THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 241 OF 2015

(ARISING FROM LD/C/138 OF 2014)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

UGANDA DEVELOPMENT BANK} .....APPELLANT

VERSUS

FLORENCE MUFUMBA} .....RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

This is an appeal from the award of the Industrial Court at Kampala before Chief Judge Asaph Ruhinda Ntengye, Hon Judge Linda Lillian Tumusiime Mugisha and Panellists Mr. Fidel Ebyau, Mr. Michael Matovu, and Han Edison Mavunwa in LD/C/138 of 2014.

The facts of the appeal as accepted by the Industrial Court are set below. The Respondent was an employee of the Appellant appointed in August 1998 as an Internal Auditor. She eventually became the Principal Internal Auditor and her salary was correspondingly increased. In January 2010, her monthly salary was raised to Uganda shillings 5,565,695/=. Further on 14th June, 2011 the Respondent and other staffs of the Appellant were advised via e-mail to take their leave balance for the year 2010 before the end of June 2011 to avoid forfeiture of the leave. The Respondent requested to take her leave from 17th June, 2011 but was advised by her supervisor to take it from 27th June, 2011. She took her leave accordingly and would come into office once in a while to work on pressing matters. On 5th July,

2011 while in office, she received a memorandum from the Chief Executive Officer to *inter alia* show cause why she should not be disciplined for absconding from duty whereupon she wrote an explanation. On 8th July 2011, while still in the office, she was served with a termination letter from the Chief Executive Officer. The Respondent responded by questioning the propriety of the termination and on 20th July, 2011 was invited for a meeting about the termination. On 10th August, 2011, the Chief Executive Officer wrote to the Respondent informing her that her termination had been converted into retrenchment and that she would be paid Uganda shillings 114,291,500/=.

The Industrial Court was addressed on the following issues:

1. Whether the claimant's contract was illegally and wrongfully terminated by the Appellant?
2. Whether the claimant was liable to pay the loans advanced to her by the Appellant and if so by how much?
3. Remedies, if any.

On the first issue of whether the Respondent's contract was illegally and wrongfully terminated by the Appellant, the Industrial Court answered the issue in the affirmative.

On the second issue of whether the claimant is liable to repay the loans advanced to her, the Industrial Court held that whoever secures a loan from a money lending institution on agreed terms is obliged by law to pay the same and the lending institution is mandated by law to recover the same in the event of default. The Industrial Court held that the claimant is only liable to pay such amounts on the loan that she would have been obliged to pay under the loan agreements after retiring from the services of the Respondent bank lawfully.

On the question of remedies, the Industrial Court made several awards which are addressed on other grounds of appeal.

The Appellant was aggrieved and appealed to this court on nine grounds of appeal that:

1. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in holding that the Respondent's contract of employment was wrongfully terminated.

2. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in their interpretation of section 65 of the Employment Act.

3. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in their interpretation of "dismissal" and "termination" and in holding that the employer is obliged to give reasons at the time of dismissal or termination and not later.

4. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in holding that the Respondent whose employment was wrongfully terminated is entitled to relief from paying loan amounts up to the time she would have officially retired.

5. Further and in the alternative, but without prejudice to the foregoing, the learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding special damages which were not specifically pleaded and which were not founded on the Respondent's cause of action.

6. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding to the Respondent the following reliefs; namely:

    a) Such sums of money as were recoverable under the three loan agreements from her salary up to the time she would have retired.

b) Severance allowance.
c) General damages.
d) Aggravated damages.
e) Leave pay for 2011.
f) Salary that she would have been entitled to from the date of unlawful termination up to the date of the award.

7. Further and in the alternative, but without prejudice to the foregoing, the learned Chief Judge, Judge and panellists of the Industrial Court erred in law and exceeded their jurisdiction in awarding the amounts of general damages and aggravated damages as well as salary from the date of dismissal up to the date of the award and in giving the Respondent relief from paying part of the loans properly owed by her.
8. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding interest at the excessive rate of 25% per year.
9. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding costs to the Respondent.

The Appellant prays for orders that the appeal be allowed, the award of the Industrial Court be set aside, and costs of this appeal and that in the Industrial Court be awarded to the Appellant.

At the hearing of the appeal, learned Counsel Mr Albert Byamugisha represented the Appellant while learned Counsel Mr John Mugarura represented the Respondent. With leave of court, Counsel adopted and relied on their arguments as written in their conferencing notes filed on court record.

Submissions of the Appellant's Counsel

Mr. Byamugisha for the Appellant argued **grounds 1, 2, and 3** together and relied on section 2 of the Employment Act for the definition of the phrase "Dismissal from employment" as the discharge of an employee from employment at the initiative of his or her employer when the said employee has committed verifiable misconduct. Secondly, he set out the phrase "Termination of employment" which means the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as, expiry of contract, attainment of retirement age, etc. Further the Appellant's Counsel defined "termination" which has the meaning given by section 65 and further set out section 65 of the Employment Act. Counsel submitted that under section 65(1) (a) termination shall be deemed to take place where the contract of service is ended by the employer with notice.

The Appellant's Counsel further set out the provisions of section 58 of the Employment Act on notice periods and submitted that the decision of the Industrial Court that an employee must be given a reason for termination was a decision delivered *per incuriam*. He relied on **Stanbic Bank Ltd v Kiyemba Mutale S. C. C.A. No.02 of 2010**, for the proposition that an employer may terminate the employee's employment for a reason or no reason at all provided it/he or she does so according to the terms of the contract. Failure to comply with contract terms is breach of the terms of contract and actionable as such.

Mr. Byamugisha submitted that under Clause 7.1.1.2 (a) of the Human Resource Manual the Bank reserves the right to terminate the services of any staff by giving due notice but not necessarily the reasons for such termination. Mr. Byamugisha submitted that the Respondent was notified

of the decision to terminate her services by exhibit P11. He conceded that reasons for termination were not given. By copy of letter of termination, the Director Finance was requested to compute and pay terminal emoluments to the Respondent in accordance with the terms of her employment. Further, Kanyeihamba, JSC in **Barclays Bank of Uganda vs Godfrey Mubiru; Civil Appeal No. 1 of 1998** held that a contract can be terminated by giving the contractual notice or upon failure to do so, by payment in lieu of notice. He submitted that the right of an employer to terminate with notice or without notice at the pain of payment in lieu of notice cannot be fettered by the courts.

In light of the cited authorities, Mr. Byamugisha submitted that termination is lawful where the employer gives notice for the period stipulated under the contract or makes payment in lieu of such notice, irrespective of whether he or she has given reasons for the questioned termination or not.

Mr. Byamugisha submitted that that it is convenient for an employer to terminate without reasons as this prevents possible acrimonious hearings where there is a total breakdown in the employer/employee relationship or where a loss occurs to the employer but the investigations fail to pinpoint who exactly in the department is culpable. The employer should not be compelled to continue employing such people. Mr. Byamugisha submitted that in the premises, the Industrial Court should have restricted itself to termination and the procedure provided thereunder and not interpreted "dismissal" and "termination" to mean the same thing.

With regard to the submission that reasons for termination are mandatory and should be provided, Mr. Byamugisha relied on Section 68 (3) of the Employment Act for the proposition that reasons for termination are supposed to be stated in the certificate of service referred to in section 61 of the Employment Act. Section 61 (1) (f) of the Employment Act provides

that a certificate of service shall indicate the reasons for termination, where the employee so requests.

Mr. Byamugisha submitted that it is the certificate of service which should have been taken into account for reasons of termination of the Respondent's services and not the notice of termination in exhibit P11. The Respondent referred to this certificate of service issued to her in her testimony but it was not tendered in evidence.

Grounds 4 and 5 with regard to relief from paying the loan amounts:

With regard to grounds 4 and 5, Mr. Byamugisha submitted that the Respondent's cause of action was not for breach of contract of the housing loan, the car loan, the personal loan and the salary advance.

He cited section 61 (1) of the Contracts Act which is to the effect that where there's a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract compensation for any loss or damage caused to him.

Relying on the above provision of the Contracts Act, Counsel argued that the Respondent did not show that the Appellant, by terminating her services, breached the respective loan agreements.

Counsel further argued that the Industrial Court relied on authorities where the loan amounts were claimed as special damages yet it was not the case in the Appellant's pleadings.

Ground 6 with regard to reliefs awarded to the Respondent

Severance allowance:

With regard to the award of severance allowance, the Appellant's Counsel referred court to the testimony of the Respondent that:

I was not rendered redundant but I was unfairly dismissed. I am not entitled to severance package if I was not rendered redundant.

He argued that Section 7 .1.1.4 (b) of the Human Resource Management Policy Manual that provides that redundant staff shall be paid a severance package in lieu of notice as determined by the Board, and this did not apply to the Respondent and therefore she was not entitled to that award. He argued that the Industrial Court awarded the Respondent payment in lieu of notice contrary to the Human Resource Management Policy Manual. Counsel further argued that the Respondent having rejected the award on grounds of redundancy was not entitled to the award of severance allowance. He submitted that section 87, 88, 89, 90 and 92 of the Employment Act which the Industrial Court relied on in making the award concerns unfair dismissal and not wrongful terminated.

General damages and aggravated damages:

The Appellant's Counsel submitted that the Respondent was not entitled to general damages and aggravated damages because her employment was not wrongfully terminated.

He argued that a court cannot grant both awards; that is, general damages and aggravated damages, because they are both compensatory in nature, except that aggravated damages are enhanced as damages because of the aggravating conduct of the defendant. That aggravated damages reflect the exceptional harm done to the plaintiff by reason of the defendant's actions or omissions.

Counsel argued that it is inconceivable that failure to state a reason for termination of employment in a letter of termination of employment amounts to exceptional harm especially where section 61 (1) (f) of the Employment Act provides that the certificate of service shall indicate, where the employee so requests, the reason or reasons for termination.

Leave pay:

Counsel faulted the Industrial Court for awarding leave pay to the Respondent. He relied on the decision of Kanyeihamba, JSC in **Bank of Uganda v Betty Tinkamanyire** (supra) at page 7 that 'claims of leave allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law'.

Salary from the date of unlawful termination up to the date of the award:

Counsel submitted that the decision of the Supreme Court in the case of **Bank of Uganda v Betty Tinkamanyire SCCA No. 12 of 2007** is still good law. He argued that the Industrial Court erred in awarding salary arrears from the date of unlawful termination to the date of the award in view of the case of *Tinkamanyire* (supra) where court held that an employee is only entitled to payment in lieu of notice. That the Respondent was awarded salary in lieu of notice from the date of termination and so, a further award of salary from the date of termination contravenes section 93(5) of the Employment Act which prohibits double awards.

Ground 7 with regard to the jurisdiction of the Industrial Court to award general damages, special damages, salary and relief from paying the loan amounts:

On ground 7 of the appeal, learned Counsel for the Appellant submitted that the Industrial Court exceeded its jurisdiction in awarding the sums in general damages, aggravated damages, salary from the date of dismissal up to the date of the award and relief of the Respondent from paying part of the loan amounts owed to the Appellant.

He argued that according to section 77 of the Employment Act, the remedies for unfair termination are the awards of compensation specified under Section 78 of the Employment Act. Counsel further submitted that section 78 (3) of the Employment Act provides that the maximum amount of additional compensation which may be awarded under section 78 (2) of the Employment Act is three (3) months' wages.

Ground 8 and 9 with regard to interest and costs

With regard to interest, the Appellant's Counsel submitted that whereas the award of interest is discretionary, the award must be supported by evidence. In the instant case, there was no evidence on record to support the award of interest at the excessive rate of 25% per year from the date of the award till payment in full.

With regard to costs, it was argued for the Appellant that the Respondent's contract of service was terminated in accordance with the contract terms. It was therefore lawful and the Respondent was not entitled to costs having rejected the Appellant's offer of payment in lieu of notice, July 2011 salary, and provident fund.

Submissions in reply of the Respondent

In reply to the submissions of the Appellant's Counsel on **grounds 1, 2 and 3**, learned Counsel Mr John Mugarura reiterated the findings of the Industrial Court. He sought to distinguish "termination" from "dismissal". He argued that in termination, there must be circumstances that are justifiable but which may have no bearing on the fault or misconduct of the employee as provided under section 2 and 65 of the Employment Act. In that in dismissing an employee, the employer must establish that there is verifiable misconduct on the part of the employee, for instance; abuse of office, negligence insubordination or incompetence. He relied on the definition of dismissal under section 2 of the Employment Act.

Mr. Mugarura submitted that whether the employer chooses to "terminate" or "dismiss" an employee, such employee is entitled to reasons therefore. He relied on section 68 and 71 of the Employment Act. He submitted that that the Industrial Court rightly held that in terminating services of an employee, there ought to be justifiable circumstances which are not consequent to misconduct on the part of the employee mentioned under section 65 of the Employment Act, unlike dismissal of an employee where misconduct on the part of the employee must be established.

Further, he submitted that the court rightly held that whether the employee chooses to "terminate" or "dismiss" an employee, the employee is entitled to reasons for the dismissal or termination just as the employer had reason to employ him or her. In that regard Mr. Mugarura submitted that the Industrial Court rightly rejected the contention of Counsel for the Appellant that section 58 of the Employment Act did not require an employer to give reasons for termination.

Mr. Mugarura opposed the submissions of the Appellant's Counsel that an employer may terminate the employee's services for a reason or no reason at all. He submitted that the facts in the instant appeal were distinguishable from those in **Stanbic Bank Ltd vs Kiyemba Mutale; SCCA No. 2 of 2010** relied on by the Appellant's Counsel. This is because in the *Kiyemba Mutale* case (supra), the Respondent's service of employment was terminated in 1997 under the Employment Act, Cap 219 (formerly Decree 4 of 1975) and the facts therefore predate the Employment Act 2006 under which the facts in this appeal fall. In **Stanbic Bank Ltd vs Kiyemba Mutale** (supra) the Supreme Court relied on common law and the repealed Employment Act Cap 219 for its decision. The facts in this appeal are distinguishable to the extent that the Industrial Court rightly relied on the Employment Act, 2006 as the facts giving rise to the claim arose in the year 2011.

Mr. Mugarura submitted that Industrial Court rightly observed that they did not think the circumstances under which the claimant went on leave amounted to absconding so as to constitute reason for dismissal or termination. Failing appraisal was another reason fronted by the Appellant for termination of the Respondent's services. The Industrial Court noted that failure to mention this fact in the termination letter constituted dishonesty on the part of the Respondent. Even then failing appraisal imputed incompetence on the part of the claimant and, section 66 of the Employment Act ought to have been complied with before a decision to terminate is taken. Mr. Mugarura referred the court to section 66 of the Employment Act which provides for notification and hearing before termination.

Mr. Mugarura further submitted that the Industrial Court noted that the words "dismiss" and "terminate" were used interchangeably under section 66, 68 and 71 of the Employment Act. This implied that whether it is "termination" or "dismissal", the employer must give reasons which must exist at the time of termination.

Mr. Mugarura reiterated the finding of the Industrial Court to the effect that the Appellant breached Chapter Four (4) on discipline and Chapter Five (5) on performance, of its Human Resource Management Policy Manual. In the said chapters, the Appellant was required to retrain, caution and Counsel underperformers before resorting to termination of their employment.

Lastly, Counsel relied on section 73 (b) of the Employment Act to argue that the Appellant did not act in accordance with justice and equity in terminating the Respondent from her employment and as such, grounds 1, 2 and 3 of the appeal ought to fail for lack of merit.

In reply to the submissions of the Appellant's Counsel on **grounds 4 and 5**, Counsel for the Respondent reiterated the findings of the Industrial Court

to the effect that the Respondent was unable to and could not be liable to pay the loan amounts due following the termination of her services by the Appellant. He relied on **Okello Nymlord vs Rift Valley Railways (U) Ltd; Civil Suit No. 195 of 2009.** In that matter, the defendant having guaranteed a salary loan to the plaintiff wrongfully terminated his services. The court held that the loan was premised on the understanding that the plaintiff would continue to be employed by Rift Valley Railways and pay off the loan which understanding was frustrated by the unlawful act of the defendant.

Counsel then reproduced the Industrial Court's finding on the matter where it held that;

> ··· It is not clear on the evidence before this court how much money was deducted from the salary of the claimant to cover each of the loans and how much (if any) was paid into the loan account from other sources of the claimant. What is clear and not denied is that the housing loan extended to over 10 years after the normal retirement of the claimant. This in our view presupposed that the claimant would have to find other means to service her loan after retirement from the bank. In respect to this loan therefore she would only be entitled to relief from the Respondent for only the value of deductions from her salary up to the time she would have officially retired.
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> The vehicle loan was to be recovered within four years and in the case of the housing loan, the instalment amounts recoverable and over what period are not revealed on the record. If the same principle of dedication was applied across all the loans, we are of the considered view that it applies up to the time the claimant would have been retired. Should any of the loans have been intended to be wholly covered by the salary and any other emoluments of the claimant, then, she would be entitled to a relief in the whole sum of the loan. It is the decision of this court therefore, that on the second issue the claimant is only liable to repay such amounts on the loans that she would have been obliged to pay under the loan agreement after retiring from the service of the Respondent bank lawfully. (sic)

Counsel argued that the principles enunciated in the case of **Okello Nymlord v Rift Valley Railways (U) Ltd; Civil Suit No. 195 of 2009** and in **Forest Authority v Sam Kiwanuka; Civil Appeal No. 005 of 2009,** apply with equal force to the instant case. He quoted the following observation by Hon. Justice Stephen Musota that the *"loan was premised on the understanding that the plaintiff would continue to be employed by RVR and pay off the loan eventually which was frustrated by the unlawful act of the defendant. In my considered view therefore, the plaintiff is entitled to the value of the outstanding loan as special damages"*

Based on the foregoing decision, Counsel argued that the Respondent was no longer liable to repay the said loans following the unlawful and wrongful act of terminating her employment contract which caused her failure to service the loans.

With regard to the Appellant's contention that the loan amounts were never claimed as special damages which had to be specifically pleaded and proved, it was argued for the Respondent that she took the Housing loan of UGX 120,756,639/=, personal loan of 9,943,356/=, car loan of UGX 24,877,683/= and Salary Advance of UGX 616,667/= which the Appellant pleaded in the Appellant's counterclaim.

He submitted that by asking Court to find that the Respondent is no longer liable to repay the value of the said loans owing to the illegal termination of her employment contract, the Respondent would benefit by way of the value of the foregoing loans which is properly special damages because it is a liquidated and ascertainable amount of money.

Counsel relied on **Forest Authority v Sam Kiwanuka** (supra), where the Court of Appeal held that special or general damages may be awarded where a party contracts a loan obligation but as a result of an unlawful or wrongful act of another making the borrower fail to repay the loan, the

latter is entitled to special damages of an amount equivalent to the outstanding bank loan at the time of the unlawful act and further, that the victim is entitled to general damages for the inconvenience and embarrassment caused to him as a result of the unlawful acts of the defendant.

Mr. Mugarura submitted on ground 4 & 5 of the appeal that the Respondent is only entitled to repay such amounts on the loans that she would have been obliged to pay under the loan agreement after retiring from the service of the Appellant bank lawfully.

In reply to the submissions of the Appellant's Counsel on **ground 6 & 7**, learned Counsel for the Respondent submitted, with regard to **severance pay**, that the Appellant in its letter dated Wednesday, August 10, 2011, marked exhibit "P12" offered a severance pay of UGX 83, 215, 239 (Uganda shillings eighty-three million two' hundred fifteen thousand two hundred thirty-nine). He argued that the Respondent was unlawfully terminated and as such, she was entitled to UGX 83, 215, 239 as severance pay pursuant to section 87 of the Employment Act, having worked for the Appellant for a period of about thirteen (13) years. Counsel added that it is immaterial whether the Appellant was allegedly making the severance pay under Section 7.1.1.4 of its Human Resource Management Policy Manual since the Employment Act takes precedence over the said manual.

Counsel further argued that the Appellant's decision to pay severance allowance by necessary implication means that it admitted to having unfairly terminated the Respondent's services.

The learned Counsel for the Respondent observed that the Appellant conceded to four reliefs including;

a) Salary in lieu of Notice for 3 months.

b) Salary for July 2011 of UGX 2,341, 554
c) Provident fund of UGX 10,182, 452
d) Leave pay for 2011 of UGX 2, 341, 554

Mr. Mugarura noted that the Appellant's Counsel did not address court on with regard to salary in lieu of Notice, salary for July 2011, and provident fund and invited court to maintain the awards given by the Industrial Court in respect those reliefs.

With regard to payment of **salary for a period of 66 months**, Counsel supported the decision of the Industrial Court that in view of the case of **Omunyokol Akol Johnson v Attorney General; S.C.C.A. 06/2012,** arrears of salary from the time of illegal termination of employment to the time that the claimant would have ordinarily and legally retired are payable to the claimant as special damages. That decision departed from the earlier decision of the Supreme Court in **Bank of Uganda v Betty Tinkamanyire; SCCA No. 12 of 2007** where it was held that the contention that an employee whose contract of employment is illegally terminated is entitled to be paid salary for the period that remains up to the normal and legal retirement is not acceptable. He argued that the case of *Tinkamanyire* decision and that of *Omunyokol Akol Johnson* were based on facts that arose before the enactment of the Employment Act in 2006. He submitted that the decision of the Industrial Court is forward looking and based on the application of the Employment Act of 2006.

With regard to the relief of the award of **general damages**, Counsel supported the holding of the Industrial Court that damages are generally compensatory in nature and the injured party must always be awarded such sums of money as may put him or her in the same position as if the wrong complained of had not been occasioned. He relied on the decision of the

Supreme Court in the case of **Omunyokol Akol Johnson v Attorney General SCCA No. 06 of 2012** where Odoki AG. JSC (as he then was) supported payment of salary arrears as well as an award of general damages on the ground of embarrassment and inconvenience.

Mr. Mugarura contended that the Respondent was a senior member of staff whose services were wrongly terminated and she was greatly embarrassed and inconvenienced after working for the Appellant Bank for almost 13 (thirteen) years. He relied on **Kiyingi v National Insurance Corporation, [1985] H.C.B 4,** where the services of a senior member of staff were wrongly terminated and the court awarded him general damages for embarrassment and inconvenience. Mr. Mugarura submitted that there was no basis advanced by the Appellant for its contention that the Industrial Court exceeded its jurisdiction in the award of general damages. Lastly on general damages, Counsel submitted that section 78 of the Employment Act limits the powers of the labour officer and not the powers of the Industrial Court.

On **aggravated damages**, the Respondent's Counsel submitted that the Industrial Court had wide discretion to award aggravated damages of UGX 200,000,000/=. The Industrial Court took into consideration the circumstances of the case such as the fact that the claimant had served the Appellant bank for 10 years and had four years left before her retirement. Her services were terminated without any reason and reasons were formulated after termination. This constituted humiliation and distress especially, owing to the fact that she was served with the termination notice when she was on leave but had come to office to work on urgent matters for the Appellant.

The learned Counsel relied on the Supreme Court case of **Bank of Uganda v Betty Tinkamanyire (supra)** where the Respondent who had served the

Appellant bank for ten years in various positions without blemish on her record was terminated four years before the retirement age. On 25 August 2002, she had been sent to Germany to understudy the Human Resource Department of a Germany Bank and upon her return, she was handed a letter terminating her employment. No reason was given for termination and neither was she given an opportunity to be heard.

Justice Kanyeihamba, JSC on the award of aggravated damages of Uganda shillings 100,000,000/- stated that it was for unlawful, degrading and callous acts that made the Appellant eligible for aggravated damages. He found that the Appellant had four years left to retire with full pension rights and there was evidence to conclude that she would have served diligently till retirement age.

Mr. Mugarura submitted that likewise, the Respondent was a senior member of staff whose services were wrongly terminated to her great embarrassment and inconvenience after she had worked for the Appellant for about 13 years. In those circumstances, it was extremely difficult for the Respondent to get alternative employment as she was yet to retire at the age of 55 years and most prospective employers had shunned her. Her attempts to resort to private audit practice were futile as she could not earn sufficient money to meet her basic needs. Counsel further noted that the Respondent had been allowed to go to Johannesburg, South Africa for the IT Risk Based Training scheduled for 27th June, 2011 and 28th June 2011. She did not go because the training was postponed till further notice. According to Counsel, this implied that she was still needed, otherwise she would not have been sponsored to go for a course that was going to cost the Appellant approximately USD 54,829. He invited this court to find that the above circumstances justified the award of aggravated damages.

With regard to **leave pay for July 2011**, learned Counsel for the Respondent reiterated the decision of the Industrial Court to the effect that the Appellant had conceded to leave pay in its letter of 10th August, 2011 marked exhibit P12 addressed to the Respondent. In the said letter, the Appellant offered to pay UGX 2,341,554 in accordance with its Human Resource Management Policy Manual. Counsel further cited section 58 (6) & (7) of the Employment Act which provide that:

> (6) Any outstanding period of annual leave to which an employee is entitled on the termination of the employee's employment shall not be included in any period of notice which the employee is entitled to under this section.
>
> (7) During the notice period provided for in subsection (3), the employee shall be given at least one-half day off per week for the purpose of seeking new employment.

In the premises, Counsel submitted that the Industrial Court rightly awarded leave pay of UGX 2,341,554 to the Respondent for the month of July, 2011.

On the award of interest of 25% per annum, the Respondent's Counsel submitted that the award of interest is at the discretion of the court. He relied on **Omunyokol Akol v Attorney General; SCCA No. 6 of 2012.** Interest awarded on special damages is awarded from the date of loss, while interest on general damages is awarded from the date of judgment. Counsel argued that the Appellant did not prove its allegation that the interest of 25% awarded was not supported by evidence. The Industrial Court, upon reviewing all the evidence on record was satisfied that interest of 25% per year was sufficient and the award was supported by the manner in which the Respondent was treated as she was nearing her retirement. Counsel invited court to uphold that interest of 25% per year awarded by the Industrial Court.

On **the award of costs**, Counsel for the Respondent submitted that the Industrial Court was enjoined to grant costs as it did, to the successful party, who was the Respondent. Mr. Mugarura submitted that by praying for costs of this appeal and in the Industrial Court, the Appellant concedes and admits that costs had to be awarded in the Industrial Court. The Appellant cannot be seen to approbate and reprobate. The Respondent had a constitutional right to engage a lawyer of her choice and the **Labour Disputes (Arbitration and Settlement) Act, 2006** under section 20 envisages legal representation by an advocate.

Resolution of Appeal

I have carefully considered the grounds of appeal, the submissions of Counsel, the facts and circumstances of this appeal and the law. The Appellant has a right of appeal from a decision of the Industrial Court to the Court of Appeal on points of law only. Section 22 of the **Labour Disputes (Arbitration and Settlement) Act, 2006 (LADASA)** provides that:

> An appeal shall lie from a decision of the Industrial Court to the Court of Appeal only on a point of law, or to determine whether the Industrial Court has jurisdiction over the matter.

The grounds of appeal aver that there are errors of law that the Appellant would like this court to consider. It is however apparent that certain basic facts are required to resolve the questions of law. For instance, the question of whether the services of the Appellant were unlawfully terminated rest on the material facts as to the conduct of the Appellant in relation to the

termination of services. I shall however consider the grounds of appeal as raised in the memorandum of appeal in light of the jurisdiction of this court to consider points of law only.

I further note that there were three issues agreed upon by the parties before the Industrial Court on which Counsel fully addressed the Industrial Court. The issue to determine is whether the error of law must necessarily be an error in resolving the issues agreed by Counsel of the parties in that court. If this approach is adopted, ground one of the appeal substantially has elements of grounds two and three of the appeal.

The first issue before the Industrial Court was whether the claimant's contract was illegally and wrongfully terminated by the Appellant and it was considered as a matter of law by the Industrial Court. In the grounds of appeal, this issue has been split into three sub issues covering grounds 1, 2 and 3 which must be taken to spring from the ruling of the Industrial Court at page 8 of their award that the first legal question is answered in the affirmative. This conclusion was reached by the Industrial Court after considering several points of law as well as matters of fact. It is therefore necessary to set out the issue before the Industrial Court and further the grounds arising from resolution of that issue. The issue before the Industrial Court was:

Whether the claimant's contract was illegally and wrongfully terminated by the Respondent?

On the other hand, the grounds of appeal arising from resolution of the issue are as follows:

1. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in holding that the Respondent's contract of employment was wrongfully terminated.

2. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in their interpretation of section 65 of the Employment Act.

3. The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in their interpretation of "dismissal" and "termination" and in holding that the employer is obliged to give reasons at the time of dismissal or termination and not later.

Ground 1 of the appeal directly arises from the issue agreed upon in the Industrial Court which could be the only issue arising from a decision of the Industrial Court in resolving it. However, upon perusal of the award, it is clear that in resolving the question, matters of law were discussed which included interpretation of section 65 of the Employment Act. The definition of "dismissal" and "termination" and the question of whether an employee is entitled to reasons or grounds of the dismissal from the employer. This would cover grounds 2 and 3 of the appeal.

Ground 4 of the appeal arises from issue 2 and can only be in the alternative from the proposition that even if the services of the Respondent were wrongly terminated, the question is whether the Respondent was entitled to relief from paying salary loans at the time she would have officially retired. Issue number 4 ought to have been considered as part of the remedy arising from resolution of issue number 1 before the Industrial Court.

The question in ground 4 of the appeal arises from issue 2 before the Industrial Court which was whether the claimant was liable to pay the loans advanced to her by the Respondent and if so by how much. From that, ground 4 of the appeal arises. The Appellant avers that:

4. The learned Chief Judge, Judge and panellists of the Industrial Court

erred in law in holding that the Respondent whose employment was wrongfully terminated is entitled to relief from paying loan amounts up to the time she would have officially retired.

In the circumstances I am bound to consider the grounds 1, 2 and 3 of the appeal together since they arise from the central issue before the lower tribunal as to whether the services of the Respondent were unlawfully or wrongfully terminated.

On the issue of whether the contract of the Respondent was illegally and wrongfully terminated by the Appellant, the court found that the claimant/Respondent was an employee of the Appellant on permanent terms before she was terminated which fact is not in dispute. The chronology was that the services were terminated on 8th July, 2011 but the termination letter did not disclose any reason for termination. The reason for termination was subsequently communicated on 10th August 2011 as redundancy resulting into retrenchment.

The first issue considered by the Industrial Court is whether an employee who is legally dismissed/terminated was entitled to reasons for the dismissal or termination. The court considered section 2 of the Employment Act which defines termination of a contract of the service of employment. This was based on the submission that the services of the Respondent were terminated without giving any reasons contrary to law. The Industrial Court further considered section 65 of the Employment Act. It held that under section 2 of the Employment Act, dismissal from employment occurs at the instance of the employer when the employee is guilty of verifiable misconduct. However, in terminating the employment of an employee, there must be circumstances that are justifiable but which may have no bearing on the fault or misconduct of the employee. Such circumstances include expiry of contract, non-existence of the position due to

restructuring, bankruptcy or dissolution of the employer, attainment of retirement age and instances provided for under section 65 of the Employment Act.

The Industrial Court concluded that in dismissing an employee, the employer must establish that there is verifiable misconduct on the part of the employee. Instances of a verifiable misconduct include abuse of office, negligence, insubordination and specifically circumstances that impute fault on the part of the employee which include incompetence. Where the employer chooses to "terminate" or "dismiss", the employee is entitled to reasons for the dismissal or termination. They disagreed with the submission of the Appellant's Counsel that under section 58 of the Employment Act, an employer is not required to give an employee reasons for termination.

The Industrial Court further gave the facts and circumstances in which the Respondent's services were terminated but I do not need to repeat them here. On the question of whether the reason for termination was absconding, the tribunal found that the Respondent was on leave and relied on the provisions of section 75 (b) of the Employment Act which provides that the fact that an employee wants to, or proposed to take any leave to which he or she was entitled under the law shall not constitute reasons for dismissal or for the imposition of a disciplinary penalty. At this point in time, we are not obliged to consider the question of fact. The conclusion from the evidence was that no reasons were given for termination and the submission was whether it was necessary to give reasons for termination of services. The tribunal as a matter of fact noted that the termination letter contained no reasons for termination and thereafter the Respondent gave reasons of absconding as well as failing the appraisal. They found that failing the appraisal was forwarded as another

reason for termination of the contract of employment of the claimant but this fact was not mentioned in the termination letter. In any case, if there was incompetence on the part of the employee, the applicable provision was section 66 of the Employment Act which requires notification and hearing before termination. The Industrial Court further found that the Human Resources Management Policy Manual of the Appellant which deals with discipline was inapplicable because no evidence was adduced to show that any of the provisions were complied with. In the premises, the Industrial Court found that the employer did not act in accordance with section 73 (b) of the Employment Act which require acting in accordance with justice and equity in terminating an employee from employment and therefore answered issue 1 in the affirmative.

I have carefully considered the submissions of Counsel and the legal provisions and authorities cited. The Appellant's Counsel submitted on grounds 1, 2 and 3 together and contended that the Industrial Court gave a decision which was *per incuriam* to the effect that an employer must give reasons for termination. He contended that it was *per incuriam* in terms of the decision in **Stanbic Bank Ltd v Kiyemba Mutale; SCCA No 02 of 2010** where it was held that an employer may terminate the employee's employment for a reason or no reason at all. The Appellant's Counsel also relied on the provisions of section 58 of the Employment Act which caters for notice periods in cases of termination of employment. He argued that the Industrial Court erroneously relied on the definition section for the meaning of dismissal from employment and termination of employment without regard to the meaning of the termination with notice under section 65 (1) (a) under a contract of service. He further contended that the Respondent was notified of the decision to terminate her services and a Director of Finance was requested to compute and pay terminal emoluments. For the proposition that an employer may terminate the

contract of service by notice or the employee may receive payment in lieu of notice the Appellant's Counsel further relied on **Barclays Bank of Uganda vs Godfrey Mubiru; Civil Appeal No 1 of 1998**. The Appellant's Counsel submitted that it may be convenient for an employer not to give reasons for termination to prevent acrimonious hearings were there is a breakdown in an employer/employee relationship. In such situations, the employer may justify reasons for termination under the provisions of section 68 (3) of the Employment Act. Moreover, the reasons for termination may be contained in the certificate of service provided for under section 61 (1) (f) of the Employment Act. Furthermore, he argued that the Appellant gave the Respondent a certificate of service according to the testimony of the Respondent herself.

In reply to the submission of the Appellants Counsel on grounds 1, 2 and 3 of the appeal, the Respondent's Counsel supported the decision of the Industrial Court. Further, the Respondents Counsel submitted that the decision of the Supreme Court in **Stanbic Bank Ltd vs Kiyemba Mutale** (supra) was distinguishable on the ground that the Respondent's employment in that case was terminated in 1997 when the repealed Employment Act, Cap 219 formally Decree 4 of 1975 was in force. Since that time the Employment Act 2006 was enacted and is the applicable law to the facts before the Industrial Court. Secondly, section 66 of the Employment Act 2006 requires notification and hearing before termination. He supported the Industrial Court decision that whether the employer decides to terminate the employment or dismisses the employer, reasons must be given or reasons must exist at the time of termination. Further, the Appellant never complied with chapter 4 on discipline and chapter 5 on performance in terms of its Human Resource Management Policy Manual. In any case the Respondent's Counsel submitted that the Appellant did not

act in accordance with justice and equity in terminating the services of the Respondent contrary to section 73 (b) of the Employment Act.

The main issue to be considered is whether the Appellant was obliged to give reasons for termination of service. It is an elementary point of law that statutory provisions are the primary sources of law while judicial decisions are a secondary source of law. Statutory provisions are binding on the judiciary unless otherwise set aside for being unconstitutional or ultra vires (issued without jurisdiction) the enabling law. Section 14 of the Judicature Act cap 13 laws of Uganda which gives the jurisdiction of the High Court clearly gives primacy to the Constitution followed by Acts of Parliament and provides as follows:

> 14. Jurisdiction of the High Court.
>
> (1) The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.
>
> (2) Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised—
>
> (a) in conformity with the written law, including any law in force immediately before the commencement of this Act;
>
> (b) subject to any written law and insofar as the written law does not extend or apply, in conformity with—
>
> (i) the common law and the doctrines of equity;
>
> (ii) any established and current custom or usage; and
>
> (iii) the powers vested in, and the procedure and practice observed by, the High Court immediately before the commencement of this Act insofar as any such jurisdiction is consistent with the provisions of this Act; and

(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience.

(3) The applied law, the common law and the doctrines of equity shall be in force only insofar as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary.

(4) Subject to subsection (2), in every cause or matter before the High Court, the rules of equity and the rules of common law shall be administered concurrently; and if there is a conflict or variance between the rules of equity and the rules of common law with reference to the same subject, the rules of equity shall prevail.

(5) For the purposes of this section, the expressions "common law" and "doctrines of equity" mean those parts of the law of Uganda, other than the written law, the applied law or the customary law, observed and administered by the High Court as the common law and the doctrines of equity respectively.

Subject of the Constitution, the jurisdiction of the High Court shall be exercised in conformity with the written law. This written law includes the Acts of Parliament and statutory instruments. On the other hand, the common law and doctrines of equity include the case law. Where there is a decision of the Superior Courts, it falls under the secondary sources of law while the written law is the primary source of law. It follows that the written law takes precedence over case law. Binding case law can only interpret the statutory law in the absence of which it is the common law or decisions on the doctrines of equity. We are therefore bound to uphold the primary source of law over any other source which is secondary.

Starting with the definition of "dismissal from employment", it is provided under section 2 of the Employment Act that it means discharge of an employee from unemployment at the initiative of the employer for justifiable reasons other than misconduct, such as, expiry of contract, acting in the retirement age etc. The question is whether, reasons have to be

given. The Industrial Court obviously relied on the phrase "initiative of the employer for justifiable reasons". By use of the phrase "justifiable reasons", the question is whether the justifiable reasons have to be communicated to the employee upon termination.

On the other hand, the word "termination" is defined by section 2 of the Employment Act as having the meaning given in section 65 of the Employment Act. Section 65 of the Employment Act, 2006 provides that:

> 65. Termination
>
> (1) Termination shall be deemed to take place in the following instances-
>
> (a) Where the contract of service, being a contract for a fixed term or task, ends with the expiry of the specified term or the completion of the specified task and is not renewed within a period of one week from the date of expiry on the same terms or terms not less favourable to the employee;
>
> (b) Where the contract of service is ended by the employee with or without notice, as a consequence of unreasonable conduct on the part of the employer towards the employee; and
>
> (c) Where the contract of service is ended by the employee in circumstances where the employee has received notice of termination of the contract of service from the employer but before the expiry of the notice.
>
> (2) The date of termination shall, unless the contrary is stated, be deemed to be-
>
> a) In the circumstances governed by subsection (1)(a), the date of expiry of the notice given;
>
> b) In the circumstances governed by subsection (1)(b), the date of expiry of the fixed term or completion of the task;
>
> c) In the circumstances governed by subsection (1)(c) or subsection (1)(d), the date when the employee ceases to work for the employer; and
>
> d) In the circumstances when an employee attains normal retirement age.

Section 65 of the Employment Act speaks for itself. Section 65 (1) of the Employment Act gives the instances where termination is deemed to have

taken place. These include expiry of the contract term; where the service is ended by the employee with or without notice; where the contract of service is ended by the employee in circumstances where the employee has received a notice of termination of service but ends it before the expiry of the notice.

In all the instances under section 65 (1) (a) – (c) of the Employment Act, the incidences where termination shall be deemed to have taken place are not applicable to the facts and circumstances of this appeal. The Respondent's services were not terminated upon expiry of the contract term. It was not ended by the employer with notice. The other circumstances when the employee may terminate the employment are stipulated in section 65.

Further, section 65 (2) of the Employment Act provides for when the date of termination shall be deemed to be. This includes the date of expiry of the notice when it has been given; the date of expiry of the fixed term of the contract; the date after notice when the employee ceases to work for the employer; and circumstances when the employee attains normal retirement age.

The date of termination of the contract of service of the Respondent is not in issue and section 65 (2) of the Employment Act, is not applicable.

I have further considered section 68 of the Employment Act referred to by the applicant's Counsel. Section 68 (supra) has the head note "proof of reason for termination". It deals with the proof in claims arising out of termination. It is therefore inapplicable to termination at the time when it occurs where the question is whether a reason has to be given. To submit otherwise is to state that the reasons maybe given when a claim is made.

The mode of discharge in the circumstances of this appeal was by letter of termination. The facts as to the termination are not in issue. The

termination letter is dated 8th July, 2011 written by the Chief Executive Officer to the Respondent. The terms of the letter are as follows:

> This is to inform you that at its 47th meeting held on Thursday 7th of July 2011, the UDBL Board of Directors made a decision to terminate your services with the Bank.
>
> You are required to leave the Bank effective immediately. UDBL shall effect payment of three month's salary in lieu of notice according to section 7.1.1.2 (b) of the UDBL Human Resource Management Policy Manual. You will also be paid your salary for the days worked this month. Please note that the payments to you will be subject to any monies owed by you to the Bank.
>
> You will however be required to report the bank on Monday, 11 July 2011 at 12 PM to hand over all the duties to Mr Joshua Makuyi, Principal Officer, Finance Department.
>
> By copy of this letter, the Director Finances requested to compute and pay your terminal emoluments if any.

The Respondent replied to the letter by her own letter dated 10th July, 2011 protesting the termination letter. She stated that according to the Human Resource Management Policy Manual, there was supposed to be a disciplinary committee to handle all matters of discipline and procedures to be followed are properly outlined. She found the terms of the termination letter unacceptable because of the likely effect on her future career. She stated that she would not hand over her duties to Mr Makuyi Joshua as she was still on annual leave until Wednesday 13th July, 2011. She also prayed for redress.

The Chief Executive Officer replied by letter dated 20th July, 2011 inviting the Respondent to meet the UDBL Board of Directors on 21st July, 2011 at 10 AM regarding the matter of termination of her services with UDBL.

Subsequently, by letter dated 10th August, 2011, the Chief Executive Officer of the Appellant communicated to the Respondent by letter and made reference to a letter dated 10th July, 2011. The Respondent was informed by that letter that the board of directors on 21st July, 2011 after due consideration of the Respondent's presentation and all circumstances decided that it would maintain its decision to terminate the services with the bank as earlier communicated. Secondly, to pay terminal benefits pursuant to section 7.1.1.4 and 7.1.1.2 (b) of the Human Resources Policy. The Appellant computed terminal benefits which include salary in lieu of notice and other benefits amounting to Uganda shillings 114,291,560/=. In addition, the Respondent was notified that amounts owed as salary advances and personal loans shall be deducted from the terminal benefits. Secondly, the car and housing loans, being secured loans, shall continue to be serviced by the Respondent on the terms stipulated in the respective agreements between the Respondent and the Appellant bank.

It is clear from the above correspondences that the services of the Respondent were terminated with immediate effect and that termination was maintained by the letter dated 10th August, 2011. What is of particular interest is paragraph 3 of the letter dated 10th of August 2011 in which the Chief Executive Officer of UDBL informed the Respondent as follows:

> Without prejudice to the Boards response to your presentation, it was resolved that the termination be maintained on grounds of redundancy arising from the restructuring of the Internal Audit Unit, in particular the creation of the post of and appointment of a Chief Internal Auditor for the bank. The bank provided you with the opportunity to apply and compete for the position, which unfortunately you failed to do.

Subsequent reasons were provided to the Respondent. However, this was after she had been dismissed for some unknown reasons. The Industrial Court clearly dealt with the issue in light of facts leading to the termination.

The termination was clearly a dressing up of facts. The formal notice or letter of termination concealed what had happened before. Prior to the termination, the applicant had written an email to the CEO indicating that she will be taking her annual leave effective 27th June, 2011 and ending on 13th July, 2011. By the same e-mail, she indicated that she would leave her responsibilities to one Joshua Makuyi.

Just a few days later on 5th July, 2011 she received a memorandum from the Chief Executive Officer on the subject of "Absconding Office and Advances for Training". Part of the memorandum reads as follows:

> The purpose of this memo therefore is to:
>
> 1. Request you to show cause as to why disciplinary action cannot be taken against you for absconding your office from 27th June, up to now. Your explanation should reach the undersigned on or before the close of business on 6th July, 2011.
> 2. Give account or make arrangements to immediately refund all the monies that were advanced to you for the South African course. Your account or proof of refund should also reach the undersigned on or before the close of business on 6th July 2011.
>
> Please treat this matter as very urgent.

Subsequently, the Respondent wrote a letter giving a detailed explanation indicating that the Director of Administration had advised all staff to take their annual leave balances for the year 2010 by June 30th, 2011 or else forfeit it according to the HR policy. She thereafter sought permission from the CEO to proceed on annual leave with effect from 17th June, 2011 and the CEO advised her to take her leave with effect from 27th June, 2011. On 27th June, 2011 she duly circulated a memorandum to staff that she was proceeding for leave. On 27th June, 2011, she was in the bank because she

had not travelled to Johannesburg, South Africa for the IT Risks Based training which had initially been scheduled for 27th June, 2011 and 28th June, 2011. The funds involved for the training had been withdrawn in cash pending advise by the course organisers. The memorandum is dated 6th July, 2011. On 8th July, 2011, the CEO signed a termination letter terminating the services of the Respondent.

The termination letter clearly followed on the heels of the correspondence between the parties namely the CEO and the Respondent on the question of absconding from duty. No reasons were given in the termination letter. Secondly, the subsequent reason given did not do away with the termination letter which took effect immediately. Instead the termination letter was confirmed. Belatedly, the board resolved that the termination be maintained on grounds of redundancy arising from the restructuring of the Internal Audit Unit. The subsequent letter quoted clause 7.1.1.2 (a) (b) of the Human Resource Management Policy Manual which provides that:

(a) The bank reserves the right to terminate the services of any staff by giving due notice (but not necessarily reasons thereto).
(b) Except in the case of gross misconduct or as otherwise provided in an employment contract, termination notice for staff level at 4 and above shall require three months' notice or payment of three month's salary in lieu.

The termination letter purported to proceed under clause 7.1.1.2 quoted above. On the other hand, the Board further relied on the clause 7.1.1.4 on the redundancy. Clause 7.1.1.4 provides as follows:

(a) On redundancy arising, staff affected shall be selected for discharge, taking into consideration the length of service, efficiency, conduct and general record of the employee.
(b) Redundant staff shall be paid the severance package in lieu of notice, as determined by the Board.
(c) Redundant staff shall also be eligible to receive the following entitlements:

(i) Benefits under the provident fund in accordance with laid down rules and regulations;

(ii) Cash payment for any earned eave not taken;

(iii) Award under any other retirement awards for which one is qualified and or entitled.

Redundancy under 7.1.1.4 and determination and a 7.1.1.2 cannot be done at the same time. The consequences of each are different. It may be argued that the Respondent was selected for discharge under 7.1.1.4 and subsequently given a termination letter under 7.1.1.2 both clauses are cited above. Benefits for termination under clause 7.1.1.2 (d) include salary and all entitlements up to the end of the period worked. Secondly, it includes benefits from the staff provident fund (if applicable) in accordance with laid down rules and regulations. Any other retirement pension award under the rules is qualified and entitled. Further it is provided that any monies owed to the bank shall be deductible from this payment.

I have carefully considered ground 1 of the appeal as to whether the Industrial Court erred in law in holding that the Respondent's contract of employment was wrongfully terminated. The central issue for a resolution of this issue is whether the Appellant complied with its human resources manual or whether it violated the terms thereof.

Under sections 3 and 27 of the Employment Act 2006, a written contract of service cannot exclude the application of the Employment Act 2006 to the extent that it applies to the detriment of an employee or purports to exclude an employee from presenting a complaint under the Employment Act. Except as provided under the Act a contract between an employee and employer, which excludes the provisions of the Employment Act is void except contracts which confer better rights on an employee than those provided under the Labour laws. Section 3 of the Employment Act makes the provisions of the Employment Act applicable to written contracts of

employment. Further, section 27 of the Employment Act provides as follows:

> 27. Variation or exclusion of provisions of the Act
>
> (1) Except where expressly permitted by this Act, an agreement between an employer and an employee which excludes any provision of this Act shall be void and of no effect.
>
> (2) Nothing in this section shall prevent the application by agreement between the parties, of terms and conditions, which are more favourable to the employee than those contained in this Act.

The Employment Act, 2006 under section 58 thereof clearly provides that the contract of service shall not be terminated by an employer unless he or she gives notice to the employee and exceptions are;

- Where the contract of employment is terminated summarily in accordance with section 69; or
- Where the reason for termination, is attainment of retirement age.

The provisions on the summary termination under section 69 of the Employment Act provide as follows:

> 69. Summary termination
>
> (1) Summary termination shall take place when an employer terminates the service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> (2) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> (3) An employer is entitled to dismiss summarily, and the dismissal shall be termed justified, where the employee has, by his or her conduct indicated that he

or she has fundamentally broken his or her obligations arising under the contract of service.

It is clear that no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Secondly, an employer is entitled to dismiss summarily on the ground of fundamental breach by the employee of the terms of employment. It is clear from section 58 (1) that a contract of employment cannot be terminated by an employer unless he or she has given notice to the employee except where the contract is terminated summarily under section 69 where the employee has attained the retirement age.

The use of the expressions "wrongful dismissal" or "wrongful termination" do not change the nature of what has occurred. It merely means that the Respondent was dismissed or her services terminated without following the contractual provisions or the employment law.

Having carefully considered the law, it is my considered holding that the services of the Respondent could not be terminated without notice as occurred in this case. Secondly, she could only have been terminated summarily without notice if she had committed a fundamental breach of her terms of service. The subsequent letter of the Appellant clearly indicates that the Respondent was terminated on account of some other factor such as redundancy. The statutory provisions of the Employment Act override the contractual provisions except in situations where contractual terms provide better terms than the statutory provisions. The Respondent did not concede to payment in lieu of notice. The Respondent services were terminated without notice and termination was to take effect immediately.

Under section 58 (3) (d) of the Employment Act, the Respondent was entitled to not less than three months' notice having served for 10 years or

more. The Respondent had been offered employment on 23rd of July 1998 and her services were terminated in July 2011. In any case, it is stipulated that where the employee has been employed for a period of more than 12 months, the notice shall not be less than one month. Where the employee has been employed for a period of five years but less than 10 years, the notice period shall not be less than two months. Furthermore, under section 58 (5) of the Employment Act, any agreement between the parties to exclude the operation of section 58 shall be of no effect but that would not prevent an employee from accepting payment in lieu of notice. In the circumstances of this appeal, the Respondent rejected the notice of termination and was of the view that she was entitled to disciplinary procedure before being dismissed.

In the premises, the holding of the Industrial Court that the Respondent's services were wrongfully terminated cannot be faulted. Ground 1 of the appeal has no merit and is disallowed.

Having resolved ground one of the appeal, grounds two and three of the appeal have no further bearing on the conclusion of the Industrial Court on issue number 1 in which the Industrial Court considered whether the claim is contract was illegally and wrongfully terminated by the Respondent. In relation ground 2 of the appeal, the question is whether the lower tribunal erred in law in the interpretation of section 65 of the Employment Act. As I noted above section 65 of the Employment Act only gives the instances when termination shall be deemed to place. One of the instances is where the contract of service is ended by the employer with notice. Having found that the contract of service of the Respondent had been terminated without notice contrary to the law, ground two of the appeal has no merit and is also disallowed.

With regard to ground 3 of the appeal that the Industrial Court erred in law in the interpretation of "dismissal" and "termination" and in holding that the employer is obliged to give reasons at the time of dismissal or termination and not later, I agree with the Appellant that the certificate of service may contain, where the employee requests, the reason or reasons for the termination of the employee's employment. However, section 61 of the Employment Act has to be read in context. The context of section 61 of the Employment Act is section 65 which deals with termination. Section 61 does not apply where the contract of service is ended wrongfully i.e. without the requisite notice. In other instances, termination is deemed to occur where the contract of service is for a fixed period upon the expiry of the term or completion of the specified task and where the contract is not renewed. Secondly, when the contract of service is ended by the employee. In the circumstances where the contractual services are terminated by the employer without notice when it is not a summary dismissal, then the question of whether reasons should be given for the termination can only be considered whether it is a claim arising out of termination under the provisions of section 68 of the Employment Act. As I held above, in this appeal, the Respondent's services were terminated by letter with immediate effect.

On the other hand, it is explicitly provided by section 66 (1) of the Employment Act that an employer shall before reaching a decision to dismiss an employee, on grounds of misconduct or poor performance, explain to the employee, in a language the employee may reasonably understand, the reason for which the employer is considering dismissal. In the facts and circumstances of the appeal, it is clear that the Industrial Court considered the circumstances before a termination letter was served upon the Respondent. Those circumstances included allegations of misconduct through absconding. However, the termination letter was

clothed without reference to the immediately preceding correspondence between the parties on alleged absconding from duty. It is quite significant that the letter of termination is dated 8th July, 2011. On the other hand, the explanation of the Respondent to allegation of absconding from office and advance payment for training was written on the 6th July, 2011. In those circumstances, the Industrial Court could not be faulted for coming to the conclusion that the Respondent was entitled to reasons for termination. The facts clearly show that the Respondent was dismissed following her explanation to the CEO. The holding of the Industrial Court implements the provisions of section 66 of the Employment Act. In other instances, where termination is irregular, it may be sufficient to give notice as stipulated in the law. However, on the request of the employer, further reasons may be given. In the circumstances of this appeal, ground 3 of the appeal has no merit. I will refrain from making comments about other instances where reasons do not have to be given. Ground 3 of the appeal is accordingly disallowed.

I wish to emphasise that ground 4 of the appeal arises from issue number two before the Industrial Court. Issue number two was:

Whether the claimant was liable to pay the loans advanced to her by the Respondent and if so by how much?

Ground 4 of the appeal which springs from a resolution of the above issue is that the Industrial Court erred in law in holding that the Respondent whose employment was wrongfully terminated is entitled to relief from paying loan amounts up to the time she would have officially retired.

We will start with the premises that the Respondent's services were wrongfully terminated. According to **Halsbury's laws of England 4th Edition Vol 16 Para 302** "wrongful dismissal" is defined as follows:

302: "Meaning of 'wrongful dismissal". A wrongful dismissal is a dismissal in breach of the relevant provisions in the contract of employment relating to the expiration of the term for which the employee is engaged. ...

Where an employee is wrongfully dismissed, he is released, by the employer's repudiation of the contract's provisions, in particular from a restraint of trade clause.

In this appeal, the facts are that the dismissal was in breach of statutory provisions which override contractual terms. The statutory provisions should be read together with the contractual provisions which are in harmony. It follows that the employer repudiated the terms of the contract and the court can award reasonable remedies. Secondly, the award of reasonable remedies does not have to proceed on the basis of the contractual terms of the loan agreement. The principle of *restitutio in integrum* requires the court to assess loss and to put the plaintiff/claimant to a position he or she would have been in, had the breach not occurred. In **Dharamshi v Karsan [1974] 1 EA 41** the East African Court of Appeal case of held that general damages are awarded to fulfil the common law remedy of *restitutio in integrum.* This means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred.

The same rationale applies in the assessment of damages or compensation. Generally, in assessing damages, loss of income in the circumstances should be considered as a natural or probable consequence of dismissal and is a special damage since it can be quantified exactly. General damages on the other hand are those damages which are not capable of precise quantification such damages for pain, suffering, mental anguish etc. Secondly, in assessing damages, the prospects of the Respondent of getting alternative employment may be considered to mitigate the loss of income award is alternative employment is likely and to aggravate it if

unlikely. Thirdly, the fact that the Respondent was confirmed on permanent and pensionable terms and the duration of her service is a factor that may be considered when assessing the manner of termination of her services and may be taken into account in assessing general damages. Generally, where a claim is pleaded, the issue of whether it is properly entitled as general or special damages can be a question of form and not substance and the facts and circumstances of the case can be considered before a decision is made.

I start from the premises that the contract of service of the Respondent was repudiated by a wrongful termination. Secondly, the holding of the Industrial Court was explicitly clear at page 8 of the ruling as follows:

> The Respondent through legal Counsel argued that the claimant had not entered the counterclaim in response to the loans and that therefore she admitted that she owed the same.
>
> Considering that in her memorandum of claim, the claimant prayed for declaration that she was not liable to repay the loan, we do not accept this argument. It is not denied that the claimant took loans from the Respondent. Evidence reveals that a percentage of the loan was being recovered from the deductions from the earnings of the claimants by virtue of her employment with the bank.
>
> We accept the contention of Counsel for the Respondent that one of the loans had a repayment period of 15 years which will elapse in 2026, 10 years after which the claimant would have retired if her services had not been terminated. We have perused the housing loan agreement for Uganda shillings 102,500,000/= which is secured by monthly instalments from the salary of the claimant, terminal benefits as well as a mortgage. Another car loan is a car loan of Uganda shillings 25,000,000/= recoverable within a period of 4 years by salary deductions. Although we have not seen on the record the personal loan agreement, the claimant never denied that she took it and we too take the position that she owes the Respondent such a loan.

> We take the position that whoever secures a loan from the money lending institution under agreed terms is obliged by law to pay the same and the lending institution is mandated by law to recover the same in the event of default.
>
> ... It is the decision of this court therefore, that on the second issue the claimant is only liable to repay such amounts on the loan that she would have been obliged to pay under the loan agreements after retiring from the service of the Respondent bank lawfully.

In other words, the court found that the Respondent was not obliged to pay through deductions for the period before she was supposed to retire from the service lawfully. From the outset, the issue is problematic because the court found that the Respondent was liable to service the loan under the contractual terms. The first question that comes to mind is whether having found that she was not obliged to pay deductions up to the period that she was supposed to retire, whether that meant that that amount was awarded and was deemed to have been remitted to the lending bank. In my judgment it is a question of the language used. It meant that the amount had to be paid to the lender but not deducted from the Respondent who was no longer earning the salary. This is problematic because the Respondent was supposed to have continued in her employment and was compensated for this in the judgment though it was held that her services were terminated prematurely before her retirement. That meant that the employer was supposed to continue paying for her services from which deductions could have been made to service the loan amounts which remained outstanding. In the circumstances, the issue cannot be considered in isolation of other remedies awarded by the Industrial Court. The totality of remedies under the principle of *restitutio in integrum* meant that the loan amounts could be deducted from whatever sums the court awards as compensation. This issue can only be concluded after considering the remedies the court awarded the Respondent. It ought

not to be handled in isolation of other issues on appropriate remedies. The totality of the remedies, have to be considered and the amount owing to the Appellant offset from the total sum awarded to the Respondent. This can be structured into the awards for the remaining four years' period before would have been retirement and awards in relation to terminal benefits what compensate the Respondent from which outstanding loans owed the Appellant could further be offset. If the loan amount is offset for the anticipated about 4 years' period, the Respondent would be paid less money for the specified period relieving her of obligation to service the loan for that period before her anticipated retirement. If it is awarded, the Respondent would remain liable to pay the outstanding sums. The resolution of ground 4 with regard to the relief from paying the loan amounts shall be dealt with together with the reliefs awarded to the Respondent under several other heads of claim.

Ground 5 is that:

> Further and in the alternative, but without prejudice to the foregoing, the learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding special damages which were not specifically pleaded and which were not founded on the Respondent's cause of action.

The Respondent claimed the following remedies which are by definition special damages before the Industrial Court namely compensation for arbitrary termination of employment;

1.	Salary of the month of July	UGX. 5,565,695/=
2.	Leave pay for 2011 for one-month	UGX 5,565,695/=
3.	Salary arrears	UGX 972,648/=
4.	Provident fund contribution	UGX. 10,182,452/=

5. Severance allowance (terminal benefits) UGX. 83,215,239/=

6. Salaries in lieu of notice UGX. 16,697,085/=

7. Salary for 66 months less loan advances UGX. 212,335,870/=

The Appellant counter claimed for outstanding loan amounts owed as at 25th November, 2011 as follows:

- Housing loans UGX 120,756,639/=
- Car loan UGX 24,877,683/=
- Personal loan UGX 9,943,356/=
- Salary Advance UGX 616,667/=

There are 2 grounds locked up in ground 5 of the appeal. The first is whether the Appellant pleaded the claims as special damages. The second issue is whether the claims were founded on the Respondent's cause of action. As the court which only handles points of law from a decision of the Industrial Court, the question of whether special damages were pleaded can easily be answered. Paragraph 13 of the claim clearly pleads special damages even though it does not specify it or it is not entitled as such. The particulars of claim are particularised and it is therefore a question of form and not substance. The question of cause of action is a question of entitlement to the remedies which is the subject matter of other grounds of appeal. Ground 5 of the appeal has no merit and is hereby disallowed.

Ground 6 is that:

The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding to the Respondent the following reliefs; namely:

a) Such sums of money as were recoverable under the three loan agreements from her salary up to the time she would have retired.

b) Severance allowance.

c) General damages.
d) Aggravated damages.
e) Leave pay for 2011.
f) Salary that she would have been entitled to from the date of unlawful termination up to the date of the award.

Ground 6 (a) reproduces elements of ground 4 of the appeal in that deals with the award of the Industrial Court on the question of loan amounts. As I have stated above, damages are assessed on the basis of the common law doctrine of *restitutio in integrum*. The assessment of damages must proceed from the premises that the Respondent lost earnings because of the wrongful termination and the award of damages can be assessed as flowing naturally from the loss of employment at the age of close to retirement age. The Respondent pleaded that she was unable to service the loan amounts advanced to her because of the termination. She also pleaded in paragraph 15 of the claim that she had a period of 4 years left before her retirement. Secondly, she claimed that the housing loan was insured against loss of employment. Some of the loans were secured loans.

In ground 6 (b) of the appeal, the question is whether the Respondent was entitled to severance pay.

This court held in **African Field Epidemiology (EFENET) v Peter Wasswa Katyaba; Court of Appeal Civil Appeal No 0124 of 2017 (Arising from Labour Reference No 084 of 2016** that a cause of action for unlawful or wrongful dismissal other than a statutory claim under the Employment Act can be handled by the Industrial Court. Secondly, this court adopted the dichotomy between a common law cause of action and a statutory cause of action in **Halsbury's laws of England 4th Edition Vol 16** and also cited Paragraph 302 thereof where "wrongful dismissal" is defined as follows:

302: "Meaning of 'wrongful dismissal". A wrongful dismissal is a dismissal in breach of the relevant provisions in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

(1) the employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and

(2) His dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily.

In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.

The common law action for wrongful dismissal must be considered entirely separately from the statutory action for unfair dismissal. The existence of the latter does not, however, abrogate the common law action which may still be particularly appropriate in two cases:

(a) where the employee is not entitled to bring an action for unfair dismissal;

(b) Where the damages for wrongful dismissal are likely to exceed the statutory maxima placed on compensation for unfair dismissal, as, for example, in the case of a well remunerated employee on long notice or a fixed term contract.

Where an employee is wrongfully dismissed, he is released, by the employer's repudiation of the contract's provisions, in particular from a restraint of trade clause.

This Court held that wrongful dismissal may be considered repudiation of the contract and the terms of the repudiated contract are not binding or

enforceable and therefore remedies that maybe awarded are not necessarily those in the terms of the written contract of employment.

The Respondents claim did not fall under statutory claims lodged by complaint to the Labour Officer under section 93 of the Employment Act but was a reference under section 8 (1) of the **Labour Disputes (Arbitration and Settlement) Act** (LADASA) to the Industrial Court from the High Court. The original suit was High Court Civil Suit No 184 of 2012. The Industrial Court has jurisdiction to hear any question of law or fact referred to it under any other law by virtue of section 8 (1) (b) of **the Labour Disputes (Arbitration and Settlement) Act** which gives the functions of the Industrial Court as adjudication on questions of law and fact arising from references to the Industrial Court by any other law.

The Respondent was the plaintiff in the High Court and the claim before the Industrial Court did not seek reinstatement to her job but sought damages for wrongful dismissal. In the premises, the yardstick to be used is that of *restitutio in integrum* in the award of compensation or damages. The Appellant had offered the Respondent severance pay in the sum of Uganda shillings 83,215,239/=. However, the basis of the offer was redundancy. This is what the Industrial Court held:

> This court has already ruled that the termination of the complainant was unlawful and had very little, if at all, to do with redundancy.
>
> Consequently, we agree with the submissions of Counsel for the claimant that under sections 87, 88, 89 and 90 of the Employment Act, the claimant is entitled to severance allowance.

Clearly section 87 of the Employment Act deals with the circumstances where severance pay is due to the employee. However, the circumstances include where the employee is unfairly dismissed by the employer.

Secondly, it includes circumstances where the employee dies. Thirdly, it includes circumstances where the employee terminates his or her contract as a result of incapacity not caused by his or her own wilful misconduct. Unfair dismissal is provided for by section 71 of the Employment Act. An employee who is unfairly dismissed may lodge a complaint with the Labour Officer. In the circumstances, section 87 of the Employment Act which gives the instances where severance package is due is inapplicable to a cause of action of unlawful or wrongful termination as in this case. In any case, a complaint that an employee has been unfairly terminated can be made to the labour officer within 3 months from the time the cause of action arose. The claim of the Respondent emanated from a reference of the High Court to the Industrial Court and the provisions of section 71 of the Employment Act do not apply to it.

Secondly, the Industrial Court having found that the dismissal was wrongful, could not at the same time proceed to award the severance pay as if it was a contractual termination of services. Severance pay was therefore erroneously awarded on the premises that the Appellant had offered it. The Appellant had offered a redundancy package which was no longer applicable as held by the Industrial Court since the Respondent proceeded on the basis of wrongful termination of services which was not brought under section 71 of the Employment Act.

With regard to the award of general damages, it follows the finding of wrongful termination and the question could have been whether the award was excessive. In **Halsbury's Laws of England Fourth Edition Reissue Volume 12** (1) paragraph 812 general damages are defined as those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. The losses are presumed to be the natural or probable consequence of the wrong complained of with the result that

the Plaintiff is required only to assert that such damage has been suffered. It was held by Lord Wilberforce in **Johnson and another v Agnew [1979] 1 All ER 883** at page 896 that the award of general damages is compensatory:

> i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.

Where the court has established a wrongful dismissal, the principle of restitutio in integrum requires the court to assess the natural or probable consequences of the wrongful act. I note that the claimant prayed for salary for 66 months less the loan advances. This as noted is a claim for award of special damages and not general damages. The Industrial Court stated as follows:

> The claimant had served the bank for 10 years and had 4 years left before her retirement. She was terminated without any reason only to formulate the reasons after the termination of her job. We think this constituted humiliation and distress especially that she was served with the termination while on leave but in her office doing urgent business of the bank. We are of the considered opinion that 150,000,000/= is sufficient for general damages and 200,000,000/= for aggravated damages.

The Appellant did not appeal on the ground that the award of general damages was excessive. This court only handle points of law from a decision of the Industrial Court. I therefore consider the question of principle as contended by the Appellant's Counsel whether general damages were properly awarded together with aggravated damages for the same tort of unlawful termination, humiliation and distress as held by the Industrial Court. We can do this by considering the rationales for the award of aggravated damages.

Aggravated damages are awarded at the discretion of the court and the question should be whether the Industrial Court erred in law to award aggravated damages as a matter of principle. The basis for the award of aggravated damages according to the Industrial Court is the humiliation and distress caused to the Respondent. The question of whether the Respondent was humiliated thereby aggravating the wrongful termination of employment is a question of fact. **Halsbury's laws of England Fourth Edition Vol 12 Paragraph 811**, discusses the circumstances under which aggravated damages may be awarded:

> the court may award more than nominal measure of damages, by taking into account the defendant's motives or conduct and such damages may be either aggravated damages which are compensatory in that they compensate the victim of a wrong for mental distress, or injury to feelings, in circumstances in which the injury has been caused or increased by the manner in which the defendant committed the wrong.

In **Halsbury's laws of England Fourth Edition Volume 12** (supra) at paragraph 1114, it is written that aggravated damages in tort are where damages are "at large". In such cases the court takes into account the defendant's motives, conduct and manner of committing the tort which may have injured the proper feelings of dignity and pride of the plaintiff. Having repudiated the contract, the only question which could have been considered is whether there were circumstances that aggravated the tort for which aggravated damages could be awarded instated of nominal general damages. Secondly, the question could have been whether the awarded of aggravated damages were manifestly excessive. Otherwise in principle there is no basis for faulting the Industrial Court for awarding aggravated damages for humiliation of the Respondent. Moreover, there is judicial precedent of the Supreme Court in **Bank of Uganda v Betty Tinkamanyire; SCCA No 12 of 2007**, where aggravated damages were

awarded for the employer's degrading and callous action against a former employee.

The crux of the matter is whether aggravating damages may be awarded at the same time as general damages for the same tort. In my judgment, general damages are awarded at a lesser quantum than aggravated damages. General damages are said to be aggravated and the court may award aggravated damages where aggravating circumstances are proved. The aggravation is reflected in an increase in the general damages awarded and are called aggravated damages. In the premises I agree with the submission of the Appellant's counsel that it was erroneous to award general and aggravated damages separately. It is the same species of award except that one is an aggravated form of the other. To that limited extent, ground 6 (c) of the appeal is allowed to the extent that the Industrial Court should have make up its mind on whether the damages are aggravated or not but should not award the general and aggravated damages in the same breath separately. I would in the circumstances set aside the award of general damages and would substitute the two awards with an award of aggravated damages only.

In relation to the award of leave pay for 2011, the Industrial Court held that there was no evidence that the Respondent was entitled to one month's pay. They however relied on the Appellants own letter where the Appellant conceded by letter dated 10th of August 2011 addressed to the Respondent to pay Uganda shillings 2,341,554/= in accordance with the human resource policy of the bank. They proceeded to grant this remedy. As I have noted above, the Respondent was not entitled to contractual remedies as such but to be restored under the general principle of *restitutio in integrum*. This did not bar the Industrial Court from awarding special damages for an item which is admitted. In my judgment, the Industrial

Court should have taken the admission as evidence for assessment of special damages.

In the premises, grounds 6 of the appeal is further partially allowed in that the award of severance allowance as well as the award of leave pay for the year 2011 were erroneously premised. The question is whether they Appellant suffered any prejudice if indeed it is the natural and probable consequence of wrongful dismissal. If the award had proceeded from the premises of *restitutio in integrum*, it could not be faulted. An award of general and special damages, fall under the doctrine of *restitutio in integrum*. Similarly, aggravated damages are awarded for the tort of misconduct towards the plaintiff/claimant. This covers the rationale for award of general damages which are considered aggravated by the conduct of the defendant and therefore general damages are subsumed in the aggravated damages.

Before concluding on ground 6 of the appeal, I will further consider ground 7 that deals with the alternative to ground 6 namely:

Ground 7: Further and in the alternative, but without prejudice to the foregoing, the learned Chief Judge, Judge and panellists of the Industrial Court erred in law and exceeded their jurisdiction in awarding the amounts of general damages and aggravated damages as well as salary from the date of dismissal up to the date of the award and in giving the Respondent relief from paying part of the loans properly owed by her.

I have already held that the Industrial Court had jurisdiction to handle any claim of fact or law referred to it under any other law. The Industrial Court therefore did not exceed its jurisdiction in awarding aggravated damages as well as special damages as the assessed quantum for loss of salary for 66 months.

To conclude grounds 6 and 7, the award of severance allowance was erroneous. Secondly, the award of leave pay proceeded on erroneous premises. The Industrial Court having held that there was no evidence to support the claim, could not at the same time go ahead to award a higher amount on the basis of an admission by the Respondent. Ground 6 is only partially allowed. However, there is no basis for setting aside the award of aggravated damages and after setting aside general damages as erroneously awarded separately.

The Industrial Court allowed salary to be claimed from the date of the unlawful termination to the date of the award. This proceeded from the premises that the Respondent suffered loss of income as a result of unlawful termination. The award of salary is merely quantification of income as a result of termination and can stand as assessment of quantum of loss of income.

Going back to ground 4 of the appeal, where the Respondent is awarded loss of income by way of salary for 66 months, it ought to be stated that that it is less money she owed the Appellant for the same period for purposes of clarity. In the summary of awards, Industrial Court held that the claimant will recover such sums of money as was recoverable under the three loan agreements from her salary at the time she would have retired. The Appellant was left with a period of 4 years to reach retirement age. It is not clear to hold that the claimant would recover such sums which are due to the Appellant. This is money that is owed the Appellant and which was supposed to be deducted from the salary of the Respondent. If this money is awarded separately as the Industrial Court did, it had to be retained by the Appellant. The Industrial Court rightly held that the Respondent was obliged to continue servicing the loan on her own after the period she would have retired under the terms of the relevant loan agreements. The

issue that arises is that her loan was secured by terminal benefits and this had to be dealt with as an offset from any terminal benefits or awards in lieu of compensation therefore.

In the circumstances the Appellant owed the Respondent contributions to the provident fund as well as a deduction owed by Respondent to the Appellant to service contractual loans up to the time of her retirement. For clarity monies owed the respondent by way of loss of income were to be less deductions to be retained to service the bank loan. Moreover, the Appellant was further entitled to offset terminal benefits to complete payment of the obligations of the Respondent under the various loans. In the premises, the Respondent's entitlements under the judgment should be offset to service the loans from her salary according to the rate agreed in the contract up to the time of her retirement which was about 4 years from the time of termination of her contract of employment. This is offset from the 66 month's salary quantum awarded. Thereafter, she remained obliged to continue servicing any loan sums which remained outstanding on her own and reconciliation of accounts can be carried out by offsetting any terminal benefits the Respondent is entitled to from the provident fund. The loan amounts for the period of 4 years before retirement are serviced by the Appellant as a setoff from the quantum of special damages awarded. Ground 4 of the appeal is that the Industrial Court erred in law in holding that the Respondent, whose employment was wrongfully terminated, is entitled to relief from paying loan amounts up to the time she would have officially retired.

Ground 4 of the appeal is disallowed because the failure to service the loans which were serviced through salary deductions is a direct consequence of the wrongful termination and in this judgment the issue of offsetting loan amounts is addressed in the award of special damages for

the period up to the award by the Industrial Court. The Industrial Court clearly took into account the period that was left before the Appellant could retire. The staff loan policy exhibit D7 clearly states that the staff loan scheme was the facility offered by the bank with the purpose of motivating employees while at the same time assisting staff to develop themselves. The loans consisted of personal loans, staff vehicle loans and staff housing loans. Loan amounts were computed using a formula which considers employee salary among other factors. I have further noted that eligibility for the loan included permanent employees and contract employees. In clause 1.6.1, it is provided that staff loans may be secured by gratuity, retirement package or insurance policy. In paragraph 1.9 it is provided that when the staff employment with the Appellant is terminated, all the outstanding balance on the loan shall be due and payable immediately. While the Respondent can be shielded for the period up to the award of special damages, thereafter her loan obligations descend on her and subject to any loan secured by mortgage or other security, salary loans are terminated and outstanding sums should be offset from terminal benefits. Finally, in paragraph 1.13 on repayment for the loans it is provided that:

> An employee shall repay the loan by direct deductions from salary, all or part of any outstanding loans taken. Direct cash payments shall also be accepted.

The natural consequence of termination is that there would be no salary to repay the loan by direct deductions from salary. If terminal benefits are paid, deductions have to be computed and offset. It was therefore material that the period the Respondent was left with to serve the bank/Appellant before retirement should be considered to shield the Respondent from immediately payment due to abrupt termination of her services. What was material being that had her services not been terminated, she would have continued to pay the loan through direct deductions from her salary as well as contribute to the provident fund for her retirement. The Industrial Court

took into account the fact that the housing loan extended to a period of 15 years which is about 10 years after the expected retirement period of the Respondent. They held that the Respondent was supposed to service that loan from other sources after retirement. There were no clear facts as to the exact amounts and period left for the loans. This is what the Industrial Court held:

> The vehicle loan was to be recovered within 4 years and as in the case of the housing loan, the instalment amounts recoverable and over what period are not revealed on the record. If this same principle of deductions was applied across all the loans, we are of the considered view that the same applies up to the time the claimant would have officially been retired. Should any of the loans have been intended to be wholly covered by salary and any other emoluments of the claimant, then, she would be entitled to a relief in the whole sum of the loan.
>
> It is the decision of this court therefore, that on the 2nd issue the claimant is only liable to pay such amounts on the loans that she would have been obliged to pay under the loan agreements after retiring from the service of the Respondent bank lawfully.

Following the principle of *restitutio in integrum* the Industrial Court held that the Respondent was not entitled to the deductions up to the time she would have retired being a period of about 4 years. This is strange because there would be no salary and loan terms include offset from gratuity and terminal benefits after termination of services. I would therefore partially allow this ground of appeal and substitute it with this judgment as finds that the Respondent's deductions from salary would be an offset from award of special damages and further the Appellant is bound to contribute to the provident fund for the same period of 66 months as stipulated in the contract so that calculation of gratuity and terminal benefit by the trustee of the provident fund is not affected. Similarly, the salary loans amounts that remain outstanding after deductions from special damages shall be

offset from terminal benefits due to the Respondent from any provident fund.

For emphasise salary loan amounts will be offset from any quantum of special damages award based on salary loss for the remaining period of time before her due time for retirement. This is from the award of 66 month's salary loss and should be less deductions on salary loan amounts and with corresponding obligations of the Appellant in terms of contributions to the employee provident fund for the same period as held by the Industrial Court. Further, deductions by way of offset are envisaged from terminal benefits.

Ground 8: The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding interest at the excessive rate of 25% per year.

I have carefully considered the arguments of Counsel and I agree that reasonable interest has to be paid under the provisions of section 26 of the Civil Procedure Act. What is reasonable interest being a question of fact with the underlying principle of *restitution in integrum.*

In **African Field Epidemiology Network (EFENET) v Peter Wasswa Kityaba; Civil Appeal No. 124 of 2017 at page 42,** the Appellant challenged the award of interest of 24% on all awards as excessive. This court held that the award of interest is compensatory and is assessed on the same footing of *restitutio in integrum.* According to **Stroud's Judicial Dictionary of Words and Phrases, Sweet & Maxwell 2000 Edition** interest is compensation paid by the borrower to the lender for deprivation of the use of his money. In **Riches v Westminster Bank Ltd [1947] 1 ALLER 469 HL at 472** Lord Wright held that

> '… the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as

representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation...'

In the circumstances, the interest can be awarded at a bank rate for fixed deposit and the award of 25% is excessive. I would substitute therefor an interest of 18% per annum on the special damages from the time of termination of employment till payment in full. Secondly, interest is awarded at 8% per annum on aggravated damages from the date of the award of the Industrial Court till payment in full.

Ground 9: The learned Chief Judge, Judge and panellists of the Industrial Court erred in law in awarding costs to the Respondent.

I have carefully considered ground 9 of the appeal. The claim of the claimant was contested before the Industrial Court and in this court. Costs follow the event and I see no basis for departing from the general rule. The claimant was represented by Counsel. Ground 9 of the appeal is disallowed.

In the circumstances, the appeal substantially failed and only partially succeeded to the extent stated in this judgment. Exercising the powers of this Court under section 11 of the Judicature Act, the judgment of the industrial court is set aside to the extent set out in this judgment and for clarity substituted with this judgment so that the final order shall show that the following orders issue:

(a) The award of the industrial court to the Respondent of special damages by way of the quantum of salary of 66 months from the time of her termination is upheld. From this award will be deducted or offset her salary loan obligations to the Appellant for the same period of time which begins immediately after the date of termination

of the Respondents services up to the time of the award of the Industrial Court.

(b) Similarly, the Appellant shall pay any contributions in respect of provident fund contributions in respect of the Respondent of Uganda shillings 10,182,452/- directly to the trustee of any provident fund.

(c) The award of Uganda shillings 2,341,554/= being salary for July 2011 by the Industrial Court is upheld

(d) The award of Uganda shillings 2,341,554/= by the Industrial Court being leave pay for 2011 is set aside.

(e) The award of the Industrial Court of severance pay of Uganda shillings 83,215,239/= is hereby set aside.

(f) The Respondent is entitled to pursue her terminal benefits from the any trustee of provident fund as if she duly retired from service and any outstanding salary loan amounts as at the date of termination of her services after offsetting deductions from special damages for 66 months shall be offset from these terminal benefits.

(g) The award of aggravated damages of Uganda shillings 200,000,000/= to Respondent by the Industrial Court is upheld.

(h) General damages of Uganda shillings 150,000,000/= awarded by the industrial court is hereby set aside/disallowed.

(i) Interest of 18% per annum is awarded on special damages awarded from the time of termination of the Respondents employment till payment in full.

(j) Further interest is awarded at 8% per annum on aggravated damages from the date of the award of the Industrial Court till payment in full.

(k) Costs are awarded to the Respondent in this court and in the court below.

Dated at Kampala and the 3rd day of July 2020

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 241 OF 2015

UGANDA DEVELOPMENT BANK LIMITED========== APPELLANT

VERSUS

FLORENCE MUFUMBA==========RESPONDENT

(Appeal from the award of the Industrial court at Kampala before Hon. Chief Judge Asaph Ruhinda Ntengy, Hon. Judge Linda Lillian Tumusiime Mugisha, and panelists Mr.Fidel Ebyau,Mr. Micheal Matovu and Mr. Hon Edison Mavunwa In LABOUR Dispute /c/138 of 2014 dated 19/11/2015)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA)

JUDGMENT OF HON.MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of my Brother Hon. Mr. Justice Christopher Madrama, JA in draft and I agree with the findings and final decisions and orders and have nothing more useful to add.

Dated at Kampala this 3rd day of July 2020.

.....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

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CORAM: **Hon. Mr. Justice Kenneth Kakuru, JA**
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Madrama, JA.

I agree with him that this appeal succeeds to the extent set out in his Judgment. I also agree with the orders he has proposed. I have nothing useful to add.

As Kiryabwire, JA also agrees it is so ordered.

Dated at **Kampala** this 3rd day of July 2020.

.....
Kenneth Kakuru
JUSTICE OF APPEAL