THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.121 OF 2016

(Arising from Labour Dispute Claim No.2 of 2015)

DFCU BANK LIMITED::APPELLANT

VERSUS

DONNA KAMULI:::RESPONDENT

(Coram: Alfonse Owiny Dollo, DCJ, Barishaki Cheborion, JA and Hellen Obura, JA)

JUDGMENT OF HON. MR. JUSTICE BARISHAKI CHEBORION, JA

This is an appeal from an award and orders of the Industrial Court in Labour Dispute Claim No.002 of 2015 in which the claimant's claim (respondent herein) was allowed in the following terms;

1. The termination of the claimant from her empolyment was unlawful.
2. The claimant is entitled to 60,000,000/= as general damages.
3. The claimant is entitled to 80,000,000/= as aggravated/punitive damages.

4. The claimant will be entitled to severance allowance calculated under a negotiated system between the workers and the respondent or between the respondent and a union representing the workers of the respondent. In the absence of such a system the claimant is entitled to the equivalent of 1 month pay per year worked.

5. The claimant will be entitled to salary arrears (in compensation) from the date of the unlawful termination to the date of this award.

6. The salary loan granted to the claimant by virtue of her employment and wholly secured by such employment shall not be recoverable.

7. The claimant will be entitled to 6,518,231/= being the provident fund contribution admitted by the respondent in the termination letter.

8. The claimant will be entitled to costs incurred in this matter.

The facts giving rise to this appeal as accepted by the Industrial Court are that the respondent (the claimant in that suit) was employed by the appellant (the respondent in that suit) as a Banking Officer by virtue of her letter of appointment dated 11th October, 2011. She was subsquently promoted to the rank of Customer Services Officer by the letter dated 17th January, 2013.

During the course of her work, the respondent's appraisals were good and rated "C" until she developed misunderstandings with one of her Line Managers and her appraisals were downgraded to "D" through a mechanism known as "a moderation committee". She was then placed under a Performance

Improvement Plan (P.I.P) after which according to her, she scored "C" although she never got communication regarding particularly the P.I.P. Having had a new Line Manager, she scored "C", "B" and "D" for the months of July, August and September 2014 respectively. She was on 16th October, 2014 terminated for non performance without being accorded a fair hearing.

According to the appellant, during the course of employment of the respondent, she was subjected to performance appraisals which fully involved her and when she was rated for the year 2013, she was rated "D" by the moderation committee, she was placed under a P.I.P which coincided with the midyear assessment and both Were done concurrently giving the respondent a "D" which amounted to non performance. Since appraisals involved the respondent by way of feedback and discussion on ways to improve, the termination of the respondent's services was lawful and in accordance with the Human Resource Manual.

Being dissatisfied with the award of the trial Court, the appellant appealed to this Court on the following grounds of appeal;

1. *The Court erred when it held that the respondent was not accorded a hearing before termination*

2. *The Court erred when it awarded aggravated damages which Were not pleaded.*

3. *The Court erred when it awarded salary arrears from the date of termination to the date of award which was not awardable in law.*

4. *The Court erred when it relieved the claimant of her loan obligation when neither the same had been pleaded nor proved.*

5. *It is contrary to common sense and justice to relieve the respondent of her outstanding loan obligations when she used and benefitted from the money advanced.*

6. *The Court erred when it awarded excessive general and aggravated damages.*

At the hearing of the appeal, Mr. Brian Kalule appeared for the appellant while the respondent was represented by Mr. Byarugaba Kusiima. Counsel for the appellant abandoned ground 1 and proposed to argue only 5 grounds.

On the issue of aggravated damages in ground 2 of the appeal, counsel for the appellant submitted that the Industrial Court awarded UGX 80,000,000/= (Uganda shillings Eighty Million) as aggravated/ punitive damages which was an error because there is nothing known as aggravated/ punitive damages. He referred Court to the decision in ***Uganda Revenue Authority V Wanume David Kitamirike, Court of Appeal Civil Appeal No.43 of 2010*** where the Court made a distinction between aggravated and punitive damages. According to counsel, it was an error for the trial Court to find that both damages Were punitive and could be awarded. He added that in ***Omunyokol Akol Johnson V***

The Attorney General, Civil Appeal No.6 of 2012, the Supreme Court noted that it was an error of legal principle to award what is termed as omnibus damages.

Counsel further submitted that aggravated damages Were not pleaded, it was therefore an error for Court to award the same because a party cannot be allowed to succeed on a case not set out by him in his pleadings unless pleadings are amended which was not the case in the present appeal. He referred Court to the decision in ***Ms Fang Min V Belex Tours and Travel Limited SCCA No.6 of 2013 consolidated with Civil Appeal No.1 of 2014, Crane Bank Limited V Belex Tours and Travel Limited.*** Counsel argued that punitive damages could not be awarded because the same are not available in employment cases as was settled by the ***Supreme Court in Bank of Uganda V Betty Tinkamanywere, Civil Appeal No.12 of 2007*** where Court stated that for cases of that nature, a Court is only limited to award of aggravated damages and not punitive damages. Counsel further submitted that the rationale is that a contract is not intended to be punitive because punishment is a reserve of criminal law except where the conduct has been egregious.

Regarding the award of salary arrears which was argued under ground 3 of the appeal, counsel faulted the learned Judges for awarding arrears from the date of termination to the date of the award. He submittted that there was no basis for award of salary where an employee has been terminated because salary is

only paid for work done. He added that it is untenable for an employee who has been terminated prematurely or illegally to be compensated for the remainder of the period that they would have rendered and relied on ***Bank Of Uganda V Betty Tinkamanywere (supra)***

On ground 4 of the appeal, counsel submitted that the Court relieved the respondent of her loan obligations which she had neither pleaded nor proved. He further submitted that the Court noted that the said remedy had not been proved but had been mentioned in the witness statement but counsel for the appellant chose not to cross-examine on it. Counsel added that a witness statement is not a pleading and a party is not bound to cross-examine on evidence that has not been pleaded. He relied on ***Independent Electoral and Boundaries Commission and anor V Stephen Mutinda Mule and Others, Civil Appeal No.219 of 2013.***

On ground 5 of the appeal, counsel submitted that it would be unfair and unjust enrichment for Court to relieve the respondent of her loan obligations which had been undertaken under a separate contract from her employment contract. He argued that the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. Further, that the respondent borrowed money from the appellant which she was supposed to repay with interest and the Court cannot award damages and at the same time relieve her of her loan obligations as this would amount to unjust enrichment. He relied on ***D.K Njagi Marete V Teachers Service***

Commission, Industrial Court Cause Number 379 of 2009 for the proposition that employment remedies must be proportionate to the economic injuries suffered by the employees.

On ground 6 of the appeal, counsel submitted that Court awarded general damages of UGX 60,000,000/= (Uganda shillings Sixty Million only) which was excessive in counsel's view. Counsel further submitted that Court will interfere where an award is excessive or manifestly low. Considering the circumstances of the case, the respondent was a low level employee, earning only UGX 1,800,000/=(Uganda shillings One Million Eight Hundred Thousand only) per month and she had worked for only 3 years. In counsel's view the award of UGX 60,000,000/= (Uganda shillings Sixty Million only) was therefore excessive. He relied on ***Twinomugisha Moses V Rift Valley Railways (U) Ltd HCCS 212 of 2009*** where an employee earning 3,300,000/= was awarded 30,000,000/= in damages. Counsel prayed that the appeal succeeds and costs be awarded to the appellant.

The respondent opposed the appealand on ground 2 her counsel submitted that the Court's reference to the damages as aggravated/punitive was not a lump up of two different kinds of damages but a slight error which could be corrected by a slip order because the respondent had prayed for punitive damages which Were properly awarded at Ug shs UGX 80,000,000/= (Uganda Shillings Eighty Million only). Counsel further submitted that it was not correct for the appellant to state that punitive damages are not awardable in cases of

breach of contract because the trial Court was alive to the humiliation and embarrassment that the respondent had suffered before awarding her punitive damages. Counsel relied on ***Ahmed Ibrahim Bholm V Car & General Ltd SCCA No.12 of 1992*** where punitive damages Were awarded following breach of an employment contract and the justification was that the employee had suffered harrassment, humiliation and embarrassment.

On ground 3 of the appeal, it was the respondent's case that the decision in ***Omunyokol Johnson V Attorney General (supra)*** makes a distinction between the contract of employment which is governed by the Employment Act and the Statutory Public Employment which is governed by the Public Service Act and Public Service Regulations. Further, that the Supreme Court in ***Omunyokol Johnson (supra)*** awarded salary arrears from the time of unlawful termination of the appellant to retirement premised on the principle that the dismissal was contrary to the rules of natural justice and therefore void abnitio. Counsel added that in the instant case, the process that was undertaken to terminate the respondent was illegal hence void abnitio so she was entitled to salary arrears until the date of the award.

On ground 4 of the appeal, counsel submitted that under paragraph 12 of the Memorandum of Claim, the issue of the loan and liability thereunder was pleaded when the respondent stated that she held the appellant liable for her failed obligations. He further submitted that the notice of intention to hold the appellant liable for the loan obligations of the respondent was given under

paragraph 12 of the Memorandum of Claim and there was no miscarriage of justice occassioned to the appellant but the appellant infact neglected to cross examine the respondent on the issue of the loan and as such left this evidence uncontroverted. He relied on ***Okello Nymlord V Rift Valley Railways Civil Suit No.195 of 2009*** where the defendant was held liable for the loan obligations of the plaintiff following his unlawful termination of the contract of employment.

On ground 5 of the appeal, counsel referred Court to the decision in ***Okello Nymlord (supra)*** where Court held that the loan was premised on the understanding that the plaintiff would continue to be employed by the defendant company. This was frustrated by the unlawful act of the defendant and the plaintiff was therefore entitled to relief of the value of the outstanding loan. Counsel further submitted that in the instant case, the respondent was relieved of her loan obligations but this did not amount to unjust enrichment as unjust enrichment is based on equity. He contended that the respondent was wrongfully terminated hence being denied the source of income that would service her loan. It was therefore only fair that the appellant company meets the loan obligation itself.

On ground 6 of the appeal, counsel submitted that the award of UGX 60,000,000/= (Uganda shillings Sixty Million only) as general damages was not excessive and it was only fair in all respects having due consideration to what the respondent had been through at the hands of the appellant including loss

of livelihood. Counsel further submitted that where a person is wrongfully dismissed, he is entitled to be compensated fully for the financial loss suffered as a result of the dismissal. He relied on ***Southern Highlands Tobacco Union Ltd V David Maqueen (1960) E.A 490.*** Counsel prayed that the appeal be dismissed and costs awarded to the respondent.

In rejoinder, Mr. Kalule submitted that paragraph 12 of the Memorandum of Claim only states that the respondent had failed to meet her loan obligations but there was no prayer of being relieved of her loan obligations. Further that it only came up in the course of the witness statement but it was never pleaded. Counsel added that in her witness statement, the respondent stated that she could not meet her loan obligation but the loan agreement was never adduced in evidence and therefore its terms Were unknown. Counsel reiterated his earlier prayers.

I have studied the record of appeal and the judgment of the Industrial Court. I have also considered the submissions of both counsel and the authorities that were availed to Court which have been very useful in resolving this matter.

It is trite law that the duty of this Court as a first appellate court is to re-evaluate evidence and come up with its own conclusion as enunciated in ***Rule 30(1) of the Court of Appeal Rules and Banco Arabe Espanol V Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.***

On ground 2 of the appeal, the learned Judges of the Industrial Court are faulted for awarding aggravated damages which were not pleaded. It was the

appellant's case that the Industrial Court awarded UGX 80,000,000/= (Uganda Shillings Eighty Million only) as aggravated/ punitive damages which was an error because there is nothing termed as aggravated/ punitive damages.

In response to the above submission, counsel for the respondent submitted that the Court's reference to the damages as aggravated/ punitive damages was not a lump up of two different kinds of damages but a slight error on the face of it which could be corrected by way of a slip order because the respondent had prayed for punitive damages which Were properly awarded at Ug shs 80,000,000/=.

While dealing with this issue, the learned Judges of the Industrial Court stated that;

> *"In our understanding, aggravated damages are punitive in nature and are intended to give relief to the claimant or the aggrieved party for the embarrassment that he or she may have suffered at the instance of the other party.....In the instant case I am of the opinion that the fact that the grading of the claimant could by a stroke of a pen be reversed without her being heard and consequently causing termination distressed her and humiliated her. The fact that her grades of July, August and September 2014 are not even considered before her termination, in our view, compounded the already bad situation. Accordingly we consider 80,000,000/= as aggravated punitive damages sufficient."*

This Court has in ***Uganda Revenue Authority V Wanume David Kitamirike, Court of Appeal Civil Appeal No.43 of 2010*** made the following distinction between aggravated and punitive damages;

"Aggravated damages are, like general damages, compensatory in nature, but they are enhanced as damages because of the aggravating conduct of the defendant. They reflect the exceptional harm done to the plaintiff by reason of the defendant's actions/ omissions.

Both general and aggravated damages focus on the conduct of the defendant in causing the injury to the plaintiff that is being compensated for.

Punitive or exemplary damages are an exception to the rule, that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of Court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct. They are also awardable for the improper interference by public officials with the rights of ordinary subjects.

Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society's and also the Court's sense of decency. They may also be awarded to prevent unjust enrichment. They are awardable with restraint

and in exceptional cases, because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract."

With due respect, I do not agree with the view of learned Judges of the Industrial Court that aggravated damages are punitive in nature because a clear reading of the above excerpt indicates that aggravated damages are compensatory in nature.

Counsel for the appellant submitted that punitive damages could not be awarded to the respondent because the same was not available in employment cases as was well settled by the Supreme Court in ***Betty Tinkamanywere (supra).*** In the said case, Justice GM Okello, JSC held that *"In the instant case, I accept Mr. Masembe-Kanyerezi's contention that for a case of this nature, a court is only limited to award of aggravated and not punitive damages. This view is supported by* ***Esso Standard (U) Ltd. - vs - Semu Amanu Opio, Civil Appeal No. 3 of 1993,*** *where this Court (Platt, JSC, as he then was) stated that the principles of exemplary or punitive damages cannot be extended to breach of contract and that there is no precedent for that extension."* The said judgment was delivered on 16th day of December 2008.

In response, counsel for the respondent submitted that it was not correct for the appellant to state that punitive damages are not awardable in cases of breach of contract because the trial Court was alive to the humiliation and embarrasment that the respondent had suffered before awarding her punitive

damages. He relied on ***Ahmed Ibrahim Bholm V Car & General Ltd SCCA No.12 of 1992*** where Justice Tsekooko, JSC with whom the other Justices concurred held that *"It is now recognised that courts in East Africa can award punitive and or exemplary damages in torts and contracts. This is clear from the decision of* ***Obongo Vs Kisumu Municipal Council (1971) EA 91***, *a decision of the E. A Court of Appeal. Spray, V.P., in his lead judgment, at page 96B, stated: -*

> *"It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is Ill established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit of them goes to the person who was wronged, their object is entirely punitive. In the present case, it is not clear how far damages at large were contemplated either in the consent judgment or in the proceedings that followed. Certainly the judge made no general award, possibly because he considered that the consent judgment precluded it. Aggravated damages were, therefore, inappropriate. On the other hand, I am satisfied that the intention was that the damages should be punitive and that the judge was entitled in law to award exemplary damages."*

Justice Tsekooko went ahead to award punitive damages of UGX 5,000,000 (Uganda Shillings Five Million only) considering that the appellant was

subjected to high handed mistreatment by the respondent, and bearing in mind that the lower Court had awarded US $1870 to the respondent as salary for the residue of the contract which was terminated. The said judgment was delivered in 2004.

The two positions of the Supreme Court appear to be contradictory. However, under Article 132(4) of the Constitution, the Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decision of the Supreme Court on questions of law. The lower Courts would be bound by the latter decision.

The judgment in **Ahmed Ibrahim Bholm V Car & General Ltd (supra)** was delivered on 16th January, 2004 while **Betty Tinkamanywere (supra)** was delivered on 16th December, 2008. In light of Article 132(4) of the Constitution, the Betty Tinkamanywere case would take precedence. However, I note that in the Ahmed Ibrahim Bholm decision all four justices of the Supreme Court concurred with Justice Tsekooko's lead judgment while in Betty Tinkamanywere's decision, it was only Justice Okello who delt with the issue of punitive damagess not being awardable in employment cases. Justice Kanyeihamba who wrote the lead judgment with which the rest of the coram concurred was silent on that issue. I am therefore, inclined to follow the decision in Ahmed Ibrahim Bholm.

I am persuaded by the Court of Appeal decision in **Wanume David (supra)**, that punitive damages can be awarded in employment disputes but with restraint and in exceptional cases. This is because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract.

Counsel for the appellant submitted that aggravated damages were not pleaded and it was therefore an error for Court to award the same because a party cannot be allowed to succeed on a case not set out by him in his pleadings unless pleadings are amended which was not the case in the present appeal.

I have had the opportunity of perusing the Memorandum of Claim and note that the respondent made the following prayers;

a) *A declaration that the termination/dismissal of the claimant was wrongful/unlawful and /or unfair*
b) *An order for the payment of compensation for wrongful, unfair, unlawful termination;*
c) *An order for payment of all overtime worked while in the employment of the respondent*
d) *An order for severance allowance*
e) *An order for general damages*
f) *An order for punitive damages given the highhanded conduct of the respondent*

g) *An order for the payment of all terminal dues owed to the claimant including the contributions to the provident fund*

h) *Interest at the commercial rate from the date of filing until payment in full*

i) *Costs of the suit.*

I agree with counsel for the appellant that aggravated damages were never pleaded. It is now well settled law that a party cannot be granted relief which it has not claimed in the plaint or claim.

The Supreme Court in ***Ms Fang Min V Belex Tours and Travel Limited SCCA No.6 of 2013 consolidated with Civil Appeal No.1 of 2014, Crane Bank Limited V Belex Tours and Travel Limited*** stated as follows;

> *"In the present case, it is clear that the Court of Appeal erred in basing its judgment on a cause of action which was neither pleaded nor argued before the Court or the High Court. The Court of Appeal also granted reliefs which Were not prayed for in the plaint without any amendment of the plaint. The respondent never claimed for the recovery of the suit land, for cancellation of the certificate of title of Ms Fang Min, for cancellation of the outstanding amount of the loan owed by the respondent and for Mesne profits from the suit property as ordered by the Court of Appeal. The respondent had only claimed against the two appellants jointly and severally special damages of shs.194,313,00/= plus US$ 5,899 and interest thereon and general damages for conversion.*

It is now well established that a party cannot be granted relief which it has not claimed in the plaint or claim. See ***Attorney General V Paul Ssemogerere & Zachary Olum, Constitutional Appeal No.3 of 2004 (SC) and Julius Rwabinumi V Hope Bahimbisomwe, Civil Appeal No.10 of 2009 (SC); Hotel International Ltd V The Administrator of the Estate of Robert Kavuma, SCA No.37/95 and Standard Chartered Bank (U) Ltd V Grand Imperial Hotel Ltd.***

In Julius Rwabinumi V Hope Bahimbisomwe (supra), Katureebe JSC, observed,

"I only wish to add by way of emphasis that the Court of Appeal should have restricted its decision to matters that Were pleaded by the parties in their respective petitions. The parties sought intervention of the Court in respect of specific properties where there was alleged contribution by either party. They did not ask Court to pronounce itself on all their properties generally. This Court has had occassion to pronounce itself that a Court should not base its decisions on unpleaded matter."

I therefore find that the learned Judges of the Industrial Court erred in awarding the respondent aggravated damages.

Ground 2 of the appeal therefore succeeds.

On ground 3 of the appeal, the learned Judges of the Industrial Court were faulted for awarding salary arrears from the date of termination to the date of award which was not awardable in law. Counsel for the appellant submitted

that there was no basis for award of salary where an employee has been terminated because salary is only paid for work done. He added that it is untenable for an employee who has been terminated prematurely or illegally to be compensated for the remainder of the period that they would have retired.

In response, counsel for the respondent submitted that the decision in ***Omunyokol Johnson V Attorney General (supra)*** makes a distinction between the contract of employment which is governed by the Employment Act and the statutory public employment which is governed by the Public Service Act and Public Service Regulations. Further that the Supreme Court in ***Omunyokol Johnson (supra)*** awarded salary arrears from the time of unlawful termination of the appellant to retirement premised on the principle that the dismissal was contrary to the rules of natural justice and therefore void abnitio like in the instant case.

The learned Judges of the Industrial Court found that the respondent was entitled to her salary arrears from the date of the unlawful termination to the date of the award. They stated as follows;

> *"It is our considered opinion that the fact that this executive moderation committee could easily overturn the grading of an employee to his or her prejudice without hearing from his/her Line Manager who initially gave her the grade or the employee himself/herself to defend the initial grade is to say the least very unfair. I take the position that any appraisal system*

that is not constituted of principles of fairness and natural justice is but a sham."

The respondent's employment contract was terminated by a letter dated 15th October, 2014 and in the said letter, the appellant was to pay to the respondent a sum of Eight Hundred Eighty Thousand One Hundred Sixty One Uganda Shillings, One month in lieu of notice totalling to One Million Eight Hundred Nineteen Thousand Ugandan Shillings, 100% of her personal contribution and 100% Company's contribution to the provident fund amounting to Six Million Five Hundred Eighteen Thousand Two Hundred Thirty One Ugandan Shillings.

Section 66 of the Employment Act states thus;

1) *"Notwithstanding any other provision of this part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.*

2) *Notwithstanding any other provision of this part, an employer shall, before reaching any decision to dismiss an employee, hear and consider any representations which the employee on the grounds of*

misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make."

Counsel for the appellant submitted that the respondent was given a hearing since she was subject to performance appraisals which entailed a discussion between the employee and his or her line manager. The employee gives feedback on her performance and is heard. After the employee makes his or her representations, the Moderation Committee sits and considers the performance and gives a final rating and any person who is aggrieved by the decision of the moderation committee has a right to appeal to the Managing Dwerector which right the respondent did not exercise.

RW3, Harriet Ssali testified that for the year 2013, the Moderation Committee rated the respondent "D" and as a result put on a Performance Improvement Plan (PIP). The PIP involved a monthly assessment of the employee by the line manager/supervisor. The Line Manager and the employees are required to have a free and frank discussion of issues and recommended courses of action. The PIP coincided with the mid-year assessment for 2014 and thus were done concurrently.

I have looked at the annextures attached to the Witness Statement of Harriet Ssali, the Human Resource Business Partner for Consumer Banking and find that the respondent was rated as an average performer with "C". Further, she had received a number of emails and caution letters relating to her performance marked as annexture "D2", "D3", "D4", "D5", "D6" and "D7". This

evidence was corroborated by the witness statement of Scovia Kasemwere and William Sekabembe.

In ***Isaiah Gitiku Gikumu V Menengai Oil Refineries Ltd Cause No.296 of 2014 (Kenya High Court),*** it was held that the hearing contemplated by section 41 of the Employment Act, 2007 (which is identical to our section 66 of the Employment Act, 2006) did not require an employer to hold a mini-court. The hearing can be conducted either through correspondences or through a face to face hearing.

Under paragraph 14 of her witness statement, the respondent stated that:

> *"All my previous appraisals had as is the practice understandably been signed off by Line Manager/ Supervisor who had direct supervisory role over me and therefore could speak competently to my work ethics. However three weeks after my 2013 appraisal that later led to a down grade from C to D, I was invited for another appraisal meeting by my former line manager of Jinja road branch, a one Jacqueline Nakigudde, which I found quite odd as I was not aware of the existence of a re-appraisal on a previously concluded exercise."*

I do not agree with the learned Judges of the Industrial Court that the Executive Moderation Committee overturned the grading of the respondent without according her a hearing. This is because annexture "D" being a letter dated 28th January, 2014 attached to the respondent's witness statement and paragraph 14 of the respondent's witness statement state otherwise.

I find that the respondent was accorded a proper hearing before termination and therefore the learned Judges erred in awarding her salary arrears from the date of termination to the date of the award based on the assumption that the respondent was not accorded a fair hearing before termination.

Ground 3 of the appeal succeeds.

The learned Judges of the Industrial Court are faulted in ground 4 of the appeal for relieving the respondent of her loan obligations when neither the same had been pleaded nor proved. Counsel submitted that the Court noted that the said remedy had not been proved but had been mentioned in the witness statement but counsel for the appellant chose not to cross-examine on it. Counsel added that a witness statement is not a pleading and a party is not bound to cross-examine on evidence that has not been pleaded.

In response, counsel for the respondent submitted that under paragraph 12 of the Memorandum of Claim, the issue of the loan and liability thereunder was pleaded when the respondent stated that she held the appellant liable for her failed obligations but the appellant infact neglected to cross examine the respondent on the issue of the loan and as such left this evidence uncontroverted.

The Learned Judges of the Industrial Court stated as follows;

"I appreciate the contention of counsel for the respondent that parties are bound by their pleadings and indeed on perusal of the claim, pleadings

relating to acquisition of the loan and terms of payment of the same do not exist in the claim. I notice however that in the claimants witness statement under clause 48(a) she states.....As counsel of the claimant rightly submitted, the claimant was not cross examined on those assertions and hence the evidence was not challenged or controverted. The question in our mind is: Would the unchallenged evidence be legally swept off the record merely because it concerned a matter that was not pleaded? In our considered view, the answer is in the negative. It is the duty of the appropriate party to cross examine every witness that brings evidence against such party with a purpose to discredit the said evidence.....In the recent case of Florence Mufumba V Uganda Development Bank Labour Dispute Claim 138/2014, this Court held that the claimant was entitled to be relieved of the loans that were intended to be wholly settled by salary deduction but for the unlawful termination of employment. I have no reason to depart from this decision. In the result, the claimant is entitled to be relieved of the loan obligations if the salary in terms of the loan agreement was meant to secure the whole loan."

Under paragraph 12 of her Memorandum of Claim, the respondent averred that the wrongful, unlawful and unfair termination has denied her a source of livelihood as not only can she get employment in any other financial institution but also finding any other alternative employment is an uphill task following the circumstances that are alleged to surround her termination/dismissal. The

claimant is therefore currently unable to meet her loan obligations and the needs for her family at home, for which she holds the respondent liable.

Under paragraph 48(b) of her witness statement, the respondent stated that;

> *The respondent's recoveries department harrassed me with calls demanding I pay the loan, or they would post my picture in the newspapaers and defame me. I expected that owing to the special circumstances surrounding my loss of a job, they would take on a softer approach of debt recovery which was not the case. I never had any intention of defaulting in my loan and in any event, the respondent continues to withhold from me money that I could use to clear the loan. That in the circumstances the respondent be ordered to clear the loan itself having taken away from me abruptly and uncontitutionally my source of livelihood*

As to whether a witness statement amounts to a pleading, S.2(p) of the civil Procedure Act defines a pleading to include any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant to them, and the reply of the plaintiff to any defence or counter claim of a defendant. In light of the above definition, I am of the considered view that a witness statement is not a pleading but rather evidence in proof of maters pleaded.

As noted earlier in this judgement, the respondent did not plead to be relieved of her loan obligations but only raised the issue under paragraph 48(b) of her

witness statement which was her evidence in chief. Therefore, I find that since the issue of being relieved from paying the loan was not pleaded, no evidence could be led to prove the same.

Therefore ground 4 of the appeal succeeds.

The learned judges of the Industrial Court are faulted in ground 5 of the appeal for relieving the respondent of her loan obligations when she used and benefited from the money advanced. Counsel for the appellant submitted that it would be unfair and unjust enrichment for Court to relieve the respondent of her loan obligations because she borrowed money from the appellant which she was supposed to repay with interest and the Court cannot award damages and at the same time relieve her of her loan obligations as this would amount to unjust enrichment.

In response, counsel for the respondent referred Court to the decision in ***Okello Nymlord (supra)*** where Court held that the loan was premised on the understanding that the plaintiff would continue to be employed by the defendant company. This was frustrated by the unlawful act of the defendant and the plaintiff was therefore entitled to relief of the value of the outstanding loan. In other words, the defendant was held liable for the loan obligations of the plaintiff following his unlawful termination of the contract of employment.

Counsel added that in the instant case, the respondent was relieved of her loan obligations but this did not amount to unjust enrichment as unjust enrichment is based on equity.

I find that the above authority is distinguishable from the instant case because in ***Okello Nymlord (supra),*** the plaintiff's loan was premised on the understanding that the plaintiff would continue to be employed by RVR and pay off the loan which was eventually frustrated by the unlawful act of the defendant. In the instant case, the terms of the loan agreement between the appellant and the respondent were unknown to Court since none of the parties bothered to avail Court with the loan agreement. I cannot assume the terms of the loan agreement because the claim was not pleaded and proved. In any event, unlike in the case of ***Okello Nymlord (supra)*** where the termination of employment was found to be unlawful, in the instant appeal, I have already made a finding that the learned Judges of the Industrial Court erred when they found that the respondent was not accorded a hearing before termination.

As already found in ground 4, I find that the learned Judges of the Industrial Court erred in relieving the respondent of her loan obligations in the absence of the loan agreement and without the said relief being pleaded.

Ground 5 of the appeal succeeds.

On ground 6 of the appeal, the learned Judges of the Industrial Court are faulted for awarding excessive general and aggravated damages. Counsel for the appellant submitted that Court awarded general damages of 60,000,000/= and 80,000,000/= as aggravated punitive damages which was excessive because the respondent was a low level employee, earning only 1,800,000/= per month and she had worked for only 3 years.

In reply, counsel for the respondent submitted that the award of 60,000,000/= as general damages was not excessive and it was only fair in all respects having due consideration to what the respondent had been through at the hands of the appellant including loss of livelihood.

It would naturally follow that in light of my resolution of grounds 2 to 5 of the appeal, ground 6 should succeed. However, for the sake of completeness, i will proceed to resolve this ground as well.

In ***Storms V Hutchinson (1905) AC 515,*** Court stated that general damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss.

While assessing general damages, the Court should mainly be guided by the value of the subject matter, the economic inconvience that the respondent may have been put through and the nature and extent of the injury suffered. ***See Uganda Commercial Bank V Deo Kigozi (2002) 1 EA 305.***

The principle upon which this Court may interfere with an award of damages has been decided in a number of cases. In ***Patel V Samaj and Another (1941) 11 EACA 1*** where the Court of Appeal of Eastern Africa cited with approval ***Flint V Lovell (1935) 1 KB 360*** where Green LJ stated that,

"In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

In awarding general damages, the learned Judges of the Industrial Court found that the respondent had been working with Bank of Baroda and she probably changed to the appellant expecting better rewards for her performance. She had worked for the appellant for 3 years and had a career cut short. The respondent was awarded 60,000,000/= as general damages. However, in my view, the amount of 60,000,000/= was too high in the circumstances of this case. In any event, the award of general damages was not justified because the termination was lawful.

Regarding aggravated/punitive damages of 80,000,000/=, I have already held under ground 2 that there is a clear distinction between aggravated and punitive damages. I further found that aggravated damages were never pleaded and Court erred in awarding the same because it is now well established that a party cannot be granted relief which it has not claimed in the plaint or claim. I still hold the same view.

Therefore ground 6 of the appeal succeeds.

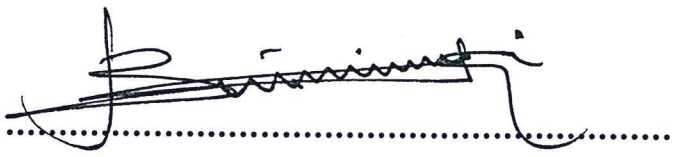
In conclusion, the Appeal succeeds. The judgment and orders of the Industrial Court are quashed and set aside save for the seventh order wherein the Court ordered that the respondent will be entitled to 6,518,231/= being the provident fund contribution admitted by the respondent in the termination letter and not challenged by this appeal.

In addition, I make the following orders;

1. The respondent shall pay back the loan at the rate which was attached to it but not the commercial interest rate.
2. Bearing in mind that the appellant was able to maintain the seventh order, each party shall bear their costs.

I so order

Dated this 30th day of Oct. 2019



Barishaki Cheborion

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Owiny-Dollo, DCJ, Cheborion Barishaki & Obura, JJA)

CIVIL APPEAL N0. 121 OF 2016

DFCU BANK LIMITED::APPELLANT

VERSUS

DONNA KAMULI::RESPONDENT

(On appeal from the award and orders of the Industrial Court of Uganda in Labour Dispute Claim No. 2 of 2015 made on 15th December 2015)

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment prepared by my brother Cheborion Barishaki, JA and I concur with his conclusion that the appeal succeeds and agree with the orders proposed.

Dated at Kampala this 30th day of Oct. 2019.

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Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CORAM: OWINY – DOLLO DCJ, CHEBORION AND OBURA JJA.

CIVIL APPEAL NO 121 OF 2016

(Appeal from the award and orders of the Court Labour Dispute Claim No. 002 of 2015)

DFCU BANK LIMITED ..... APPELLANT

VERSUS

DONNA KAMULI ..... RESPONDENT

JUDGMENT OF OWINY – DOLLO; DCJ

I have had the benefit of reading, in draft, the judgment of my learned brother Cheborion JA. I agree with his findings, and conclusion that this Appeal should succeed; and each party should bear her/its costs for the reasons given in the Judgment.

Since Obura JA also agrees, orders are hereby given in the terms proposed by Cheborion JA.

Dated, and signed at Kampala this 30th day of Oct. 2019

Alfonse C. Owiny – Dollo

Deputy Chief Justice