollection. A victim's refusal to cooperate and recantation of prior statements implicating the Applicant are well documented symptoms of psychological reactions of having to relive traumatic events in a judicial environment.

58. V01's account of what occurred was corroborated by several independent witnesses who were consistent and highly detailed in their recollection including:

- a. V01's mother, W01 who reported the matter to the local police.
- b. The lead OIOS investigator who corroborated the fact that local police examined V01 after it was alleged that the Applicant had sex with her.
- c. Mr. Lusimanadjo whose record of conversation indicates that a complaint of sexual exploitation was made against the Applicant with the local authorities.

59. The Applicant has consistently lacked credibility. His various explanations and denials are outweighed by countervailing evidence. The Applicant's evidence before the Tribunal did not undermine the credibility, weight or probative value of the evidence adduced by the Respondent.

60. The disciplinary measure imposed is proportionate to the offence and the Applicant's due process rights were respected. Accordingly, the Applicant's claim that his due process rights were breached is unfounded.

61. In view of the preceding, the Respondent requests the Tribunal to reject the Application in its entirety.

Considerations

62. The legal issues arising from the facts in this case are as follows:
- a. Did the 20 July 2011 hearings violate the Applicant's right to a fair hearing?
 - b. Has the Applicant made out a case sufficiently compelling to lead the Tribunal to the conclusion that there was no basis upon which the charges against him were established?
 - c. Was the disciplinary measure imposed on the Applicant disproportionate to the offences made out against him?

Did the 20 July 2011 hearings violate the Applicant's right to a fair hearing?

63. The Applicant submitted that the hearing on 20 July 2011 generated several issues that violated his right to a fair hearing in the following ways:
- a. There was inadequate notice of the hearing;
 - b. Given the inadequate notice, Counsel for the Applicant was unable to attend the hearing;
 - c. Since Counsel was unable to attend, the truth-serving function of the adversarial system was impaired;
 - d. The courtroom was sealed to the public and there was no clear record of the proceedings accessible to the Applicant further aggravating the problem; and
 - e. There was reasonable apprehension of injustice since the witnesses who testified on that day were summoned by the Tribunal to provide potentially important evidence concerning extremely serious allegations and were fully examined by both the Tribunal and the Respondent.

64. The Tribunal's decision to move to Kinshasa to hear this case was necessitated by the following factors:

- a. The poor sound quality when using a telephone communication to connect between Nairobi (where the Tribunal and Counsel for the Respondent was sitting), Addis Ababa (where Counsel for the Applicant was sitting) and Bukavu, (Democratic Republic of Congo, where most of the witnesses were expected to testify from). The poor sound quality in the courtroom made it difficult to hear witnesses and their Counsel and sometimes it was impossible for interpreters to deliver quality interpretation.
- b. The need for a better audio connection with Bukavu to facilitate hearing the witnesses and the interpreters via telephone.
- c. Numerous technical problems had been experienced with the telephone connection to the Democratic Republic of Congo during a previous hearing¹.
- d. The outcome of a cost benefits analysis of the options available for organizing proceedings that are consistent with the principles of the rule of law, open justice and due process.

65. Having commenced hearing the case in Kinshasa, the Tribunal, in accordance with arts. 17 (1) of its Rules of Procedure, was minded to issue Order No. 76 (NBI/2011) requiring Counsel for the Respondent to avail the personal appearance of certain witnesses at the hearing. Counsel for the Applicant had already made plans to depart from Kinshasa by the time the Respondent was able to comply with the Tribunal's Order and to avail some of the witnesses required by the Tribunal. That notwithstanding, various attempts were made to contact Counsel for the Applicant to ensure his participation via teleconference but these attempts proved futile.

¹ See at para. 16 of *Norbert Bagula* UNDT/2011/138.

66. The Applicant's Counsel was subsequently provided with audio recordings of the court proceedings of on 26 July 2011 and was afforded an opportunity to cross examine the witnesses on 23 January 2012.

67. Article 17 (2) of the Tribunal's Rules of Procedure provides that the Tribunal may, if it considers it appropriate in the interest of justice to do so, proceed to determine a case in the absence of a party. In the present case, the Tribunal did not determine the case in the absence of the Applicant, but it afforded him every opportunity to have a fair hearing given the circumstances that necessitated the Tribunal's move to Kinshasa. On this score, therefore, the Tribunal finds and holds that the 20 July 2011 hearings did not violate the Applicant's right to a fair hearing. The Applicant's request that the Tribunal not entertain any inculpatory or prejudicial inferences that might be drawn from the 20 July 2011 evidence is denied.

Has the Applicant made out a case sufficiently compelling to lead the Tribunal to the conclusion that there was no basis upon which the charges against him were substantiated or established?

68. When an Applicant comes before the Tribunal challenging a disciplinary decision against him and seeking remedies in that regard, the principal burden on him is to show that the decision was wrong. Discharging that burden may include tendering convincing evidence that the investigation process and/or the report emanating from it, upon which the decision was based, were materially flawed or did not establish the offence. He could also show that his due process rights were breached in a way as to render the decision perverse. It would be important to convince the Tribunal that the decision-maker did not follow the relevant Rules in arriving at the impugned decision. The actions of the Applicant in the entire process leading up to the allegations against him, the investigations and his responses to charges are also relevant for arriving at a finding that the disciplinary action against him was wrong.

69. In the instant case, the Applicant's summary dismissal was based on a charge of sexual activity with a minor. Paragraph 3.2 (a) and (b) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and

sexual abuse) stipulate that sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures including summary dismissal. Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. A mistaken belief in the age of a child is not a defence.

70. Paragraph 6 of the MONUC Code of Conduct on SEA which was applicable at all material times, prohibited all MONUC personnel from engaging in any act of sexual abuse and sexual exploitation or any other form of sexually humiliating, degrading or exploitative behavior. It also prohibited any type of sexual activities with children (persons under the age of 18) regardless of the age of majority or age of consent locally.

71. When reviewing disciplinary cases, the Tribunal inquires into:

- a. whether the facts on which the disciplinary measure was based have been established;
- b. whether the established facts legally amount to misconduct under the Staff Regulations and Staff Rules; and
- c. whether the disciplinary measure applied is proportionate to the offence.²

72. The Appeals Tribunal has not yet set an exact standard for the quantum of proof required but when termination of a staff member's employment is a possible outcome, misconduct must be established by clear and convincing evidence.³

Charge 1 - Engaging in sexual activity with a Congolese female, who was, at the time under the age of 18 years.

73. With respect to this charge, the Applicant denied having had a sexual relationship with V01. The Applicant testified that the allegations of having sex with V01 arose from an extortion scheme hatched by one Ms. Piongo. He submitted that the fact that he was reported to the Police or summoned to Court

² *Mahdi* 2010-UNAT-018.

³ *Molari* 2011-UNAT-164.

are equally consistent with a 'shake-down' (or false information provided by Ms. Piongo) as local charges alone cannot constitute evidence of guilt—much less if those charges are dropped. He submitted that any errors he made in reporting his difficulties are equally consistent with shame from simply being named a sex offender. The Applicant further submits that the investigation process conducted by OIOS in this case was marred by irregularities and that the investigation statements were inaccurate or concocted by witnesses including V01, who had already reversed her story several times.

74. Having reviewed the entire case record, the following uncontested facts have been established:

- a. The Applicant knew V01 and had met her on several occasions.
- b. V01 was at the material time under the age of eighteen years.
- c. The Applicant gave V01 some money even though the specific amount and reasons for the gift are contested by the Parties.
- d. V01 attended a party at the Applicant's house with Ms. Piongo.
- e. A complaint that Ms. Piongo was using V01 for prostitution with UN staff members was made to Kamina police by W01 sometime in 2008.
- f. The Applicant was summoned on two separate occasions to appear in Court in Kamina regarding sexual exploitation and abuse claims involving V01. He attended Court on 31 May 2008.
- g. Ms. Piongo was known to the Applicant and had visited him in his offices at the UN premises to recover bail money after her arrest on allegations of trafficking V01 and her release on bail.

75. The fact that the Applicant was twice summoned to appear in Court in Kamina regarding sexual exploitation and abuse claims involving V01 does not by itself establish that he had sexual relations with the under-age girl. However, in her record of conversation contained in the OIOS investigation report, V01 told the investigators who interviewed her a few months after the alleged sexual

liaison that she twice had sexual intercourse with the Applicant, the first time being sometime in 2007 and the second time at the Applicant's party on 25 December 2007 which she attended with Ms. Piongo.

76. In W01's statement to the investigators, she stated that V01 had attended a party at the Applicant's house and that V01 had told her that she had had sex with the Applicant at the party.

77. The OIOS investigators interviewed local police in Kamina who confirmed that V01 was brought to their station on one occasion in 2007 by her mother W01 with a report that she found her sneaking out of a certain premises in the early hours of the morning. Upon a physical examination by a female Police officer, it was confirmed that she had recently engaged in sexual intercourse.

78. While testifying before the Tribunal, V01 stated that she had only met the Applicant once and that Ms. Piongo had told her to lie to the investigators that she had sex with the Applicant at his party. She then contradicted herself by stating that she had never gone to the police station to be examined at any time but added that her mother W01 took her to the police station in Kamina where she admitted to the police officers that she had had sex with the Applicant.

79. During her testimony before the Tribunal, W01 stated that she had filed a report at the Police station because Ms. Piongo had told her that V01 was in the Applicant's house. She recalled her daughter telling her that she had sex with the Applicant. She then brought a report to the Prosecutor and the matter ended there. She further stated that her daughter was not physically examined by a female police officer when she took her to the police station.

80. The investigator, Mr. Segabo, told the Tribunal that V01 gave the investigation team an account of what transpired between herself and the Applicant. She had told the team that she met the Applicant at a party at his house where the two had sexual intercourse. V01's age was established by verifying her date of birth from her school records. V01 had taken the investigators to the Applicant's residence in Kamina. W01 was also present and she told the investigators that she had found V01 coming out from that house. The team had

also interviewed Congolese Police officers who confirmed that W01 had filed a report that V01 had sexual intercourse and that the Congolese officers had examined V01 and had identified evidence of recent sexual intercourse.

81. The Tribunal has carefully considered all the evidence, both documentary and oral, before it in relation to this charge. The Tribunal finds that V01 and W01 have perjured themselves. They have mindlessly contradicted themselves before the Tribunal in a pathetic effort to distance themselves from the reports they made to such local authorities as the Police and the Court and even the UN Mission in the Congo and what they told the UN investigators in 2008.

82. In spite of the shameful parade of lies relayed by V01 and W01, the Tribunal cannot ignore the clear facts before it which call into question the conduct and behaviour of the Applicant himself in respect to this serious allegation. The Applicant had alleged an elaborate extortion scheme against him perpetrated by Ms. Piongo but too many serious questions remain unresolved, for instance:

- a. In any case where an issue arises regarding the application of the privileges and immunities enjoyed by a staff member, the staff member is required to immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments⁴.
- b. The Applicant failed to inform the Legal office of MONUC, as he was required to do by the relevant rules, of the summons to him by the local Court in Kamina. He sought privately, with the help of a UN Human Rights Officer who had no capacity to dabble into the matter, to deceive the local Court that had summoned him by telling the said Court that it had no power to demand answers on the allegation against him because he was a UN staff member. The Applicant carried on with his duties thereafter as if there was no problem until W01 reported the

⁴ Staff regulation 1.1(f).

matter to MONUC authorities. The Applicant's failure to inform the Mission of the summons from a criminal court calls into question his honesty and truthfulness. As the Officer-In-Charge of Security he must have been aware of the relevant rules.

- c. In the investigation report, it is stated that one Ms. Mounkaila, who was sharing a house with the Applicant, stated to the investigators that W01 had gone to MONUC headquarters and reported that the Applicant was sleeping with her daughter. Ms. Mounkaila said she told W01 that V01 was old enough to sleep with any man she wanted and that she was not a minor. Ms. Mounkaila later informed the Applicant of the allegation made by W01 and advised him to be careful. What was the Applicant meant to be careful of?
- d. The local Police had told the investigators that V01 was brought to them by her mother W01 who told the officers that she caught her daughter coming out of the Applicant's premises. Upon physical examination, it was verified by a Police officer that V01 had recently engaged in sexual intercourse. The investigator told the Tribunal that W01 had taken the investigation team and shown it the Applicant's house in Kamina. How did W01 know where the Applicant was living? It was not submitted or suggested and seems indeed far-fetched to conclude that these facts may have been part of Ms. Piongo's extortion scheme.
- e. The investigators had spoken to a wide array of witnesses in 2008, about thirteen of them, during investigations which took place soon after the allegations against the Applicant were made. Nearly all of these witnesses, including V01 and her mother W01, were emphatic that the Applicant and V01 had been lovers.
- f. The Applicant could not explain why Ms. Piongo had visited his office in Kamina upon her release from jail on charges of trafficking V01 to him. Why would Ms. Piongo ask him to reimburse her brother who had posted her bail bond? The Applicant could neither explain why

Ms. Piongo would personally visit his office to seek reimbursement from him for her bail bond nor could he explain why Ms. Piongo was not re-arrested on the spot and why not if he had in fact reported her attempted extortion to the relevant authorities. The Applicant could not adequately explain how an alleged extortionist could be so confident as to gain such easy access to his UN office.

- g. A situation where a mother, on different occasions, had reported to such local law enforcement authorities as the Court and the Police and then the UN Mission authorities that her under-aged child was in a sexual relationship with a UN staff member is serious indeed. It was sufficiently serious for these local authorities to wade into the matter and for the OIOS to conduct a detailed investigation in which not less than fifteen people gave witness statements leading to a conclusion that such a relationship existed. The Applicant in this situation would need more than an alleged extortion scheme by his lover, Ms. Piongo, to convince the Tribunal that disciplinary action against him was unwarranted.

83. All these unresolved questions, the established facts and the Applicant's failure to bring evidence in order to convince the Tribunal about Ms. Piongo's alleged extortion scheme support an inference that the Applicant had likely engaged in a sexual relationship with V01. Given all the surrounding circumstances of the charge, investigations and his own actions and explanations, the Applicant has not sufficiently discharged the burden upon him. It is important to underscore the fact that a disciplinary decision, however serious, does not require a standard of proof as high as in criminal cases. This Tribunal had expressed the view elsewhere that the standard of proof required in disciplinary cases is one higher than a balance of probabilities but definitely below the "beyond reasonable doubt" standard.

Charge 2 - Engaging in sexual relationships with beneficiaries of United Nations assistance, namely, local Congolese women.

84. The Tribunal has reviewed the entire record before it and finds that the Respondent has failed to prove this charge. The Respondent had failed to show that the women with whom the Applicant had sexual liaisons were beneficiaries of UN assistance. It does not stand to reason that every Congolese woman was a beneficiary of United Nations assistance. The Respondent actually needed to make a showing that the Applicant had used his position as a staff member to obtain sexual favours from vulnerable local women who depended on UN assistance. Such vulnerable women may include refugees and others living under UN food and medical assistance and physical protection.

Charge 3 - Engaging in the unofficial and unauthorized use of UN vehicles.

85. The Applicant had conceded this charge but submits that his motives were innocent. This charge had been substantiated.

Was the disciplinary measure imposed on the Applicant disproportionate to the offence?

86. The wordings in paragraphs 3.2 (a) and (b) of ST/SGB/2003/13 are clear. Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures including summary dismissal. Mistaken belief in the age of a child is not a defence. The Tribunal, having found that there is a preponderance of evidence that the Applicant engaged in sexual activity with V01 who was at the time under the age of 18 years, holds that the disciplinary measure of summary dismissal that was imposed on the Applicant was proportionate to the offence.

Judgment

87. In view of its findings above, the Tribunal rejects the Application in its entirety

(Signed)

Judge Nkemdilim Izuako

Dated this 23rd day of January 2013

Entered in the Register on this 23rd day of January 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi