

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

HCT-OO-CV-CS-0274-2001

DAVID MASSA:.....PLANTIFF

VS

NATIONAL HOUSING CORPORATION:..... DEFENDANT.

BEFORE: V.F.MUSOKE-KIBUUKA JUDGE)

JUDGMENT

The Plaintiff seeks the following orders:

- a) An order declaring his dismissal by the defendant wrongful,
- b) An order granting the Plaintiff special and general damages;
- C) An order granting the Plaintiff interest upon both special and general damages;
- d) An order granting costs to the Plaintiff.

The background to the suit is, briefly, as set out below.

The Plaintiff was first employed by the defendant on 30th March, 1990. He was employed as a ton boy. In that capacity, he was working with the defendant's truck, Reg. No UWQ 234, driven by one Magada.

On 19th April, 1999, the Plaintiff received a letter summarily dismissing him from the service of the defendant. The letter stated that the plaintiff was being dismissed because he had been involved in the theft of 1,200 Mangalore tiles belonging to the defendant. The matter was under police investigation, under file reference S.D. 39/12/99, at Jinja Road police station. The dismissal letter stated that the plaintiff was being dismissed under the Union Agreement,

Articles 14 (a) (11) and 25 (c). The Plaintiff was informed further that he was entitled to no terminal benefits he got none.

On 12th July, 1999 nearly three months after this summary dismissed, the plaintiff was arrested. He was charged with the offence of theft under sections 245 and 252, of the Penal Code Act. The criminal case, against the plaintiff, was, however, dismissed on 25th June 2000, for want of prosecution.

It appears that after the defendant had been served with the statutory notice, in respect of this suit, it sought the assistance of the police and the DPP to have the criminal case reinstated against the Plaintiff. But by the end of the hearing of this suit, the trial of the reinstated criminal case against the plaintiff had not commenced.

The fact of the reinstatement of the criminal case against the plaintiff became a bone of greatest contention during the hearing of this case. Mr. John Magezi, learned counsel for the defendant applied that the hearing of this civil suit be stayed pending the determination of the reinstated criminal case. Mr. Mutabingwa, who appeared for the plaintiff, in this matter, strongly opposed the application to stay the hearing of this case. This court found no relevance between the outcome of the criminal case and the act of dismissal which was committed before even the completion of police investigations. The application for staying the trial was, accordingly, rejected.

In its defence, the defendant corporation admitted dismissing the plaintiff in a summary manner. The defendant maintained that the plaintiff had grossly misconducted himself and that the dismissal was justified. The defendant contended further that the Plaintiffs misconduct amounted to a fundamental breach of his contract of employment for which the defendant was entitled to general damages.

Only two issues were agreed upon for determination by this court.

- a) Whether the dismissal of the Plaintiff was wrongful, and
- b) If so, what remedies are available to the Plaintiff?

I will now analyse the evidence in respect of issue number one first. It is recorded as an agreed fact that the Plaintiff was summarily dismissed, by the defendant, before the institution of the criminal case against him. In the written final submission, learned counsel for the defendant, Mr. John Magezi, relies upon the evidence of DW1, Mr. Peters Musoke, the Corporation Secretary of the defendant, DW2, Augustine Baganda, the security officer of the defendant corporation and DW3, Pepertua Rwomushoro, Asst. Corporation Secretary, to make the following submission. “the dismissal of the plaintiff arose from the theft of company property for which the plaintiff is currently being prosecuted in a court of law”

The plaintiff’s case is that the plaintiff was dismissed upon allegations that he had stolen mangole tiles belonging to his employer, the defendant. The plaintiff was dismissed on 19th April, 1999. He was subsequently arrested on 12th July, 1999. He was charged with the offence of theft of the Manglore tiles on 15th July, 1999.

It is a well established common law principle that an employer has a right to terminate the services of his or her employee without notice under certain situations. Berko, J., as he then was, in Assimwe Vs. Amref, HCCS No. 628/92, set out some of the situations under which an employer may exercise his or her right to summarily dismiss an employee when he wrote “There is no doubt that a master has a right to dismiss his employee without notice on grounds of employee’s insulting behaviour, disobedience of lawful and reasonable orders, immorality, assault of fellow workers, incompetence, negligence and drunkardness. A servant may be dismissed summarily on grounds of gross misconduct and neglect of duty or if guilty of fraud or dishonesty in his conduct of his employer’s business.”

In John Elatu Vs. Uganda Airlines Corporation (1984) (HCB 40, this court pointed out that while summary dismissal was dismissal without notice, but to justify such dismissal, at common law, the breach of duty by an employee, must be a very serious one. It must be such a breach as would amount to repudiation of the employee’s obligations under the contract of employment such as disobedience of lawful orders, misconduct, incompetence or neglect of duty, drunkardness, immorality and assaulting fellow workers.

Sekandi, J. as he then was, in A.M Jabi Vs. Mbale Municipal counsel, (1975) HCB 191, also pointed out the fundamental element that an employer’s right, under common law, to summarily dismiss his or her employee, was not absolute. It did not apply in every instance of dismissal. Where a written employment agreement existed, it was the express terms of that

agreement that applied and the terms bound the parties to the agreement. Each party was under obligation to observe those terms of the agreement. The issue of dismissal, summary or otherwise, would be governed by the contents of the agreement.

The above position, which appears to have constituted a firm substrata for several decisions of this court appears to have been placed even more on the positive side by Kanyeihamba, JSC, in Barclays Bank of Uganda Vs. Godfrey Mubiru, Sc Civil Appeal No. I of 1998 (unreported) when the learned justice wrote,

“Where a service contract is governed by a written agreement between the employer and the employee, as in this case, termination of employment or service to be rendered will depend both on the terms of the agreement and on the law applicable”.

Elsewhere, in the same judgment, after laying out an elaborate definition of summary dismissal, the learned justice concluded that by its very nature, summary dismissal did not require both notice as well as the right to heard first. In the words of the learned justice,

“It follows, of course, that summary dismissal is dismissal without notice and dismissal without notice also implies dismissal without a right to be heard first”.

In the instant case, one of the grounds upon which the plaintiff’s case is based is that the act of dismissal offended the rules of natural justice, “audi alteram Partem” in as far as the plaintiff was dismissed without being given an opportunity to be heard prior to the act of dismissal. In view of what I have stated above, it is clear that the omission to give the plaintiff an opportunity to be heard, would, in no way, render the dismissal wrongful or unlawful. Once it is established that the dismissal was a summary one, as it is agreed in this case, then the issue of either notice or the right to be heard before affecting the dismissal does not arise. That particular ground for the Plaintiffs case, is thus, not sustainable.

It appears to me that the two decisions of Mumira V. National Housing Corporation (1985) HCB 110 and Lawrence Okae Vs. Uganda Posts and Telecommunications Corporation, Civil Suit No. 214 of 1996 (unreported), which learned counsel for the plaintiff relied upon to support the ground of lack of an opportunity to be heard, are clearly distinguishable from the instant case. In Lawrence Okae’s case, his dismissal was not a summary dismissal. It was termed “a retirement in public interest” Okae was paid cash in lieu of notice by his employer.

In the case of Mumira, the Board of Directors sat and considered the matter which was not the case in the instant case.

The second leg for the plaintiff's case is grounded in clause 14 (a) (iii) and 25 (iii) of the Union Agreement which governed the employment relationship between the plaintiff and the defendant. The agreement is exhibit P2. It is dated 6th July, 1998. It was executed between the defendant and The Uganda Building Construction, Civil Engineering, Cement and Allied Worker's Union. There is no dispute to the fact that the plaintiff was a member of that union.

Clause 14 (a) (iii) of that agreement stipulates that the contract of employment of an employee of the defendant may be terminated by "summary dismissal for gross misconduct". The rest of the that clause sets out the entitlements to a worker whose employment is terminated by way of summary dismissal, retirement, death or winding up or closing the defendant Corporation. On the other hand, clause 25 (iii) provides as below:

(iii) Any employee who is suspected to have committed any criminal offence, shall be suspended and or interdicted at half pay until investigations in the case are completed. In case the employee is subsequently found innocent he! she shall be re-instated and shall be entitled to full pay for the period for which he/she was suspended. In case the employee is found guilty, he/she shall be dismissed."

-

It is clear to me from the evidence, on record, that by the date of his dismissal, on 19th April, 1999, the plaintiff was merely a suspect. He had not even been charged with any criminal offence. Only a report had been made at Jinja road police station about the subject matter of the suspicion. The appropriate provision of the Agreement that was applicable to the plaintiff as at 19th April, 1999, was clause 25 (iii) of the Agreement and not clause 14 (a) (iii) under which the plaintiff was summarily dismissed. The plaintiff should merely have been suspended and placed upon half pay pending the proof of the case in which he was a suspect. The plaintiff's dismissal under clause 14 (a) (iii) of the Agreement was, therefore, wrongful. As was the case in Mulira's case (supra), the plaintiff had not been charged with any criminal case. Even if he had been charged with any criminal case, the suspicions had not been proved in any court of law. Thus a summary dismissal was not justified in the circumstances. The Plaintiff had not committed any gross misconduct since none had been proved against him.

I accordingly find that the plaintiff was wrongfully summarily dismissed. The defendant breached the service agreement with the plaintiffs union.

Regarding the remedies available to the Plaintiff, under clause 14 of the Agreement of Service, any employee who is summarily dismissed, as the plaintiff was, is entitled to specified benefits. These were denied to the plaintiff when he was summarily dismissed. He was clearly entitled to them.

However, during the trial and specifically, on page 2 of the written final submissions, learned counsel for the defendant, Mr. Magezi conceded that the plaintiff was entitled to a total sum of Shs. 3,158,4791 in termination benefits and that the defendant was willing to pay that sum. Since the plaintiff had quantified a total sum of 3,126,485/=, as terminal benefits entitlements, but the defendant is willing to pay 3,158,479/=, I will leave the matter at that. I award the plaintiff a total of 3,158,479/= as special damages representing his monetized total entitlements at the time of the termination of his employment with the defendants.

The Plaintiff also sought general damages for wrongful dismissal. The defendant has contended that the plaintiff is entitled to no general damages. He argues that the position arises out of the unalienable right of an employer to terminate the employment of his or her servant at will.

With due respect, I do find no merit in that argument. That position might be tenable under common law. But where the employment relationship is governed by a written contract such as in the instant case, an employee whose contract of service has been breached by the employer remains with the option of suing for general damages. The courts have in numerous decisions awarded general damages in similar situations. In Gulabali Ushillani Vs. Kampala Pharmaceuticals Ltd, SCCA No. 6 of 1998, Mulenga JSC, stated the following about the issue:

I now turn to the issue of damages. As I said earlier, in this judgment, the lower courts held, and it is supported by the evidence, that it was the Respondent who repudiated the employment contract. As a general rule, where one party to a contract wrongfully repudiates it, the innocent party has the option to either accept the repudiation and sue for damages, or to treat the contract as subsisting, and hold the party in fault to the terms of the contract and seek other remedies for enforcing it. It appears to be settled at common law, however that the contract of employment is an exception to the general rule. Save in very special

circumstances, where a contract of employment is repudiated, the innocent party has no option to treat the contract as subsisting”.

Indeed, in that particular case, the Supreme Court upheld with approval the sum of 4,900,000/= general damages, which the lower court had assessed.

In the instant case, the plaintiff’s monthly pay is agreed to have been 260, 1761= considering all the circumstances of this case, I think that using a multiplier of 15 in order to calculate general damages , would be fair in the circumstances. I accordingly award Shs. 260,176 x15= 3,902,640/= as general damages to the plaintiff.

The plaintiff also sought exemplary damages. I have considered the prayer. I do not find this case to be a proper one for the award of exemplary damages and none are awarded.

The last prayer concerns interest on special damages. The plaintiff sought interest on special damages at .the rate of 40% per annum. I agree that the circumstances of the instant case are very similar to those which the court of Appeal of Uganda, found to have prevailed in the case of Charles Lwanga Vs. Centenary Rural Development Bank, court of Appeal Civil Appeal No. 30 of 1999. I am in full agreement that interest should be paid, by the defendant on the plaintiff’s terminal benefits which the defendant withheld unjustifiably since the date of termination of employment. I , however, do not consider the rate of 40% in any way justified. I award interest, on the special damages, to the plaintiff at the rate of 20% @ annum since 19th April, 1999, till payment in full. Interest will also accrue on the general damages, at 6%@annum, from the date of judgment to the date of payment in full.

The plaintiff will have the costs of this suit.

In the final result, judgment is entered in favour of the plaintiff against the defendant. The following orders are made:

- a) a declaration that the plaintiff’s summary dismissal was wrongful.
- b) an order awarding . 3,158,479/= as special damages,
- c) an order awarding Shs. 3,902,640/= as general damages,
- d) an order awarding interest on (a) above at 20%@,nnum from 19th April, 1999 till payment in full and on (b) at 6% @ annum from the date of judgment till payment in full; and
- e) an order awarding the costs of this suit to the plaintiff.

..

V.F.MUSOKE-KIBUUKA (JUDGE)

14.11.2002.