THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0085 OF 2004

COSMA NTEZIYALEMYE …… APPELLANT

VERSUS

1. **MBARARA DISTRICT LOCAL GOVERNMENT COUNCIL**
2. **THE ATTORNEY GENERAL…… RESPONDENTS**

CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, JA

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

(An appeal from the Judgment of Hon. Mr. Justice Paul K. Mugamba in High Court at Mbarara Civil Appeal No. 85 of 2004 delivered on the 19th day of August 2004).

JUDGMENT OF THE COURT

The appellant appeals against the decisions of High Court of Uganda on the following grounds;-

1. ***The Learned trial Justice erred in law and in fact when he held that, the dismissal of the Appellant was not wrongful and that the Appellant was not unfairly treated.***

2- The Learned trial Justice erred in law and in fact when he held that none of the defendants was liable.

3- The learned trial Justice erred in law and in fact when he failed to properly evaluate the evidence on record which led him to arrive at wrong conclusions thereby occasioning serious miscarriage of justice.

On 18th Sept 2013 when this appeal came up for hearing **Mr**. **Ngaruye Ruhindi** learned counsel for the appellant was not in court. **Mr. John Fisher Kanyemibwa** was holding his brief.

Parties were ordered to file written submissions, only the appellant complied.

The brief facts giving raise to this appeal are briefly as follows;-.

The plaintiff was a sub-county chief who was first employed by the first appellant in 1988. Before that he had been a Grade II teacher. He was indicted on September 26th 1996. His services were terminated in August 1997 when he still held the office of sub-county chief. His appeal to the Public Service Commission was rejected. The termination of the services of the appellant by the first respondent came in the wake of a report by a Commission of Inquiry into suspected frauds in graduated tax administration in Mbarara District which implicated him. Police Inquiries and Criminal proceedings were commenced against him.

The Criminal proceedings were later terminated. He then brought a civil action against the respondent at the High Court. His contention was that he had been very unfairly treated and discriminated against. The respondent disputed the claim.

The Attorney General did not file a defence and was not represented at the trial. The High Court dismissed the appellant's claim with costs. Being dissatisfied, the appellant filed this appeal on the grounds already set out above.

On ground one learned counsel for the appellant submitted that the charge for which the appellant was indicted and for which he was required to answer was different from that for which he was required to defend himself at the hearing before the District Service Commission.

He submitted that, this contravened Regulation 36 of the Public Service (Commission) Regulations (SI Cap 288-1). Learned counsel went on to set out in detail the requirements of the above Regulation. This Regulation he contended is mandatory. He relied on the decision of this court in ***David Iyamulemye vs Attorney General Court of Appeal Civil Appeal No. 81 of 2006.*** *(Unreported)*

He further contended that the since the above Regulation was not complied with the learned Judge erred when he held that the appellant was not wrongly dismissed.

Counsel submitted further that the appellant was not granted an opportunity to argue his appeal before the Public Service Commission, where he had appealed the decision of the District Service Commission. That the Public Service Commission had rejected his appeal without giving him a hearing.

That the District Service Commission referred to the appellant in its minute 374/97 exhibit D2 as a former Sub-county Chief while he was on interdiction, and that, this was an indication that the District Service Commission had already made up its mind to dismiss him before the hearing.

On ground two counsel submitted that the District Service Commission having flauted the Public Service Regulations should have been found liable. He repeated his arguments in respect of ground one, that the appellant was not given an opportunity to present his defence and that Regulation 36 (Supra) had not been complied with.

On ground three learned counsel faulted the trial Judge for having failed to properly evaluate the evidence. That the learned Judge had found that the appellant had not sought particulars of the charge from the Chief Administrative Officer (CAO). Counsel contended that evidence on record showed that the appellant had in fact approached the CAO for further particulars but the CAO had failed to provide them.

Counsel submitted further that whereas the charge preferred was that of abuse of office, the particulars of the offence related to the offence of making a false claim. That when he appeared before the District Service Commission he was required to answer charges of embezzlement. Counsel contended that the appellant had been tried for an offence for which he had not been allowed to give a written defence as required by Regulation 36 of the Public Service (Commission) Regulations. He asked court to allow the appeal.

This is a first appeal and as such this court is required to re-evaluate the evidence and come up with its own inferences on issues of law and fact. See **Rule 30(1)** a of the Rules of this Court. ***Fr. Narcensio Begumisa & others vs Eric Tibebaaga (Supreme Court Civil Appeal No. 17 of 2002)***

The appellant in his first ground of appeal faults the learned trial Judge for having failed to find that he had been wrongly dismissed from his employment and that he been unfairly treated.

The reason that appellant gives for this contention that he was wrongly dismissed, is that, he had not been given an opportunity to defend himself. In this regard the learned trial Judge found as follows as page 3-4 of his Judgment.

> ***"…… in that letter the plaintiff was told that a charge of abuse of office was being laid against him following investigations by a commission of inquiry.***

He was asked to defend himself within a fortnight. He did not. Then there is exhibit D1 which was a reminder for the plaintiff to submit his defence in writing. Exhibit D1 made reference to Exhibit P.6 but also gave two weeks which apparently extended the time, given that the earlier letter was dated 26th September 1996 while the reminder was dated 30th September 1996. Once again no response was made by the plaintiff by way of a written defence"

In his own testimony in court the appellant stated as follows in cross examination

"I was interdicted because of the charge of abuse of office. I was suspected. I have the copy here. Para. 1 gives the reasons for interdiction…….

…… The letter of interdiction was after the Commission of Inquiry. I was interdicted after the commission of Inquiry made its investigations but during investigations by police.*(Sic)* ***I appeared before the Chief Administrative Officer as required by the letter of interdiction. He asked me to make a defence against the accusations. I did not make the defence because I did not know the particulars of the allegations yet. I asked him but I did not elaborate. I wrote the defence at a later time about 21st July 1997. I***

had been asked to write a defence in the letter of 26th September 1996. My defence was 9 months later. I was dismissed on 4th August 1997. The interdiction letter had given me two weeks to write my defence. I asked to be given particulars of the allegations though I do not have the evidence of the request here. The letter gave me an opportunity to defend myself. I was later given the particular and then I wrote my defence. I do not have the evidence of the letter of particulars here." *(Emphasis added).*

In re-examination he stated as follows;-

"I was interdicted before the Commission of Inquiry released its report. The letter of interdiction did not clearly bring out the particulars of the charge to enable me make a defence. I filed my defence later because had not got the particulars at the time of interdiction. I demanded for the particulars on two occasions. I first asked for them around 10th October 1996. They kept quiet. I wrote another letter before the District Service Commission called us to appear before it around 28th July 1997. I put in my defence before I appeared before the District Service Commission a week later. I was interdicted even before I appeared in court." *(Emphasis added).*

From the above evidence we are satisfied that the appellant was granted an opportunity to be heard and that he presented his defence, which was rejected.

From the above evidence there is nothing to suggest that Regulation 36 of the Public Service Regulations was not complied with. The issue of non compliance with the Public Service Regulations appears to have been an afterthought. The fact of non-compliance was neither pleaded in the plaint nor was any evidence adduced at the trial to prove it. It is not set out in any of the grounds of appeal. That issue only appears prominently in the appellant's written submissions. It is trite law that evidence cannot be adduced on an issue of fact that had not been pleaded. Likewise submissions cannot be made in respect of an issue that had not been set out in the grounds of appeal. The issue as to whether or not Regulation 36 was complied with is one of mixed fact and law and as such it out to have been pleaded in this court and in the court below.

It could not have been covered under a general ground of appeal such as ground one herein, which in itself appears to offend the provisions of **Rule 66(2)** of the Rules of this Court. That rule requires that every memorandum of appeal sets forth concisely and under distinct heads without argument or narrative the grounds of abjection to the decision appealed against.

We find no merit in ground one and we hereby dismiss it.

Ground two also offends the provision of **Rule 66(2)** of the Rules of this Court as it is too general and does not specify the specific grounds of objection to the decision appealed from.

Be that as it may, it is clear from the evidence on record that the appellant was dismissed having admitted to the charges that had been preferred against him.

In his examination in-chief DW1 stated as follows;-

> ***"In his defence before the District Service Commission the plaintiff admitted he used some of the money to pay school fees for his children because the Administration had delayed to pay his salary. This is contained in the minutes of the Service Commission of 24-29th July 1997."***

On his part DW2 in his examination in-chief stated as follows;-

> "***The second charge concerned abuse of office, failure to account for 66 school desks made in fiscal year 1995/1996. The charges were read to him by the Chairperson of the Commission. In his defence he admitted he used Administration funds to pay school fees for his children because Administration had delayed in paying his salary. As for the desks he insisted he delivered them but there was no proof of this such as a receipt of the desks. The Commission rejected his defences because he was not exonerated.***

Commission decided he be dismissed from service of the Administration and be made to refund the Shs. 1,350,105".

This evidence was not contraverted by the appellant. The defence presented by the appellant was in fact and law an admission of the charges against him. The District Service Commission rightly rejected it. The Public Service Commission could not have upheld an appeal arising from admitted charges. It also rightly rejected it.

Having held as we have on ground one, that the appellant was given an opportunity to be heard and was not unfairly treated, we can only hold that ground two has no merit either. It is also dismissed.

On ground three, we find that the learned trial Judge properly evaluated the evidence and came to the correct conclusion that the appellant was given an opportunity to be heard. The learned trial Judge sets out in detail the correspondence between the parties contained in various letters that were exhibited in court. They all point to the fact that the appellant was availed an opportunity to be heard. That he presented his defence, and that at the hearing he admitted to the charges against him. He appealed in writing to the Public Service Commission, which appeal was rejected. We have found no law that suggests that such an appeal should have been heard in his presence. We agree with the learned trial Judge's findings that the evidence advanced

by the appellant at the trial was not sufficient to prove the appellant's claim on a balance of probabilities.

We find no merit in this ground which we also hereby dismiss.

This appeal has no merit whatsoever and it is accordingly dismissed.

The respondent did not file written submission neither did he make any oral arguments. Accordingly we award no costs of this appeal.

Dated at **Kampala** this **15th** day of **January 2014.**

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HON. MR. JUSTICE RICHARD BUTEERA
JUSTICE OF APPEAL

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HON. LADY JUSTICE SOLOMY BALUNGI BOSSA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL