



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/31/  
UNAT/1689  
Judgment No.: UNDT/2011/138  
Date: 2 August 2011  
Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

NORBERT BAGULA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

## **Facts**

1. The Applicant was recruited to the Organization on 26 February 2002 as a Casual Daily Worker (CDW) with the United Nations Mission in the Democratic Republic of Congo (MONUC) (as it then was) in Bukavu. On 1 September 2004, he received a 300-series appointment as a Warehouse Worker in Bukavu at the G-2 level.

2. According to a Joint Disciplinary Committee (JDC) report dated 9 October 2008, as a result of complaints addressed to the Regional Administrative Officer some time in late 2005 or early 2006 by several CDWs, an investigation was conducted by a Special Investigations Unit (SIU) concerning allegations that several staff members in the Engineering Section, MONUC, Bukavu, had forced them to pay money to secure and then retain their jobs in MONUC. The Applicant was one of those against whom allegations were made.

3. On 5 June 2006 SIU investigators submitted a Preliminary Investigation report. The report recommended that immediate administrative sanctions be instituted against a number of staff including the Applicant.

4. Another investigation focusing specifically on the allegations against the Applicant was conducted by SIU thereafter. The investigation report was submitted to the Officer-in-Charge of the SIU on 12 July 2006. The said report refers to voluntary statements recorded by Minani Buroko and Kashemwa Rubangiza. Buroko stated that on 18 April 2006, he was informed by his brother-in-law that the Applicant was looking for people to be hired subject to his payment of \$100 to buy UN materials. Buroko stated that he sold two of his goats and personally paid the Applicant \$100 at the Kavumu football ground.

5. The report further states that in his voluntary statement, Rubangiza had informed the investigator that he went to the Kavumu Monument and personally gave the Applicant \$100 in exchange for a job at MONUC.

6. On 30 August 2007, the case was referred by the Director, Department of Field Support Services (DFS) to the Officer of Human Resources Management (OHRM).

***Charges and Applicant's comments on the charges***

7. By a memorandum dated 12 November 2007, the Director, Division for Organizational Development, OHRM, notified the Applicant of the charges against him. The Applicant submitted several responses to the charge thereafter.

8. The Applicant was charged with misconduct for improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff. He was charged with violating staff regulation 1.2 and staff rule 301.3.

9. In his response denying the charges, the Applicant stated:

a. The responsibility of hiring CDWs belonged to the Chief of Section based on a roster list held at Bukavu Headquarters and that the people responsible for that list were not interviewed.

b. Some of the complainants and several others were involved in the theft of MONUC cement which he had reported.

c. It would be impossible to ask for the sum of \$100 from a CDW because that amount is close to one month's salary.

d. Two of the complainants had loaned money to the credit cooperative at Kavumu Centre which explains why one of them was designated to collect repayment from him. He paid back the loan in July 2006.

***JDC Review***

10. A JDC Panel was established on 13 July 2008 and held its hearing on 14 August 2008. The Panel transmitted its report to the Secretary-General on 3 October

2008. The Panel unanimously found that the evidence showed that the Applicant was more likely than not to have engaged in taking payments from local citizens in exchange for or with the promise of securing them jobs and unanimously recommended that he should be summarily dismissed.

11. On 6 November 2008, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined his case in the light of the JDC's findings, conclusions and recommendations, as well as the entire record and the totality of the circumstances. The Secretary-General accepted the conclusions of the JDC and its recommendations. The Secretary-General was of the view that the Applicant's actions were inconsistent with the standard of integrity required for international civil servants and that the severity of his misconduct was incompatible with continued service in the Organization. Pursuant to his discretionary authority in disciplinary matters, the Secretary-General decided that pursuant to staff rule 110.3(a)(vii), the Applicant would be separated from service without notice or compensation in lieu thereof.

12. The Applicant was also informed that in accordance with staff rule 110.4(d), he could appeal the decision directly to the former UN Administrative Tribunal.

13. On 13 May 2009, the Applicant submitted the present Application to the former UN Administrative Tribunal. The Respondent filed an Answer on 16 November 2009. On 22 December 2009, the Applicant counter-filed a document titled "Observations to the Respondent's Answer" challenging the Secretary-General's decision to separate him from service. The Application was subsequently transferred to this Tribunal.

14. The Applicant's case was that the CDWs who had brought the complaint of extorting money from them for UN jobs had recanted and wanted to tell the Tribunal that they had lied against the Applicant in their complaints. The said complainants wished to set the record straight by attending the hearing and explaining why and how they had lied against the Applicant. They were to attend the hearing as witnesses

for the Applicant. The hearing of this case commenced on 28 March 2011 via teleconference from Nairobi. Counsel for the Respondent was present in Nairobi and the Applicant participated via telephone from Bukavu, DRC.

15. On 28 March 2011, the Tribunal received testimony via telephone from someone who identified himself as one of the named complainants, Minani Buroko. The said witness testified that he had lied to investigators and made false allegations against the Applicant due to the fact that he was upset for having lost his job following allegations of cement theft made against him.

16. Again on 29 March 2011, the Tribunal received testimony via telephone from someone who identified himself as another one of the complainants, Kashemwa Rubangiza. Like the previous witness, Rubangiza testified that he had lied to investigators and made false allegations against the Applicant because he too was upset at having lost his job following allegations of cement theft made against him. The Tribunal was forced to adjourn further hearing of the case on that day due to numerous technical problems experienced with the telephone link with the DRC. The Tribunal was also minded to seek better clarification concerning the identity of the two witnesses who had been heard over the telephone and others yet to be called by the Applicant.

17. The hearing of this case was physically moved to Kinshasa, DRC from 20 to 22 July 2011 in Kinshasa, DRC. Interpreters who secured the interpretation from English into French and Swahili and vice-versa were present. The attendance at the Tribunal of the complainants, on the basis of whose complaints the Applicant had been summarily dismissed from service and who the Applicant had earlier told the Tribunal had recanted their numerous complaints against him was secured by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) Administration. During the hearing, the Tribunal, received testimony from the following witnesses for the Applicant:

- a. The Applicant himself.

- b. Mr. Mihigo Mudekereza.
- c. Mr. Minani Buroko.
- d. Mr. Iragi Mirindi.
- e. Mr. Kashemwa Rubangiza.
- f. Mr. Mpigirwa Mulolo.
- g. Mr. Buroko Masaka.
- h. Mr. Badesire Ntadumba.
- i. Mr. Lumbwe Asembo.

#### **Applicant's Case**

18. As per his written submissions and testimony during the hearing, the Applicant frames his case as follows.

19. The decision to terminate his appointment was made prior to giving him an opportunity to be heard before the JDC and prior to the JDC's decision and was, therefore, an abuse of discretion.

20. The JDC failed to meet its *onus probandi* with regard to establishing misconduct. The Panel's decision was based on unreliable witnesses and inconsistent testimonies. The JDC Panel received testimonies from seven witnesses, all of whom were CDWs. Each of the witnesses should have been dismissed as unreliable for specified reasons and were a group of disgruntled, low-paid local workers who worked intermittently as CDWs for MONUC. This work was, by definition, an insecure type of work due to the rotational system in place and due to its fluctuations depending on the needs of the Mission, however, such employment was highly sought after given the socio-economic conditions in the DRC. All but one of the CDWs were suspended from work by the Applicant and he owed the remaining

witness a substantial amount of money. The JDC did not address any of these facts or the evidence to suggest prejudice or ill-motive.

21. The JDC demonstrated a high level of doubt and conjecture in its consideration of his case. The standard of proof utilized by the JDC is “a preponderance of evidence” and the role of the JDC was to establish facts based on this standard. The JDC report reveals that there were serious doubts in the Panel’s findings, evidenced by the use of language such as “probably” and “more likely than not”. The Applicant submits that this language is unacceptable and constitutes a lack of due process, indicating that the JDC failed to meet its burden by the application of a standard lower than appropriate.

22. The JDC failed to establish facts and instead, relied upon conjecture and opinion without giving sufficient detail to explain why it reached certain conclusions. The JDC failed to address the major inconsistencies between the statements given during the investigation process and the oral testimonies given before it.

23. The Applicant requests the Tribunal to find that the Secretary-General erred when exercising his discretionary authority in summarily dismissing him.

### **Respondent’s Case**

24. The Respondents submissions are as follows. The Secretary-General has broad discretion with regard to disciplinary matters and this includes determination of what constitutes misconduct. The United Nations Charter and the Staff Regulations vests the Secretary-General with the authority to determine whether a staff member has met the required standards of conduct.

25. It is within the Secretary-General’s discretionary power to determine what behaviour constitutes misconduct as well as the disciplinary measure to be imposed. The Secretary-General has complied with the criteria established in the Tribunal’s jurisprudence for the review of disciplinary measures.

26. The facts on which the disciplinary measures were based have been established and legally amount to misconduct. There was no substantive or procedural irregularity. The Respondent submits that the Applicant's claim that the JDC Panel failed to consider that his accusers had motives to falsify claims against him are not correct as this claim was expressly considered by the JDC and rejected.

27. In view of the standard to be met for establishing misconduct, the Respondent submits that the testimony of seven witnesses determined by the JDC to be credible constitutes more than adequate evidence in support of its conclusion that the Applicant solicited money from Congolese nationals in exchange for their recruitment and/or continued service as Casual Daily Workers for MONUC. The defence provided by the Applicant, that the witnesses conspired to file false accusations against him, was considered by the JDC not to constitute sufficient evidence to overcome the *prima facie* case of misconduct that had been established.

28. The Respondent submits that the former UN Administrative Tribunal has consistently recognized that reports of the JDC are only advisory and, accordingly, the Respondent is even entitled to reach a different conclusion than the JDC after consideration of all the facts and circumstances of the case.

29. The Secretary-General's determination that the Applicant engaged in the solicitation of payment from Congolese nationals in exchange for, or with the promise of, securing them jobs was not arbitrary. In reaching this determination, the Secretary-General examined the entire record, including the investigation reports, the observations of the Applicant on the charges, and the findings of the JDC, which had personally interviewed the Applicant and the witnesses and had an opportunity to assess their credibility.

30. The sanction imposed is legal and proportionate to the offence. The imposition of the sanction did not constitute an arbitrary exercise of discretion. There has been no prejudice or improper motive in the exercise of discretionary powers.



31. The Respondent, therefore, requests the Tribunal to dismiss each and all of the Applicant's pleas and to dismiss the Application in its entirety.

### **Consideration**

#### ***Charge of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff***

32. The Investigation report dated 12 July 2006 concluded, *inter alia*, that:

- a. There was concrete and tangible evidence that the Applicant was engaged in extortion activities.
- b. A text message from the Applicant to Lumbwe Asembo was a clear indication of extortion.
- c. The proof and evidence of the receipt by the Applicant of monies could not be established.
- d. The collective complaint letter submitted by the CDWs could not be ruled out as fictitious.
- e. The Applicant's persistent extortion represented deficiencies in the management of the MONUC Engineering Section resulting from lack of manpower for supervision, incompetent personnel, excessive delegation for recruitment of CDWs and abuse of authority.
- f. The Applicant must be directed to settle all his financial obligations with the Uruguay and Indian contingent commanders and all the concerned CDWs salary payments for the duration of the work performed.

33. The testimonies from the witnesses during the Tribunal's hearing of the case in Kinshasa, DRC, are summarized below:

34. Mihigo Mudekereza testified that he had worked for MONUC at the Kavumu airport approximately six years ago. He had worked for only 12 days before he was laid off and told that when more equipment became available he would be re-employed. He was subsequently re-employed when the equipment arrived. When pay day came, the Applicant paid him much less than what he was entitled to. The Applicant told him that he would pay him at a later date. Despite repeated requests to the Applicant he never received any money. That is the reason why he filed a complaint against the Applicant with MONUC. He suspected that other people were receiving money meant to pay him. Mudekereza also testified that the Applicant used to meet with people and request them to raise funds and give them to him and that only those people who followed the Applicant's will were employed.

35. Minani Buroko testified that he worked for MONUC in 2006 at the airport in Kavumu. He and six other people met the Applicant at a place called Kavumu Monument. The Applicant promised them work with MONUC in exchange for a \$100 payment per person. He paid the Applicant \$100 and worked for one month. He did not receive any pay at the end of the month. When he asked the Applicant for his pay, the Applicant told him that MONUC would solve his problem.

36. Iragi Mirindi testified that the Applicant gave him a job in MONUC in 2006. Before he started working, he gave the Applicant \$100 at the Kavumu monument. There were nine other people present when he was hired. He went to Bukavu to sign his name on a list of those to be paid. When the payroll personnel called out names for payments, his name was not on the payroll. He and others in similar situations were told to go and speak to the Applicant. They tried unsuccessfully to contact the Applicant. He subsequently filed a complaint against the Applicant with MONUC.

37. Mirindi further testified that the Applicant had brought an impostor to the Bukavu airport to travel to Kinshasa to appear before the Tribunal and that he and the other witnesses challenged the said impostor. When they asked the man his name, he claimed to be Mihigo Mudekereza. The others then called the real Mihigo Mudekereza to join them on the trip to Kinshasa.

38. Kashemwa Rubangiza testified that he met the Applicant in 2006 who informed him that if he needed a job in MONUC that he was required to pay \$100. He borrowed \$100 from a cooperative and paid it to the Applicant in exchange for a job in MONUC. He worked for one month. He was told to go to Bukavu to sign some papers before he could be paid. When he got to Bukavu, he discovered that his name was not on the payroll list. He went back to Kavumu to confront the Applicant who told him that there must be some kind of confusion and that he would eventually be paid two months salary at the end of the second month. He continued working and was again not paid. He subsequently filed a complaint against the Applicant with MONUC.

39. Mpigirwa Mulolo testified that he was selected to work for MONUC by a white man sometime in 2006. After one month's employment, the Applicant told him that if he wanted to work an extra month he would have to pay \$50. Someone named Ting was sent by the Applicant to collect the money from him. He paid \$50 to that man. He was later told that his name was not on the shortlist and returned to his village. He did not hear anything else about this matter until recently when he received a phone call from his colleagues telling him that someone was trying to impersonate him before this Tribunal and that he should travel to Kinshasa to attend the hearing.

40. Buroko Masaka testified that he gave the Applicant \$100 in 2006 so that he could obtain employment with MONUC. He sold a pig to obtain the money. He remembered seeing a lot of people give the Applicant money. After working for one month, he did not receive any payment. He then filed a complaint against the Applicant. Masaka testified that the Applicant cannot travel to Kavumu because people there can "kill him because he is a bad man" and that he "is a thief and a cunning politician".

41. Badesire Ntadumba testified that in April 2006, the Applicant took \$100 from him before he was hired to work for MONUC. This happened at the Monument place near the airport. There were others present who also gave the Applicant money. At

the end of his first month of employment, he went to Bukavu to get his pay but found that his name was not on the payroll list. He protested but was asked to leave by the security guards. He was offered \$10 for transport.

42. Lumbwe Asembo testified that the Applicant had informed him and others, back in 2006, that MONUC required them to pay \$100 before they were employed for two months. He paid money to the Applicant twice. He first gave the Applicant \$400 which would be repaid with \$50 interest per month. The Applicant later approached him and told him to pay \$100 in order to obtain employment with MONUC. The Applicant sent him a text message on his phone asking for money. He worked for 11 days and received payment of \$66 but the Applicant decided to terminate his employment contrary to their agreement. It was then that he filed a complaint against the Applicant to a security man named “Sierra 5”.

43. Asembo further testified that when “Sierra 5” asked the Applicant about the text message, the Applicant denied that it was from his phone. “Sierra 5” then dialled the phone number and the Applicant’s phone began ringing in the room. At the material time, he and the Applicant were neighbours. The Applicant later moved from Bukavu and did not return to the neighbourhood. The Applicant is yet to repay the money he loaned him. He had filed a complaint with the DRC police who had arrested the Applicant but later released him.

44. The Applicant was allowed to cross examine his witnesses since their testimonies appeared hostile to his case.

45. Having observed the demeanour of the witnesses, examined and analyzed their evidence in support of the charge against the Applicant, the Tribunal finds their evidence credible, truthful and properly acted upon. The testimonies relied upon by the Respondent when imposing the disciplinary sanction against the Applicant were substantiated, corroborated and truthful. The evidence relied upon by the Respondent in this case sufficiently supports the charge of improperly soliciting and receiving

monies from local citizens in exchange for their initial recruitment and service as United Nations staff and was never recanted as alleged by the Applicant.

***Applicant's attempts to mislead the Tribunal***

46. As earlier indicated (see paras. 15 and 16 above), the Tribunal had attempted to hear this case via teleconference. At that time, the Applicant had provided telephone numbers of two people who identified themselves as Minani Buroko and Kashemwa Rubangiza. These witnesses had informed the Tribunal that they had lied to investigators and made false allegations against the Applicant because they were upset for having lost their jobs following allegations of cement theft made against them. During the hearing in Kinshasa, the Tribunal requested Minani Buroko and Kashemwa Rubangiza to inform the Tribunal whether they were the same persons who had testified via teleconference on 28 and 29 March 2011 respectively. They denied ever having done so. The Tribunal requested the Applicant's explanation and he was unable to provide one.

47. The Tribunal also received testimony from Iragi Mirindi. and Mpigirwa Mulolo that the Applicant had tried to bring impostors to appear before it in Kinshasa. The Tribunal finds that the Applicant's actions are criminal in the extreme and amount to a blatant abuse of the Tribunal's process and aggravated contempt of court *in facie curiae*.

48. This case amply illustrates some of the dangers inherent in conducting judicial proceedings via teleconference. Such proceedings are hampered by, *inter alia*, the difficulty of ascertaining the identities and demeanour of witnesses testifying on the other end of the telephone line. Additionally, they compromise the integrity of the judicial process for example there may be situation where someone is coaching the witnesses on their responses. In the instant case, if the Applicant had succeeded in his criminal scheme to hoodwink and deceive both the Respondent and the Tribunal by procuring fake witnesses to give false testimonies, a great miscarriage of justice

against the Respondent and unquantifiable harm against the reputation of the United Nations would have been occasioned.

*Need for closure of complaints and private legal obligations of staff members*

49. The Tribunal finds that the Applicant had extorted money and in some cases withheld the witnesses' pay. This poses a difficulty for the MONUSCO Administration and the image of the entire Organization. How best should the MONUSCO Administration bring closure to this episode?

50. Pursuant to art. 10(6) of its Statute, the Tribunal finds that the Applicant has manifestly abused the proceedings before it. Article 10(6) provides that:

Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

51. Section 6 of ST/AI/2000/12 (Private legal obligations of staff members) of 25 October 2000 provides as follows:

Deductions from all final entitlements, including repatriation grant, may be made under staff rules 103.18(b)(ii) and (iii), 203.13(b)(ii) and (iii) or 303.5(b) to pay the staff member's legally established obligations, including family support obligations.

52. In accordance with art. 10(6) of its Statute and section 6 of ST/AI/2000/12, the Tribunal recommends that in the present case, the Administration should withhold all final entitlements, if any, still due to the Applicant to pay for his legally established obligations. For a speedy resolution of this matter, the Tribunal further recommends:

a. MONUSCO Administration should review its records and ascertain how much pay is due to the individual witnesses for any work they undertook for MONUC and for which they were not remunerated.

b. As it is already on the record how much money the individual witnesses paid to the Applicant for employment with MONUC, these sums should be added to the amount in part (a) above.

c. These monies should be recoverable from any final entitlements that are due to the Applicant.

d. In the event that the final entitlements due to the Applicant are not sufficient to cover the afore-mentioned sums, the witnesses should be advised to pursue their claims in accordance with the laws of DRC.

e. Alternatively, the Tribunal encourages the MONUSCO Administration to exercise its discretion in determining how best to bring closure to the suffering of the witnesses in accordance with the applicable Staff Regulations and Staff Rules and with the Tribunal's findings in this case.

***Criminal accountability of United Nations officials and experts on mission***

53. Section 2 of General Assembly Resolution 62/63 (Criminal accountability of United Nations officials and experts on mission) of 8 January 2008 strongly urges UN member States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under International law, and in accordance with international human rights standards, including due process. The Tribunal finds that the facts in the present case indicate that the Applicant was engaged in acts of a criminal nature and encourages the Respondent to refer this matter to DRC officials for prosecution.

**Findings**

54. The summary of the Tribunal's findings are as follows:

- a. Having observed the demeanour of the witnesses, examined and analyzed the evidence provided by the witnesses in support of the charge against the Applicant, the Tribunal finds the evidence credible, truthful and properly acted upon.
- b. The testimonies relied upon by the Respondent when imposing the disciplinary sanction against the Applicant are substantiated, corroborated and truthful.
- c. The evidence relied upon by the Respondent in this case sufficiently supports the charge against the Applicant of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff and was not recanted as alleged by the Applicant.
- d. The Applicant had tried to bring impostors to appear before the Tribunal in Kinshasa. The Tribunal finds that the Applicant's actions are criminal in the extreme and amount to a blatant abuse of the Tribunal's process and aggravated contempt of court *in facie curiae*.
- e. This case amply illustrates some of the dangers inherent in conducting judicial proceedings via teleconference. Such proceedings are hampered by, *inter alia*, the difficulty of ascertaining the identities and demeanour of witnesses testifying on the other end of the telephone line and compromise the integrity of the judicial process.
- f. Pursuant to art. 10(6) of its Statute, the Tribunal finds that the Applicant has manifestly abused the proceedings before it. The Tribunal recommends that in the present case, the Administration should withhold all final entitlements, if any, still due to the Applicant pending its determination of all amounts owed to the witnesses and the settlement of those claims.



g. Alternatively, the Tribunal encourages the MONUSCO Administration to exercise its discretion to determine how best to bring closure to the suffering of the witnesses in accordance with the applicable Staff Regulations and Staff Rules.

### **Conclusions**

55. In view of its findings above, the Tribunal rejects the Application of Norbert Bagula in its entirety and awards costs against him in the terms described at para. 52 above.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 2<sup>nd</sup> day of August 2011

Entered in the Register on this 2<sup>nd</sup> day of August 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi