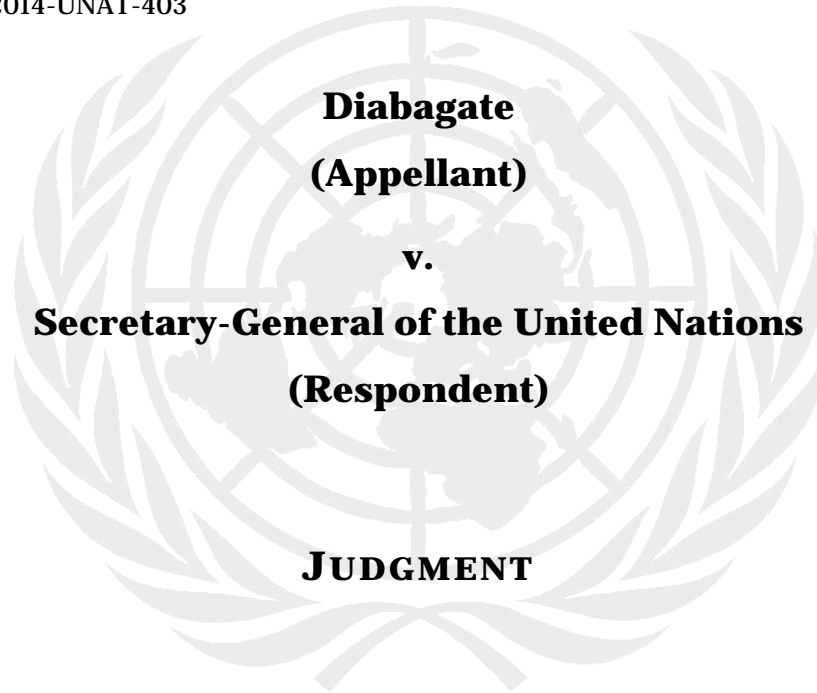




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-403



**Diabagate**

**(Appellant)**

**v.**

**Secretary-General of the United Nations**

**(Respondent)**

**JUDGMENT**

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**Before:** Judge Rosalyn Chapman, Presiding  
Judge Sophia Adinyira  
Judge Luis María Simón

**Case No.:** 2013-453

**Date:** 2 April 2014

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Miles Hastie

**Counsel for Respondent:** Zarqaa Chohan

**JUDGE ROSALYN CHAPMAN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Azoumana Diabagate against Judgment No. UNDT/2013/009, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 23 January 2013, in the case of *Diabagate v. Secretary-General of the United Nations*. Mr. Diabagate submitted his appeal on 26 March 2013, and the Secretary-General filed his answer on 24 May 2013.

**Facts and Procedure**

2. On 31 March 2004, Mr. Diabagate entered employment as a Security Officer with the United Nations Organization Mission in the Democratic Republic of Congo (MONUC). On 16 March 2007, he was deployed to Kamina in the Democratic Republic of the Congo (DRC) as Officer-in-Charge of MONUC Security. Thereafter, he was redeployed to Kinshasa.

3. On 5 May 2008, the Office of Internal Oversight Services (OIOS) received a report of allegations that Mr. Diabagate had sexually exploited and abused a 14-year old Congolese girl (V01) and had sexual relations in Kamina with several Congolese women, including prostitutes.

4. OIOS conducted an investigation into these allegations, as well as other allegations regarding the unauthorized use of United Nations vehicles. Several persons were interviewed during the investigation, including V01, her mother (W01), and Mr. Diabagate. The interviews of V01 and W01 were conducted in Swahili and subsequently transcribed into English-language statements. Their interviews were not made under oath, and the transcribed statements were not signed by V01 or W01. In her statement, V01 described how Mr. Diabagate had raped her when she was a virgin, had engaged in sex with her on several occasions, and had given her alcoholic drinks and gifts of cash. W01 said that V01 had disappeared from school and her home on several occasions for days on end and that V01 told her that Mr. Diabagate had engaged in sexual activities with her. Mr. Diabagate, in his statement, denied that he had engaged in sexual activities with V01 and explained that the allegations of sexual misconduct were a means to “shake him down”.

5. On 1 July 2009, OIOS issued its Report, in which it concluded that Mr. Diabagate: (1) had engaged in sexual activity with V01 in violation of Section 3.2(b) of ST/SGB/2003/13 of 9 October 2003, entitled “Special measures for protection from sexual exploitation and sexual abuse”; (2) had engaged in sexual relationships with local women, and such conduct is “strongly discouraged” under ST/SGB/2003/13; (3) conveyed non-UN personnel in UN vehicles without the requisite authorities and waivers in violation of MONUC Administrative Circular No. 20004/05; and (4) “failed to uphold the highest standards of efficiency, competence and integrity required of a UN staff member as per Staff Regulation 1.2(b)”. Based on these conclusions, OIOS recommended that appropriate disciplinary action be taken against Mr. Diabagate.

6. On 13 August 2009, the Director, Department of Field Support, concurred with OIOS’s findings and conclusions and recommended to the Office of Human Resources Management (OHRM) that disciplinary action be brought against Mr. Diabagate and that he should be summarily dismissed. He further recommended that the Office of Legal Affairs consider referring the matter to the national DRC authorities for criminal accountability.

7. On 5 March 2010, the Chief, Human Resources Policy Service, OHRM, charged Mr. Diabagate with violating former Staff Regulation 1.2(b) and 1.2(q), former Staff Rule 101.2(c), and ST/SGB/2003/13 by:

- (1) engaging in sexual activity with V01, a minor;
- (2) exchanging money and/or goods and/or services for sex from known prostitutes;
- (3) engaging in sexual relations with beneficiaries of United Nations assistance, namely, local Congolese women;
- (4) failing to honour his obligations to the local court; and
- (5) engaging in the unofficial and unauthorized use of MONUC vehicles.

8. On 27 June 2010, Mr. Diabagate provided comments to the charges. He denied having sexual activity with V01 and prostitutes, and stated that he had appeared before a local court on 26 April 2008 and thought the matter had been resolved.

9. On 6 October 2010 Mr. Diabagate was summarily dismissed on the grounds that he had: (1) engaged in sexual activity with V01, a minor; (2) engaged in sexual relations with beneficiaries of United Nations assistance, namely, local Congolese women; and (3) engaged in the unofficial and unauthorized use of UN vehicles.

10. On 17 January 2011, Mr. Diabagate filed an application with the UNDT challenging his summary dismissal. The Secretary-General filed his reply on 17 February 2011.

11. On 15 June 2011, the UNDT issued Order No. 56 (NBI/2011) scheduling a hearing from 14 July to 16 July 2011 in Kinshasa at MONUC Headquarters Offices, and requiring the parties to provide the UNDT Registry with the names of the witnesses and a brief description of their anticipated testimony.

12. On 14 July 2011, the UNDT commenced the hearing. On 15 July 2011, the UNDT issued Order No. 76 (NBI/2011) ordering the continued hearing on 19-20 July 2011 and the personal attendance at the hearing of V01, W01, and the OIOS investigators, among others.

13. The hearing commenced on 19 July 2011; however, neither V01 nor W01 appeared. The UNDT continued the hearing to the next day, 20 July 2011, and received evidence under oath from V01 and W01. On this date, the UNDT sat in Kinshasa, where counsel for the Secretary-General was present. However, both V01 and W01 were located in Kamina and gave their testimony by telephone. Neither Mr. Diabagate nor his counsel was in attendance at the hearing.<sup>1</sup>

14. In her testimony under oath before the UNDT, V01 admitted meeting with Mr. Diabagate on one occasion, but denied having engaged in sex with him. She also testified that Ms. Hughtette Piongo told her to lie to the OIOS investigators about sexual activity with Mr. Diabagate. V01's mother, W01, testified that V01 had told her that she had engaged in sex with Mr. Diabagate and that she had spent time at his house.

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<sup>1</sup> The UNDT described the circumstances surrounding the absence of Mr. Diabagate and his counsel, as follows:

Counsel for [Mr. Diabagate] 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 [Mr. Diabagate] to ensure his participation via teleconference but these attempts proved futile.

15. On 19 August 2011, the UNDT issued Order No. 96 (NBI/2011) continuing the hearing to 17-18 October 2011 so that Mr. Diabagate could cross-examine V01 and W01. Subsequently, the UNDT again continued the hearing to 23-24 January 2012. On 23 January 2012, Mr. Diabagate's counsel cross-examined W01 and partially cross-examined V01, who refused to answer more than a few questions.

16. On 23 January 2013, the UNDT issued Judgment No. UNDT/2013/009, in which it determined that: (1) it was proven that Mr. Diabagate had engaged in a sexual relationship with V01; (2) it was not proven that Mr. Diabagate had engaged in sexual relationships with beneficiaries of United Nations assistance; and (3) it was proven that Mr. Diabagate had engaged in the unofficial and unauthorized use of UN vehicles, as he had conceded. Based upon its determination that he had engaged in a sexual relationship with V01, the UNDT concluded that Mr. Diabagate had sexually exploited and abused V01 (a minor) in violation of ST/SGB/2003/13, paragraphs 3.2(a) and (b), which constituted serious misconduct, and summary dismissal was a proportionate penalty for such serious misconduct. Thus, the UNDT upheld the summary dismissal of Mr. Diabagate and dismissed his application.

### **Submissions**

#### **Mr. Diabagate's Appeal**

17. The UNDT erred as a matter of law when it erroneously imposed the burden of proof on Mr. Diabagate to present convincing evidence showing that he did not commit the offense, rather than placing the burden on the Administration to prove the facts underlying the offense by clear and convincing evidence.

18. The UNDT erred as a matter of law when it based its factual findings supporting the sanction wholly on hearsay evidence. The evidence given by V01 and W01 under oath was entirely exculpatory. The only evidence to support the charge of sexual misconduct with V01 was hearsay evidence, which cannot on its own support a staff member's dismissal; there was no direct physical or circumstantial evidence.

19. The UNDT erred, and the lack of notice and the hearing itself were fundamentally unfair, when testimony was taken from V01 and W01 on 20 July 2011, without Mr. Diabagate and his counsel being present. Neither the audio recording of the testimony nor the "summary" of the evidence adduced on 20 July 2012 was sufficient to afford Mr. Diabagate a

complete understanding of the proceedings. And the opportunity afforded Mr. Diabagate to cross-examine V01 on 23 January 2012 was inadequate since she answered only five questions before refusing to answer any more.

20. Mr. Diabagate requests that the UNDT Judgment should be set aside and he should be awarded salary from the date of his dismissal to trial and three months' net base salary for moral injury. Alternatively, he requests that the case should be remanded to the UNDT to determine appropriate compensation.

### **The Secretary-General's Answer**

21. The UNDT correctly concluded that Mr. Diabagate's summary dismissal was lawful in the circumstances of the case. Initially, "the UNDT correctly found in relation to the first charge that the evidence supported an inference that [Mr. Diabagate] had 'likely engaged' in a sexual relationship with V01". In this regard, the UNDT properly considered the whole record to reconcile inconsistencies in the evidence.

22. The Secretary-General does not agree with the UNDT's conclusion that the second charge, i.e., that Mr. Diabagate engaged in sexual activity with beneficiaries of UN assistance, had not been proven. However, he notes that he is barred from appealing that ruling because he prevailed in the Judgment, which dismissed the application.

23. The established facts demonstrate violations of former Staff Regulation 1.2(b) and section 3.2(a) of ST/SGB/2003/13, as the UNDT determined, which amount to serious misconduct.

24. The summary dismissal of Mr. Diabagate was proportionate to the offense since he was in a position of trust as a Security official. Moreover, due to his position, he had a "[p]articular duty of care towards women and children".

25. The Administration proved all "three charges of misconduct" by clear and convincing evidence. Thus, the UNDT correctly sustained charges (1) and (3).

26. The UNDT did not err in sustaining the charge that Mr. Diabagate engaged in sexual activity with a minor; it was not based exclusively on hearsay evidence. To the contrary, the UNDT's finding is supported by records from the local court and police, including the

physical examination of V01, records from the local school regarding V01's age, 15 witness statements taken during the OIOS investigation, and the oral testimony before the Dispute Tribunal. It is not unusual for victims of sexual crimes to recant their initial accounts of abuse; thus, the evidence must be considered as a whole.

27. The UNDT did not err in taking oral evidence on 20 July 2011. It correctly found that the absence of Mr. Diabagate and his counsel from the hearing did not violate Mr. Diabagate's right to a fair hearing. Given the circumstances of the case, Mr. Diabagate cannot show that he suffered any prejudice since he later had an opportunity to cross-examine the witnesses.

28. The UNDT did not err in applying the burden of proof. The UNDT's references to "preponderance of evidence" and an "inference" that the events had "likely" taken place meet the proper standard.

### **Considerations**

29. "Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration."<sup>2</sup> "In this context, the UNDT must 'examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence'.<sup>3</sup>

30. "[T]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".<sup>4</sup> When the termination or dismissal of a staff member is a possible sanction, the "misconduct must

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<sup>2</sup> *Nyambuza v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-364, para. 30, citing *Messenger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

<sup>3</sup> *Nyambuza, ibid.*, citing *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018.

<sup>4</sup> *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

be established by clear and convincing evidence,” which “means that the truth of the facts asserted is highly probable”.<sup>5</sup>

31. The Administration summarily dismissed Mr. Diabagate on three grounds. The UNDT determined that the first ground for dismissal, i.e., the charge that he had engaged in sexual activity with a minor (V01), had been established. The UNDT determined that the second ground for dismissal, i.e., engaging in sexual relations with beneficiaries of United Nations assistance, namely local Congolese women, had not been established.<sup>6</sup> And the UNDT determined that the third ground for dismissal, i.e., engaging in the unofficial and unauthorized use of United Nations vehicles, had been established based upon Mr. Diabagate’s admission of that ground.

32. On appeal, Mr. Diabagate raises several claims challenging the UNDT’s conclusion that he should be summarily dismissed because he engaged in sexual activity with a minor (V01), which was serious misconduct in violation of the Staff Regulations and Rules. In particular, Mr. Diabagate’s appeal focuses on the first prong of the requisite legal analysis: whether the “facts on which the sanction is based have been established” by clear and convincing evidence. For the reasons discussed below, the Appeals Tribunal determines that the UNDT erred in law and fact when it concluded that the charge against Mr. Diabagate of sexual activity with a minor (V01) had been established.<sup>7</sup>

33. The record before the Dispute Tribunal consisted of oral testimony given under oath at the hearing held by the UNDT and documentary evidence. In her testimony before the UNDT, V01 admitted meeting with Mr. Diabagate on one occasion, but denied having engaged in sex with him. She also testified that Ms. Hughette Piongo told her to lie to the OIOS investigators (in her interview) about having sex with Mr. Diabagate. W01 testified that V01 told her that she had engaged in sex with Mr. Diabagate and that she had spent time at his house. Mr. Diabagate testified that he had not engaged in sexual activity with V01 and asserted that the allegation of sexual activity with her was designed by Ms. Piongo to extort

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<sup>5</sup> *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

<sup>6</sup> The Secretary-General did not appeal this determination, broadly asserting that *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048, prohibits such an appeal. However, that case may be distinguished. See *Ngoma-Mabiala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-361.

<sup>7</sup> In light of this determination, there is no need for the Appeals Tribunal to consider Mr. Diabagate’s other claims pertaining to this charge since, even if Mr. Diabagate is correct as to those claims, no further relief would be forthcoming.



money from him. The other witnesses merely recited what they had been told or what they had heard. Thus, the testimony given under oath at the hearing before the UNDT offered no direct or even circumstantial evidence that Mr. Diabagate had sexual activity with a minor (V01).

34. The documentary evidence before the UNDT included various police and other reports, the OIOS Report and the typed statements of the witnesses' interviews taken during the OIOS investigation. The investigative interview of V01 was conducted in Swahili and subsequently transcribed into an English-language statement. V01 was not placed under oath before giving her interview and she did not sign the transcribed version of her interview statement. As such, V01's transcribed statement, in which she said that Mr. Diabagate had raped her and engaged in sex with her, was neither reliable nor trustworthy; it was solely hearsay and insufficient, by itself, to prove the charge that Mr. Diabagate engaged in sexual activity with a minor.<sup>8</sup> Similarly, the other written documents were replete with hearsay and multiple hearsay and were neither trustworthy nor sufficient to prove that Mr. Diabagate had sex with a minor (V01).

35. Moreover, the UNDT reached the erroneous conclusion that Mr. Diabagate had engaged in sexual activity with V01 by ignoring the well-established jurisprudence of the Appeals Tribunal, discussed above. In this regard, the UNDT made two additional and significant errors of law. First, the UNDT failed to place the burden on the Administration to prove the facts underlying the discipline; instead it shifted the burden to the staff member (Mr. Diabagate) to disprove the facts. This error of law is apparent from the following statement by the UNDT: "When an Applicant comes before the [Dispute] Tribunal challenging a disciplinary decision against him and seeking remedies in that regard, the principal burden on him is to show that the decision is wrong."

36. Second, the UNDT failed to apply the proper standard of proof – clear and convincing evidence. This error is apparent from the following statements by the UNDT:

The [Dispute] 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 ... was proportionate to the offence." (Emphasis added.)

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<sup>8</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302; *Nyambuza, ibid.*; *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.

See also paragraph 83 of the Judgment:

[T]he 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*. (Emphasis added.)

Clearly, neither preponderance of the evidence nor an inference amounts to clear and convincing evidence.

37. For the foregoing reasons, Mr. Diabagate's appeal should be granted and the UNDT's Judgment should be reversed or set aside. Mr. Diabagate's request for moral damages must be denied; there is no dispute that he engaged in the unofficial and unauthorized use of UN vehicles. Our decision is sufficient to give Mr. Diabagate vindication or satisfaction regarding the serious and unproven charge of engaging in sexual activity with a minor.

### **Judgment**

38. The appeal is granted and Judgment No. UNDT/2013/009 is reversed. The decision to summarily dismiss Mr. Diabagate is rescinded and he shall be reinstated or, in lieu thereof, he shall be awarded compensation in the amount of one year's net base salary.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Simón

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar