

Judgment No. 2020-



Today at around 0427hrs, the duty officer received a call from Mr. Muloki Wako of UNHCR Block A2 reporting noise from the neighbour's room. SSS duty officer went to the said house and found the occupant; Mr. Andrew Mboya, arguing with a friend but not violent. They were advised to calm down and not disturb the neighbourhood. They heeded to the advice and the area was left safe and peaceful.

5. Later that morning, Ms. Sonja Jakic demanded to see Mr. Nyawa, Mr. Mboya and Ms. Oluoch and instructed that Mr. Mboya apologize to the UNHCR person and swap houses with other SSS officers. No mention was made to her about the involvement of firearms in the incident.

6. Mr. Mboya's girlfriend, in a conversation with Ms. Oluoch, told the latter that she had been menaced with a gun. Ms. Oluoch relayed this to Mr. Nyawa. The girlfriend reconciled with Mr. Mboya and returned to his house on the night 19/20 December 2014, and on 20 December 2014, she left the compound.

7. Mr. Nyawa returned the service weapon to Mr. Mboya on the morning of 19 December 2014, but at the end of the shift at 6.00 p.m. the latter brought it back and requested that it be kept in the safe for the night.

8. On a date which is disputed, either 19 December or 22 December 2014, in the morning hours, Mr. Nyawa held a 7 (g)5.9wDe o29hfc-2.5 (e6 (r)-r) (h)-s ir 201a rn tl 7 (g) (2)-1 (0)-0.6 4.4 Tw 20

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Submissions

The Secretary-General's appeal

27. The Secretary-General submits that the UNDT erred by substituting its decision for that of the Administration by holding that the disciplinary measure of a written censure was disproportionate because, in its opinion, accountability had been achieved by the imposition of the sanction of deferment of promotion for two years. The UNDT thus exceeded its competence and its holding on the proportionality of the disciplinary measure should be overturned.

28. Moreover, the UNDT erred in its interpretation of Staff Rule 10.2 in two ways. There is nothing in the Staff Rule that would proscribe the imposition of written censure concurrently with other disciplinary measures. Second, contrary to the UNDT's holding, Staff Rule 10.2 does not create or assume a gradation in the severity of disciplinary measures that can be determined by a "systemic reading" of the rule.

29. In light of the foregoing, the Secretary-General requests the Appeals Tribunal to uphold the Administration's decision to impose disciplinary measures on Mr. Nyawa and to vacate the UNDT's rescission of the written censure.

Mr. Nyawa's answer

30. Mr. Nyawa maintains that the UNDT did find some extenuating circumstances which the Administration had failed to consider at the time of imposing the sanctions. Moreover, the UNDT was not satisfied on all the accusations leveled against him for which the two disciplinary measures were arrived at. Therefore, this reduction in the number of accusations logically called for a corresponding reduction in the level of the sanctions. In this regard, the UNDT correctly and appropriately reduced the sanctions from two to one.

31. Consequently, Mr. Nyawa requests that the Appeals Tribunal reject the appeal.

Mr. Nyawa's Cross-Appeal

32. Mr. Nyawa avers that the UNDT erred in fact and law in concluding that he violated Staff Rule 1.2(c) (failure to report unsatisfactory conduct) and Staff Regulation 1.2(b) (failure to uphold the highest standards of integrity).

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c) Dadaab Handover Notes of 20 August 2014 submitted by the Secretary-General as proof that Mr. Nyawa had a duty to ensure that the Daily Report was accurate and comprehensive;

d) SIU interview records for several

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that Mr. Nyawa's attack on the impugned Judgment on cross-appeal is mainly centered around his argument that this was only a rumour, upon which he had no basis to act. In this respect, he submits further that abstaining from spreading a rumour was clearly encouraged by the rules of the Organization.

57. Coming to the point, Mr. Nyawa's knowledge of the material facts of the case was borne out by the witnesses' testimonies either before the SIU or the UNDT, according to which he had been instantly informed about the events.

58. Specifically, Mr. Muloki, Mr. Mboya's housemate, has stated that:

He returned to his room. Shortly after, he heard Mr. Mboya's girlfriend screaming. Once again, he went to Mr. Mboya's room and found the girlfriend kneeling on top of the bed pinned down by Mr. Mboya on the mattress with the left hand while his right hand was holding his service weapon pointed at her head at close range. He tried to grab the hand that was holding the weapon. Before he could do this, Mr. Mboya pushed his girlfriend aside and pointed his weapon at him saying, "toka toka" (get out, get out). Mr. Mboya's finger was on the trigger.

He personally informed [Mr. Nyawa] about the details of the firearm incident as soon as [Mr. Nyawa] arrived at the scene, as he was the first person [Mr. Nyawa] encountered and asked what the problem was. Earlier he had told these to Ms. Awuonda when he had met her going to the scene.

And Ms. Awuonda, the Duty Officer, has stated that:

When [Mr. Nyawa] arrived at the scene she informed him that, according to Mr. Muloki, Mr. Mboya, during the quarrel with his girlfriend, pointed his gun at her and Mr. Muloki. She handed the matter to him as the supervisor. She confirmed obtaining instructions from /P Sh fcot826te sup(te)7.1 .i368 (BDC 2i3 (sM23 c)0.9 (t)TJ-0.9 (ta)3 6 (r)4.8 (

Just before the meeting with the FSCO, [Mr. Nyawa] asked her in Swahili whether it was true that Mr. Mboya had pointed a gun at his girlfriend. She confirmed that this was what the girlfriend had told her.

60. While it is true that Mr. Muloki and Ms. Awuonda did not supply the above information during their initial interview by SIU but at a later stage, i.e. when they were re-interviewed by SIU as well as before the UNDT, this alone does not eliminate the evidentiary value of their testimonies, nor does it render their statements unreliable, as correctly found by the UNDT. Moreover, their versions of the critical events coincided with that of Ms. Oluoch's account, which the UNDT Judge found more plausible, detailed and consistently narrated in her interviews than Mr. Nyawa's contention that he had heard the story from Ms. Oluoch on 20 December 2014. wna4zi)-3.1jve22.858Td[(d(h)-43e)(12.10.116v0.361j-(i)-3.(ec

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officers and his additional role in reporting daily to the senior Department of Safety and Security officials on the ground.⁶

70. In this regard, the UNDT opined:⁷

It is thus clear that, at minimum, designating duty officers, stand-by shifts, oversight of the G4S Security personnel, enforcing the curfew, responding to calls and proper reporting were the obligations of the Team Leader and in this respect [Mr. Nyawa] could give binding instructions to the team members. In addition, as transpires from the oral and documentary evidence, [Mr. Nyawa] exercised a *de facto* commanding role over the other Security Officers in his team in the following aspects ...

71. Moreover, the UNDT heard testimony from three senior security staff based in Nairobi who elaborated on the role and responsibilities of Team

74. The fact that Mr. Nyawa had been exercising at this time a *de facto* commanding role over the other Security Officers of the team, including, *inter alia*, his authority to give binding instructions to them, was bor/TT5 1 T5td e8-6 (ti)-(s)-1.7 (b)0.(8--63b.874 aww 6.158 0)Tj-0.ti8--621ng T

Whether Mr. Nyawa misled Ms. Okal when she inquired about the incident

77. In respect of the charge that he failed to report the incident by misleading a more senior Security Officer by indicating that Mr. Mboya had a small disagreement with his girlfriend, Mr. Nyawa asserts that the UNDT erred as a matt

UNDT even pronounced on the divergences in the witnesses accounts of Ms. Okal with the testimonies of Inspector Bakhoya and Mr. Mabuyah, in terms of the content of the conversation between Ms. Okal and Mr. Nyawa on 22 December 2014. In this regard, the UNDT found that:¹²

The Tribunal notes that there are divergences in the witnesses' accounts concerning the date and time of different phone calls. For example, the record shows an earlier call from the mobile phone of Ms. Okal to [Mr. Nyawa], on 21 December in the afternoon. This is consistent with the undispute.4 (sp)1-2.1 (og.08 (s c)-23 (h)6.a6 (tnm3.1 (p)tg(mo)-0.92(.9 (

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the highest standard of integrity. Since the UNDT properly found that the facts amounting to misconduct were established, the Administration has shown misconduct on Mr. Nyawa's part.

88. Accordingly, the cross-appeal fails.

Lawfulness and proportionality of the disciplinary sanction

89. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances

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disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

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considers adequate to the circumstances of the case in light of the actions and behaviour of the staff member involved.

96. We also share the Secretary-General's view that the purpose of a written censure differs from that of other disciplinary measures set forth in Staff Rule 10.2(a) and therefore it is not subsumed by any of them. The decision as to whether or not a written censure or any other disciplinary measure is adequate, imposed alone or cumulatively with other measures on the disciplined staff member, to accomplish their retributive and preventive effect, falls within the discretion of the Administration, which conducts this exercise on a case by case basis, in connection to the circumstances of the specific disciplined behaviour, and not *in abstracto*.

97. That said, however, this discretion is not unfettered, since the Administration is bound, as required by the Appeals Tribunal jurisprudence for the UNDT to review the level of the sanction imposed,

Dispute Tribunal to consider the correctness of the choice made by the
Secretary-General amor(y)]TJ

100. Consequently, the UNDT did not lapse in respen3 Tc Ot-5.7 ()1.2 ()-U767/A20

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104. The appeal and the cross-appeal are dismissed and Judgment No. UNDT/2019/149 is affirmed.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 27th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar