

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

Civil Suit No. 54 OF 2007

ROBERT MUKEMBO :::PLAINTIFF

VERSUS

ECOLAB EAST AFRICA (U) LTD :::DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The plaintiff's suit against the defendant is for recovery of special and general damages for breach of employment contract and/or unlawful termination of the plaintiff from the defendant's employment. He also prays for a host of other remedies all stipulated in paragraph 3 of the plaint.

The matter first came up for conferencing before me on 19/08/08. Only counsel for the plaintiff appeared. It was adjourned to 10/09/08 still for conferencing. Come that date, the plaintiff and his counsel appeared. Counsel conducting the defence, one Jacqueline Mukasa, was said to be out of the country. The case suffered another adjournment to 11/11/08. Again learned defence counsel did not appear. With the help of learned counsel for the plaintiff court framed the following issues for determination.

1. Whether the plaintiff was unlawfully terminated by the defendant company.
2. Whether the plaintiff is entitled to the reliefs sought.

Later, the conduct of the defence case was taken over by Mr. Pius Olaki. The issues remained as they were.

1. Whether the plaintiff was unlawfully terminated by the defendant company.

From the pleadings and the evidence adduced at the hearing, the fact of the plaintiff's employment with the defendant is not disputed. Also undisputed is the fact of

termination of his services. What is in dispute is the manner of termination, whereby the plaintiff contends that the termination was in breach of his contract of employment with the defendant, and the defendant contends that the termination was justified and in accordance with the terms of employment.

Generally when an applicant for employment gets a job, the practice is for the employee to receive from the employer written details of his employment. In the instant case, Exh. P1 is such details of the plaintiff's employment with the defendant. It embodies the Terms and Conditions of Service.

Where complaints of un fair dismissal are raised, as herein, courts resort to the said written agreements as an embodiment of the terms and conditions of the employment. Unlawful and wrongful dismissal would, in the context of such contract of employment, relate to the manner of removing the employee from the employment for reasons which did not justify dismissal under the agreement and which is therefore in breach of the contract of employment or doing so in a manner that was in contravention of the contract of employment. Whatever the complaint, once an employee alleges unfair dismissal, it becomes incumbent upon the employer to show that the dismissal was fair and in accordance with the terms and conditions of service binding both parties. In the instant case, therefore, the defendant had to satisfy court that there was a proper reason for the termination of employment and that in all the circumstances, it acted reasonably in treating the reason for the dismissal as sufficient reason for dispensing with the plaintiff's services.

Generally speaking, courts come into the picture long after the event, that is, after the termination, at a time when an employee is complaining that he was removed from the job for a reason which did not justify dismissal or in a manner contrary to regulations. The alleged wrongfulness of such dismissal may indeed take many forms. Suffice it to say, however, that a master may terminate the contract with his servant any time and for any reason, or even for no reason at all. However, the dismissed employee is entitled to receive in writing the stated reasons for his/her dismissal. The moment the employer

assigns a reason which does not appear to be part of the plaintiff's terms of employment, or if it is part thereof but executed in a wrong manner, the dismissal is ipso facto wrongful.

Relating the above general principles to the instant case, the plaintiff was an employee of the defendant company in the capacity of a service Technician, based at Century Bottling Company Ltd plant at Namanve. The defendant had a running contract with Century Bottling Company Ltd to supply them with an assortment of chemicals for hygiene and sanitation.

From the testimony of PW1 Mukembo Robert, PW2 Emmanuel Kikonkolo and DW1 Leslie Zikanga, on 2/10/2006 around 5.00 p.m. the plaintiff and PW2 left the defendant's premises in the defendant's vehicle loaded with two drums of a product to be delivered at Coca-cola in Namanve. Minutes later, DW1 Zikanga received a telephone call from Coke that the plaintiff and his colleague PW2 Kikonkolo had been arrested with two empty drums as they were about to leave the Gate of the Coca-cola plant. According to DW1, plaintiff's immediate supervisor at the time, he inquired from the Coca-cola security manager who informed him that the two had been arrested after discovering that they were in possession of two empty drums and the vehicle had been confiscated. The two employees had by then been whisked to Seeta Police Station. The next day, DW1 Zikanga went to the Coca-cola plant and he was given the car with the two drums and a guard to deliver them to Seeta Police Station. At Seeta the drums were removed from the vehicle and he (DW1) drove the vehicle to office.

DW1 Zikanga's evidence is that the drums, the subject matter of the arrest, were similar to those of the defendant; that when he investigated the matter, it was established that the plaintiff had on several occasions been involved in declaration of similar drums in and out of the gate of Coca-cola; and, that their Human Resource Officer traveled from Nairobi to Kampala to hear out the plaintiff on the matter. A decision was subsequently taken to terminate the employment of the plaintiff and his colleague, PW2 Kikonkolo. The said PW2 Kikonkolo accepted his terminal benefits, but the plaintiff did not. Hence this case. While DW1 Zikanga testified that PW1 Mukembo and PW2 Kikonkolo left the

defendant's premises with two drums of a product, PW1 and PW2 said that they left the premises with four drums: two loaded with a product and the other two empty. There was no any independent evidence to tilt the balance. Be that as it is, there is evidence that upon reaching the Coca-cola plant, the security detail at the gate required declaring and recording all the contents on the vehicle. The two drums with chemical in them were recorded in a separate book and he two empty drums were declared by signing a luggage declaration forms. The two declarations are on record as Exh. D3 and Exh. P3.

From the evidence, PW1 and PW2 were arrested by Coca-cola guards claiming the two empty drums were suspected to be stolen property. As events unfolded, PW1 and PW2 ended up as suspects in the matter. Police took over investigations. The suspects were released on Police bond. They were not prosecuted in court but the file was later closed at the instance of the Resident State Attorney presumably upon failing to find any charges to prefer against them. This was in January 2007. By now the suspects had already lost their jobs as the letter of Termination in respect of the plaintiff herein is dated 18th October, 2006, Exh. P5.

I have already indicated that the relationship between the plaintiff and the defendant was contractual. It was governed by the contract of employment, Exh. P1 and a code of conduct, also exhibited.

Clause 16 provides for termination. It reads:

“16. TERMINATION OF EMPLOYMENT

Your employment may be terminated:

- (i). by either party giving the other one (1) month's notice in writing of intention to terminate it or by payment of one (1) month's salary in lieu of such notice;***
- (ii). by the company at any time and without notice or payment in lieu of notice if you:***
 - a. are guilty of serious or persistent misconduct;***

- b. *commit a breach of any of the provisions hereof or of any of the regulations of the company;***
- c.
- ...
- d.
- ...”

Under the Rules of Conduct in the employee handbook which also applied to the plaintiff, theft from Ecolab Customers could result in disciplinary action up to and including termination.

I have already indicated that from the pleadings and evidence, the plaintiff was arrested by agents of the defendant’s client who found him in possession of property they suspected to have been stolen. The decision to arrest him did not come from the defendant but from a third party over whom the defendant had no control.

The plaintiff was indeed taken into custody at Seeta Police Post at the instance of the said third party and subsequently released on police bond. In these circumstances, all the defendant had to do was to make its independent investigation and determine whether the plaintiff’s services be retained or terminated. That decision was not in my view dependent on whether or not the allegations had been proved in a Court of Law. That was a police matter between the plaintiff as a suspect and Century Bottling Co. Ltd as the complainant. But between him and the defendant, since he was a theft suspect in respect of an Ecolab customer, he was susceptible to disciplinary action up to and including termination. On the basis of its own investigations, after a hearing that included the plaintiff and the defendant’s Human Resource Officer who flew in from Nairobi, the defendant opted for termination of the contract of employment. If I have understood the plaintiff’s complaint herein, and I believe I have, he attributes the alleged wrongfulness of the termination of his employment to the fact that the action was taken before his guilt or innocence was established through the normal police inquiry and prosecution. Such an argument cannot be sustained. In my opinion, in a situation where an employee is

accused of a criminal offence, as herein, the employee may be prosecuted by the police. It could be many months before the case is tried. It is not the law, unless the parties have so agreed in the contract document, that the employer must await the outcome of that case before he takes action. Thus in ***British Home Stores vs Burchell [1978] I. R. L. R 379*** an employee was dismissed for alleged dishonesty relating to staff purchases. The Employment Appeal Tribunal held that in such cases the employer had only to show that he entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time.

I agree.

In practice, this will require the employer to have made sufficient investigation into the matter before dismissing the suspected employee. In the instant case, there is evidence that the defendant launched an investigation and confirmed that the plaintiff was involved in a series of taking away drums from coca-cola. The plaintiff admitted taking out drums on 15/09/2006.

In my view, the employer's obligation in a situation such as this is to ensure that the employee has had an opportunity to learn what allegations have been leveled against him and should allow him to put his own side of the story to the employer before any decision is taken. This was done in the instant case. The defendant believed the plaintiff to be guilty. It believed also that his conduct jeopardized the existing contract between themselves and Century Bottling Co. Ltd and opted for termination of the contract. On the basis of the evidence on record, I'm unable to fault their decision in that regard. There were in my view grounds warranting disciplinary action. Such action under the contract of employment included termination. In the letter of termination, Exh. P5, the defendant stated:

“In recognition of the fact that your personal record reflects no year to date of disciplinary action taken against you and the services you

have rendered to Ecolab Uganda Ltd since your employment on the 1st October, 2001, you will be afforded:

- 1. All leave pay due to you.*
- 2. Full salary for the days worked up to today, less statutory deductions.*
- 3. One month's salary in lieu of notice, notwithstanding Clause 16: "Termination of Employment" within your letter of appointment, which indicates that under the circumstances mentioned above you, are not entitled to notice, or payment in lieu of notice."*

It is argued for the defendant that the defendant was entitled to dismiss the plaintiff from its employment but opted to exercise a more lenient option by terminating the contract of employment.

I have considered this argument. Under the contract of employment, the company had option to end the contract any time, without notice or payment in lieu of notice if the plaintiff was guilty of serious or persistent misconduct.

The origin of the 2 empty drums has not been conclusively determined. Moreover, no evidence was elicited from Century Bottling Co. Ltd that getting empty drums into its premises was an act of gross misconduct. From the evidence, PW1 and PW2 had done so several times. I have not been favoured with an explanation as to why they were being allowed to take them inside its premises if doing so was being viewed as an act of misconduct. But even then, this was a matter between Century Bottling Company and the plaintiff. The fact remains that as between the plaintiff and his employer, Ecolab Uganda Ltd. the plaintiff's personal record did not reflect any act of indiscipline. Given that the gate keepers had the power to disallow anybody, including PW1 and PW2, to bring into the premises any unwanted material, which power they did not exercise, I am unable to make a finding that a case of being guilty of serious or persistent misconduct has been made out. The other grounds, namely,

committing a breach of any of the provisions or any of the regulations of the company; refusing or failing to comply with any lawful order given to him by the company or its authorized agents or servants; and, exhibition of continuous or persistent neglect of duty, were also in my view not applicable to the plaintiff. In all these circumstances, the termination could only be validly carried out under Clause 16 (i), that is, by either party giving to the other one month's notice in writing of intention to terminate it or by payment of one (1) month's salary in lieu of such notice.

In *Lees vs Arthur Greaves Ltd (1974) I.C.R. 501*, a case cited with approval in *Barclays Bank of Uganda vs G. Mubiru SCCA No. 1 of 1998* it was held that payment in lieu of notice can be viewed as ordinary giving of notice accompanied by a waiver of services by the employer to terminate by notice. From the authorities, the right of the employer to terminate the contract of service whether by giving notice or incurring the penalty of paying compensation in lieu of notice for the duration stipulated or implied by the contract cannot be fettered by the courts. The employee is entitled to compensation even in those cases where the period of service is fixed.

See: Barclays Bank of Uganda vs G. Mubiru, supra.

Learned Counsel for the defendant has drawn to my attention the Court of Appeal decision in *Eng. Pascal Gakyaro vs Civil Aviation Authority CACA No. 60 of 2006*. In that case, Hon. Justice Mpagi-Bahigeine, relying on *Ombaya vs Gailey & Roberts Ltd [1974] E. A 522* held:

“.....where a person is employed and one of his terms of employment included a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current. In this case the plaintiff was awarded one month's salary in lieu of notice. He could not recover any more than one month's salary.”

I agree.

In the instant case the contract of employment could be terminated by either party giving the other (1) month's notice in writing of intention to terminate it or by payment of one (1) month's salary in lieu of such notice. The defendant opted for the latter, including payment of all leave pay due to him and any salary arrears up to the date of termination. In the premises, the termination of the employment was neither wrongful nor unlawful.

I would answer the first issue in the negative and I do so.

2. Whether the plaintiff is entitled to the reliefs sought.

He has prayed for judgment against the defendant for orders that:

(a). ***The employment contract between the parties was unlawfully terminated by the defendant.***

In view of my findings above, this relief is not available to him.

(b). ***The employment contract between the parties was breached by the defendant.***

It follows from (a) above that there is no merit in this prayer. It is disallowed.

(c). ***The defendant pays the plaintiff's unpaid salary for the months worked.***

In the letter of termination he was cleared for payment of 'full salary for the days worked up to today', less statutory deductions. No one has stopped him from getting it. The same is decreed to him, less any recoverable payments to him.

(d). ***The defendant pays the plaintiff Annual bonus for the years worked.***

Under Clause 3 of the contract of employment, Exh. P1, the plaintiff was entitled to an annual bonus comprising a 13th salary cheque payable in December at the discretion of the Company's management. This was based on the sales performance of the company in the previous financial year (i.e. ending in November). He has not indicated in the pleadings that there was any outstanding payment for the previous years. The termination was on 18/10/06, before any 13th salary cheque payable in December of that year fell due. The rule has long been established that special damages must be pleaded and strictly proved. There being no claim for this as special damages, I would disallow this claim and I do so.

(e). ***The defendant pays retirement gratuity for the years worked.***

His claim is for 6 completed years of service. However, from the pleadings, his service was from ***1st October, 2001*** to ***18th October, 2006***, which is a period of 5 completed years of service, not 6. Even then he did not retire from the service of the defendant. His service was terminated. Under Clause 9 of the contract of service, upon attaining retirement age (60 years old) within the employ of the company, he would be paid a retirement gratuity equal to 15 days basic salary for every completed year of service.

The parties agreed that this gratuity could not be paid out in the event of the plaintiff's resignation before his due retirement age or termination. In his 6th year of service, he was terminated. This relief is also not available to him.

(f) ***The defendant pays to the plaintiff his entitlements under the Provident Fund.***

Contribution under Provident Fund was governed by Clause 8 of the contract of employment. Under this clause, he was required to join the Company's Provident Fund on successful completion of his Probationary period. The contributions, to be calculated on Gross Basic Salary, were to be 5% Company's and 5% employee's. By the time his

services were terminated, he was past probation period. However, at the hearing he indicated to court that he had no documentary evidence as to whether he was on the Provident Fund or not. The basis of his claim is that the contract of service made provision for it. He has not adduced any evidence to the amount of salary he was earning per month. Last pay slip would have sufficed. He produced none. He has based his calculation on Shs.911,704/= per month for a period of 6 years but his period of service with the defendant was 5 and not 6 years (October 1, 2001 – October 18, 2006) as he claims. In the Notice of Intention to sue, Exh. P7, his salary was stated to be Shs.900,000/= per month.

It is trite that salary and other terminal benefits should be claimed by way of special damages which must be pleaded and strictly proved: *Eletu vs Uganda Airlines Corporation [1984] HCB 39*. Though pleaded in the plaint, this claim has not been proved. It fails.

(g) *The defendant prays special damages amounting to Shs.302,145,298/=.*

His calculation is based on salary for the remaining part of his contract stated to be 300 months, an equivalent of 25 years, at the rate of Shs.911,174/= per month (Total: Shs.273,352,200/=); Annual Leave pay also for the remaining 25 years at Shs.911,174/= per leave taken (Total: Shs.22,779,350/=; 10% of Shs.911,174/= being his contribution to the Company's Provident Fund for 6 years (Total: Shs.546,704/=); and Retirement gratuity for 6 completed years of service (Total: Shs.5,467,044/=). Although the terms of employment are not described in the letter of appointment as permanent and pensionable, there is provision therein that he would be paid a retirement gratuity after clocking 60 years. He did not get that far. Besides, I would of course disagree that permanent and pensionable employment is the same as employment on a fixed term. Even if we were to assume that his service with the defendant was permanent and pensionable, that in itself wouldn't preclude the employer or the employee himself from terminating such contract for whatever reason or for no reason at all.

See: John Okori vs U.E.B. [1981] HCB 52.

In that case the court held, inter alia, that where the contract of service is for an indefinite term, there is an implied right to terminate it by reasonable notice given by either party any time. Thus even where wrongful dismissal is established, damages are normally based on the wages which the employee would have received if valid notice had been given to him on the date of dismissal since he was entitled to be put in the same position as if the contract had been performed. In these circumstances, his claim that he was on a fixed term contract of 60 years and therefore entitled to prospective salary for the period he did not serve is to say the least misconceived and untenable. If any authority were required for this, it is **Bank of Uganda vs Tinkamanyire SCCA No. 12 of 2007** where Kanyeihamba, JSC stated:

“The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowance 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.

I would confine the compensation for the unlawful dismissal of the appellant to the monetary value of the period that was necessary to give proper notice of termination which is commonly known in law as compensation in lieu of notice. The principles established by this court in Barclays Bank of Uganda vs Godfrey Mubiru (supra) remain good law that governs the relationship between an employer and employees with regard to termination of the latter’s employment.”

There is therefore no merit in this claim. It is disallowed.

When all is said and done, I find that the plaintiff has not proved any entitlement beyond what he was offered upon termination, that is, one month's salary in lieu of notice; accrued leave pay; and any salary arrears due to him at the time of termination. He is not entitled to any of the reliefs he prayed for in the plaint. He is at liberty to seek payment of what he was offered upon termination, as did his colleague PW2 Kikonkolo, less any indebtedness to the defendant at the time of termination.

I would dismiss the suit and I do so.

As regards costs, considering the overall justice in this case and for the same reasons the defendant did not consider other harsher manner of dismissal appropriate, I would order each party to bear its own costs.

Orders accordingly.

Yorokamu Bamwine

JUDGE

27/07/2009

27/07/09

Mr. Kugumikiriza Moses for the plaintiff present

Mr. Olaki Counsel for the defendant absent

Plaintiff (Mukembo Robert) present

Court:

The Judgment date was fixed in an open court.

Judgment read

Mukwaya Court Clerk

E. Kabanda

DEPUTY REGISTRAR