

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**CIVIL SUIT NO. 690 OF 2002**

**WILBERFORCE MUTAKA :::::::::::::::::::::::::::::::PLAINTIFF**

**VERSUS**

**UGANDA POST LIMITED ::::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. JUSTICE ELDAD MWANGUSYA**

**JUDGMENT**

The plaintiff, WILBERFORCE MUTAKA, brought this action against the defendant for general damages arising from wrongful dismissal claims for terminal benefits, accrued leave and transport amounting to 5,282,000; payment in lieu of notice of termination and costs of the suit.

The defendant, in their amended written statement of defence denied the claim and averred that the plaintiff's dismissal from his employment was lawful. It was contended that the plaintiff misappropriated and did not account for and converted to his own use, the defendant's money totalling to shs 71,412,500 through fraudulent entries and withdrawals from customer's passbook accounts. This has resulted into untold financial loss, loss of business and embarrassment on the side of the defendant.

The defendant also filed a counter claim for recovery from the plaintiff a total sum of shs 71,412,500; general damages; interest thereon at the rate of 25% p.a from the date the plaintiff misappropriated , failed to account, and converted the said money into his own use until payment in full and costs of the counter claim.

During scheduling, the parties agreed that the plaintiff was employed and later on dismissed by the defendant. The parties also agreed upon the following issues;

1. Whether the plaintiff's dismissal was wrongful or unlawful
2. Whether the plaintiff misappropriated and failed to account for shs. 71,412,500
3. Whether each of the parties is entitled to the remedies sought in their pleadings, and if so, what is the quantum

At the hearing of the suit, the plaintiff was the sole witness of his case while the defendant called 4 witnesses, including the Manager Internal Auditor, Manager- Investigations, the Central Manager,- Operations and the Human Resource Manager.

It was the plaintiff's testimony that although he was employed by UPTC since 08/01/1988, he was only confirmed in 1991. Following the embezzlement of a total sum of shs 3,744,801 through fraudulent withdrawals from the customers' passbook accounts he was suspended on 7/06/2002 and eventually dismissed in June 2002. It was his contention that he was never given any chance to defend himself before the dismissal nor was there any proof that any investigations were carried out to prove the allegations against him. He further testified that there was no way he could have made unauthorised payments as the customers keep their passbooks themselves and authorised payments using the withdrawal forms personally; although there was an Audit Report, the plaintiff testified that this was a mere concoction as the same had been made during his absence.

During cross examination, the plaintiff was shown some of the documents whose signatures were in issue. He testified that he could not tell the person that had signed the said receipts and that the handwriting merely resembled his. When the plaintiff was shown the Transaction Summary Sheet (TSS) of 26/09/2001, he admittedly stated that he had verified those figures totalling to shs 1,270,000 and the next stage would be to transfer the figures to the cash book, however a sum of 637,000 had been entered in the cash book by the plaintiff although he could not tell why the amount so recorded in the cash book was less than what appeared in the TSS.

For the defendant, DW1 was the Manager, Internal Audit in the defendant company who testified that he was assigned by Management to carry out an audit at Mubende Post Office where the plaintiff was stationed at the time, after a complaint from Post Bank (U) written to the UPL Managing Director complaining about embezzlement cases. It was also his testimony that after checking/ auditing the records for the period of 15/2/2001- 30/10/2001, it was revealed that the plaintiff had embezzled Post Office (U) Ltd money to the tune of shs71, 412, 500; the first amount that had been reported was shs 2,010,000 while a total of shs 24.3million in cash deposits was un-receipted.

He further testified that several receipts were issued by the plaintiff for instance receipts No.057201-057272 amounting to shs 780,000 was never accounted for; other receipts were issued by another officer, a one Victoria Nakaye i.e. No.5595-5600 and 5761 totalling to shs. 1,012,000; this was however passed on to the plaintiff and was brought to account; therefore the print out from Post Bank (U) Ltd only reflected shs.1,012,000. More receipts that were issued by the plaintiff were referred to by this witness i.e. No.057752- 057800 dated 27/04/2001 totalling to shs. 1.515.000; receipt No.058201 to 058249 totalling to shs 1,115,000. On the same date, Nakaye Victoria issued receipts No.058104 to 058117 totalling to shs. 395,450; this was the only amount that is reflected in the computer printout and the cash book for the date of 27/04/2001.

DW1 further testified that, for the deposits an amount of 24,394,500 was unaccounted for and that this amount included the 2,010,000 which was originally detected. It was also his testimony that the plaintiff had also misappropriated a sum of shs 47,018,000 from withdrawals. He illustrated this by referring TSS on pages 63-72 dated 07/05/2001 i.e. Exh D3, D4 and D6 wherein, a total sum of shs 38,501,000 was indicated as having been paid out. However the amount that was recovered in the cash book was only shs 47,498,000, this therefore means that the difference of shs 8,997,000 therein was put to personal use.

The total amount of money that had allegedly been misappropriated by the plaintiff therefore came to shs 71,412,500 only.

Another defence witness, DW2, testified that in April 2001, the security and investigation section headed by himself, received instructions from the Managing Director of the defendant company to investigate suspected frauds that had been reported at Mubende Post Office in relations to Post bank savings and Deposits. The customers of Post Bank, Mubende, were complaining that their deposits were not being reflected in their respective accounts and since at that time the Post office was working as an agent of post Bank, the latter sought to recover from Post Office.

It was his testimony that when he checked among the official accounting records at the post office, he established that the 3 deposits in issue had been receipted by the plaintiff on various days. These receipts were for the months of July to September 2001 with the following particulars; No.058764 issued on 04/07/2001 with a sum of shs.310, 000 against account No. 1031108001859; the other was issued on 14/09/2001 for a sum of shs.1, 000,000 against account No.1030608010298 and receipt No.059433 issued on 21/09/2001 for a sum of shs 700,000 against account No. 1030608010298, all these were never entered in the TSS.

DW2 further testified that on 4/07/01, the plaintiff accounted for total deposits of shs 770,000; this amount did not include the amount on receipt No.058764 yet the deposits were indicated as 90,000; 80,000; 100,000 and 500,000. On 14/09/200, the plaintiff accounted for 9 transactions totalling to shs. 443,000; the amount does not include shs 1,000,000 receipted by the plaintiff as money deposited on 14/09/2001 while for the deposits by a one Nshemereirwe Enock dated 21/09/2001 worth shs 700,000 is not reflected on the TSS. This witness went on to testify that he established that the proper procedure was not followed and that he had established that the amounts in question were not included in the totals in the of the deposits which were receipted on those dates.

It was DW2's testimony that on making the findings, he brought them to the attention of the plaintiff who acknowledged issuance of the receipts but insisted that he had accounted for the money to which the defendant allowed him to go back to Mubende with a one Gabriel Oloka, the assistant to the Manager investigations to verify his assertions. On his return, he stated that the money had indeed not been accounted for. It is also DW2's testimony that the plaintiff was invited to make an additional statement on 28/05/2002 before DW2 and the same was forwarded to the Company Secretary; that by that time he was working at Clock tower where another cash deficiency of shs 334,801 had been discovered; this particular loss was reported to the police.

During cross examination, DW2 testified that the plaintiff admitted the errors when he was taken to Mubende to verify the records in issue

DW3, the central Manager Operations, testified that /he was employed by the defendant company as a reconciler of accounts between Post office and post bank; and while doing this at Mubende, it was discovered that the entries that were made at the post office were not tallying with those of post bank; for instance on 19/04/2001 receipts No 057662- 057724 totalling to shs.1, 271, 000 (this money is however not reflected anywhere in the cash book as money received) were used and yet the different receipts were give in the cash book ranging from number 058055- 058064 totalling to shs,1490,000 was declared. He further testified that shs 2,640,000 was posted on 5/5/2001 yet the vouchers were received on 28/04/2001.

DW4, the Human resource manager of the defendant, testified that the plaintiff was dismissed when he made a loss of company funds through fraud and embezzlement. However before the dismissal and during the suspension, he was given an opportunity to explain the losses he had incurred to the defendant. DW4 further testified that a statement was obtained from the plaintiff through the Investigating Department; wherein he confessed to having carried out the embezzlement. He went ahead and stated that the plaintiff was in breach of clause.18.4.42 (i), (ii), (vii) (xii), (xix) and (xxvi) of the Terms and Conditions of service. DW4also referred to

clause 18.10.2 on the procedure of termination of an employee and testified that indeed this procedure was followed by the defendants.

At the conclusion of the hearing the parties were allowed to file written submissions which was done.

Mr. Opwonya, counsel for the plaintiff, contended that section 68 of the Employment Act, 2006 merely imports into Ugandan written statutory law principles that were already in practice through common law and decided cases in Great Britain and other countries whose precedent/case law are applicable in Uganda. He further contended that the cause of action is stated in paragraph 3 of the plaint and has not been pegged on the Employment Act in particular. Counsel maintained that it is not on record that the plaintiff was given a chance to defend himself and that there was no proof of the alleged wrongdoing at the time of his dismissal; there were no prior investigations neither were the allegations labeled against him true.

Mr. Opwonya contended that there was no misappropriation of money by the plaintiff as the figures alleged to be misappropriated are clearly reflected in the computer print outs and bank reports respectively. He went on and contended that although DW2 had stated that the customers complained that money that had been deposited at Mubende Post bank was not reflecting on their accounts; there was neither any documentary evidence to support these claims nor any confession to that effect. Counsel further stated that the evidence of all the defense witnesses lacked any merit to advance the defendant's case and thus invited court to enter judgment in favor of the plaintiff and grant the prayers as sought in the plaint.

As to whether the termination was lawful, Mr. Opwonya submitted that if the employer chooses to give reasons for terminating the services of an employee, then the reasons must be justifiable, true and proven. Section 68 of the Employment Act provides;

- a. In any case arising out of termination, the employer shall prove the reason or reasons for the dismissal and where the fails to do so, the dismissal shall be deemed to have been unfair.
- b. The reason or reasons for dismissal shall be matters which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee.
- c. In deciding whether an employee has satisfied this section, the contents of a certificate such as is referred to in section 61, informing the employee of the reason for termination of employment shall be taken into account.

He contended further that it should have been shown to the plaintiff that he had been in breach of a fundamental term of his employment or that he was guilty of sufficient misconduct, through a transparent fair trial that would warrant summary dismissal.

As to whether the plaintiff misappropriated or failed to account for shs 71,412,500; Mr. Opwonya contended that the defendant/ counter plaintiff never proved that there were any losses as no genuine audit report was produced neither was the plaintiff/ counter defendant asked to account for any such money. None of the clients named as complainants were ever called to testify that they lost money. Counsel cited the case of *Erisa Bukenya & 2 others v Uganda EACA criminal appeal No. 68 of 1972*; *Uganda v Mulenga & Anor 1970 EA 269* and; *Uganda v Byamugisha (1980) HCB 98* all of which are criminal cases where the standard of proof is beyond reasonable doubt unlike in this case where that standard of proof is on a balance of probabilities. They may not be applicable in a case of dismissal where the standard of proof is not that high.

As to whether the plaintiff is entitled to any remedies; counsel submitted that it is settled at common law that the contract of employment is an exception to the general rule that where a contract of employment is repudiated, the innocent party has no option to treat the contract subsisting but sue for damages for wrongful dismissal; see *Harman LJ in Denmark productions Ltd v Boscobet Productions Ltd (1968) 3 All ER 513 at p.533*. he contended that where a party to a contract of employment wrongfully breaches the terms, the innocent party is entitled to damages; per *Mulenga JSC in Gullabhalli Ushillani v Kampala Pharmaceuticals Ltd*.

It was counsel's contention that the defendant failed, neglected and or refused to repatriate the plaintiff back to Apac district where he hails from. This would amount to shs.3, 360,000 for the plaintiff and his family consisting of 8 children, five dependants and his wife. Counsel also contended that the plaintiff is entitled to terminal benefits; 1 month's pay in lieu of notice amounting to shs 2,119,102. Mr. Opwonya cited a number of authorities including *UWA v Hon Mukama CACA No.78 of 2004*; *Shell (U) LTD V George Ndyabawe SCCA No 6 of 2005*.

In reply, Ms Basaza Wasswa, for the respondent maintained that the plaintiff was lawfully dismissed for doubted integrity. She also contended that the plaintiff breached the defendant's staff Regulation, Terms and Conditions of service hence the summary dismissal him from employment. She submitted that when an employee is in breach of a fundamental term of his employment or is guilty of sufficient misconduct, he/she may be dismissed summarily without notice. **The Barclays Bank of Uganda v Godfrey Mubiru SCCA NO.1 of 1998**, was cited. It was counsel's contention that the plaintiff's conduct was in contravention of clauses 18:4:4 (i), (ii), (vii), (xii), (xix) and (xxvi) of the defendant's staff regulation, terms and condition of service. While referring to Mubiru's case (supra), Ms Basaza contended that the plaintiff handled cash and was thus expected to exercise a higher than ordinary degree of care when executing his duties. By not accounting for money he had received, the plaintiff was fundamentally breached the terms of his employment with the defendant.

An employee guilty of sufficient misconduct in his capacity as an employee may be dismissed summarily without notice... the test to be applied must vary with the nature of the business and the position held by the employee, an employee may obviously be dismissed for dishonesty or fraud in his employment; see Chitty on Contracts, 26<sup>th</sup> Edition Vol. Pages 823-827.

Furthermore, counsel contended that the right procedure for summary dismissal was followed while dismissing the plaintiff. She referred to DW4 and DW2's testimonies, and contended that the plaintiff indeed made a statement on 28/05/01 in regard to the alleged embezzlement and was later on dismissed for breach of his duties.

As to whether the plaintiff misappropriated or failed to account for shs 71,412,500; counsel contended that the said amount constituted unaccounted for cash totaling to shs24, 394,500 and fraudulent withdrawals amounting to shs 47,018,000. The amounts that were being recorded by the plaintiff were not a true reflection of the transactions of given selected dates by the plaintiff. It is contended that the loss to the defendant company arose at the time of reconciliation between the two entities where the defendant had to pay post bank money that their ledger reflected as collected yet it was never recorded in the defendant's cash book. Counsel therefore invited court to answer this issue in the affirmative.

On the last issue, counsel reiterated her submissions made under issue 1 and contended that the plaintiff is not entitled to any of his alleged claims as he was lawfully dismissed from his employment. She further referred to the case of Mubiru (supra) where Kanyeihamba JSC agreed

with the appellant that once an employee's services are terminated, transport, luncheon or leave allowances no longer apply nor are they payable to such an employee.

In regard to the counter claim, counsel invited the court to award the liquidated amount in issue with general damages for breach of contract, interest on the said two claims at the rate of 25% p.a from the date of misappropriation till payment in full and costs of the counter claim.

I have considered the able submission of counsel on either side; I will now proceed to carefully analyze the case before me. The record has a number of documents presented in evidence before this court; for instance, the letter of suspension dated 07/06/2002 stated the reason for the defendant's action as being embezzlement of funds at Mubende and Clock Tower post offices to a tune of shs. 3,744,801. This therefore means that the defendant was justified to suspend the plaintiff from service. The question that arises then is whether the eventual dismissal of the plaintiff was justified.

Summary dismissal is dismissal without notice, and that common law, to justify such dismissal the breach of duty must be a serious one, a breach amounting in effect to a repudiation by the servant of his obligation under the contract of employment such as disobedience of lawful orders, misconduct, drunkenness, immorality, assaulting fellow workers, incompetence and neglect; see **Eletu V Uganda Airlines Corporation (1984) HCB 39.**

It is settled law that where an employee is guilty of sufficient misconduct in his capacity as an employee, he may be dismissed summarily without notice. It has also been established that misconduct means "bad, improper or unprofessional behavior". It follows therefore that since summary dismissal is without notice, it also implies that the dismissal is without a right to be heard first. The authority of **Barclays Bank of Uganda Ltd v Godfrey Mubiru SCCA No 1 of 1998,** is instructive. I quote:-

***"Managers in the banking business have to be particularly careful and exercise a duty of care more diligently than managers of most businesses. This is because banks manage and control money belonging to other people and institutions, perhaps in their thousands and therefore are in a special fiduciary relationship with their customers whether actual or potential. Thus, in Harmet V Cornelius C. (1858) 5C B (N.S) 236. It was held that where an employee holds himself out as being skilled to do a certain type of work and is employed on that basis, impliedly undertakes that he possesses and will exercise reasonable skill or competence in that work. Moreover, it is my opinion that in the banking business any careless act or omission, if***



*not quickly remedied, is likely to cause great losses to the bank and its customers. Loose talk, irregular or unconditional banking acts or behavior could lead to speculation about and the undermining of the reputation of the appellant and therefore loss of customers and investors upon which the existence and business of a bank depend. The duties and liabilities of the banking are well spelt out in the case of Rowledson V National Westminster Bank Ltd. (1978)1 WLR, 798 and National Bank PLC V Morgan (1985) AC 686.*

*When an employee is in breach of a fundamental term of his employment or guilty of sufficient misconduct, he or she may be dismissed summarily, without notice, and, before the expiration of a fixed period of employment as was held in the cases of Atkin Acton, (1830)4 C&P. 208, Bason Deep Sea Fishing Co. V Ansell, (1888)39 C.H.D 339. and Clouston & Co. V Corry, (1906)A.C 122.*

*An employee may be summarily dismissed if he or she willfully disobeys any lawful and reasonable order of the employer, Chitty on Contracts 25<sup>th</sup> Edition, vol. II p. 827, gives a number of instances and precedents where employers are entitled to summarily dismiss employees who flout or repudiate essential conditions of the contract of employment. In Pepper V Webb (1969)1 WLR 514, and Gorse V Durham C.C (1971)1 WLR 775, courts gave examples of where even one act of disobedience will justify summary dismissal.*

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

The above notwithstanding, in summary dismissal court is required to investigate whether the circumstances of the alleged misconduct justified a summary dismissal. After the evaluation of the evidence and submissions made by the counsel, there is no dispute that the plaintiff was an employee of the defendant and in the course of his duties received money which he did not account for.

After investigations revealed that the plaintiff misappropriated company funds the defendant was left with no other option but to dismiss the plaintiff from service. Section 18.4.4 of the Staff Regulations, Terms and Conditions of Service lays down a number of offences among which includes; stealing of company property or funds, fraudulent accounting or misappropriation of official funds, deliberate giving of false information resulting into loss of revenue, failure to report any matter which is one's duty to do so and incurring shortage in official funds or stocks.

There are many other offences listed therein; however I find these more applicable in the instant case.

The plaintiff testified that he had not made the suspected entries, forgetting that when he was taken to Mubende to have the same verified, he accepted that he had indeed made the entries and that he had some of the money unaccounted for. In the circumstances it is the view of this court that the defendant was entitled to instantly dismiss the plaintiff. Having taken into account the facts, the evidence and the circumstance of this case, it is my finding that the dismissal was justified.

Turning to the issue of remedies; in the letter dated 20/06/2002 by the defendant and addressed to the plaintiff, it is not disputed that the defendant was willing to pay the plaintiff's terminal benefits and the transport back home/ repatriation. It states in the 2<sup>nd</sup> paragraph;

**Your terminal benefits amounting to shs 2,725,320 will offset part of the debt of shs 3,744,801 and the balance of shs 1,019,481 less transport home of shs 200,000 which leaves a balance of shs 819,418 – which you must pay to the company or may result in legal action against you .....**

**On dismissal, you will be eligible for the UPTC calculated and ascertained benefits as per your pension Certificate.**

Although the plaintiff claimed for shs 3,360,000 as transport for himself and his family consisting of 8 children, five dependants and his wife, he did not prove to this court how he arrived at that figure. It is settled law that salary and other terminal benefits should be claimed by way of special damages which must be strictly proved, this has not been done in the instant case and as such this claim must fail. But since there is an admission by the defendant of paying 200,000 as transport back home to the plaintiff then the same would be allowed by this court.

The defendant had all along been ready and willing to make the necessary payments and the plaintiff neglected to collect the same, there was no need for him to sue the defendant in the circumstances. He should however pay to the defendant a sum of shs. **819,418=** as the balance arising from offsetting his terminal benefits from the loss he incurred to the defendant. In view of the above findings the suit brought by the plaintiff against the defendant is dismissed with costs.

I now turn to the counter claim. The counter claimant contended that the counter defendant misappropriated company funds to the tune of **shs 71,412,500=**; although counsel for the counter defendant alleged that there was genuine audit report, he did not at any time task the counter

claimant to prove the genuineness of the purported report, neither did he challenge it from being tendered into court. Through this audit report the counterclaimant went at great length to plead and prove the alleged misappropriation of the funds in issue, through the testimonies of its witnesses which this court believes.

The counter claimant further invited court to award general damages. However no attempt was made to lead evidence that would help court to arrive at a reasonable award and how it arises. Court declines to make an award of General damages. The liquidated sum of **shs 71,412,500=;** will attract interest of 10% from the date of misappropriation till payment in full. The plaintiff/counter defendant will meet the costs of the counterclaim.

**Eldad Mwangusya**

**J U D G E**

**22.05.2013**

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