THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 220 OF 2009

PAUL EDYAU :::PLAINTIFF

VERSUS

WARID TELECOM (U) LTD ::::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff filed this suit against the defendant in which he sought special damages of Shs. 9,679,848= (Nine Million, Six Hundred Seventy Nine Thousand, Eight Hundred Forty Eight only), general damages for wrongful termination of employment, interest and costs of the suit.

It is not disputed that the plaintiff was summoned to answer to charges of absence from the duty station and wrongful millage claim. The disciplinary hearing was conducted with the terms and conditions and the plaintiff was found guilty of wrongful mileage claims. His services were therefore terminated. The plaintiff appealed against the decision and the decision to terminate was upheld.

During the scheduling conference held on 19th November 2012, the following facts were agreed;

1. The plaintiff was employed by the defendant on March, 1st 2008.
2. The plaintiff was served with notice on October 24, 2008 to attend a disciplinary hearing on October 27th, 2008.
3. The plaintiff attended the disciplinary hearing on October 27th, 2008 and requested for more time to respond.
4. The plaintiff was on November 6th, 2008 again summoned to attend a disciplinary hearing on November 10th, 2008.
5. The plaintiff's services were terminated on November 11th, 2008 pursuant to the disciplinary hearing.
6. The plaintiff appealed against the decision to terminate his employment on November 13th, 2008.
7. The appeal was upheld and the decision to terminate upheld.

Two issues were framed for determination;

1. Whether the plaintiff's employment was lawfully terminated.
2. Whether the plaintiff is entitled to reliefs and remedies.

During his submissions, the plaintiff abandoned his prayer for terminal benefits as pleaded in paragraph 8 of the plaint. He

submitted that "***upon producing documents showing the payment of the terminal benefits we wish to abandon our prayer for terminal benefits.***"

The plaintiff was represented by Mr. Godfrey Himbaza while the defendant, by Mr. Thomas Ocaya.

Issue No. 1; whether the plaintiff's services were lawfully terminated;

It was submitted for the plaintiff that on 24th October, 2008, he was served with a notice of disciplinary hearing. The allegations were for abscondment from duty and utter false documents. He asked the committee to be furnished with details of the complaint.

He was given two notices. The first one was for abscondment from duty and uttering false documents. The second notice was for abscondment from duty and wrongful mileage claim. The notice to the disciplinary committee was tendered as Exhibit P.3 and the response to the notice as Exhibit P.4. He further stated that while still employed by the defendant, he had a group life insurance cover. The policy covered field persons who would get involved in accidents or die. On 20th October 2008, he was involved in an accident around Laibi was injured but was not compensated. He brought it to the attention of the defendant but they did not bother. The letter for medical examination was

admitted as PID 1, whereas the group life insurance letter was admitted as Exhibit P.5.

After the disciplinary hearing the plaintiff was cleared of the offence of abscondment from duty, but found guilty of wrongful mileage claim. The hearing took place on 10th November 2008, and he was given a termination letter on 11th November 2008, (Exhibit P.6), in his defence which was attached to the plaint as Annexture F, he tried to give explanation on the allegations of the wrongful mileage claims. However, the committee did not consider his explanations and went ahead to dismiss him. Moreover it is on record that there was no formal written mileage policy.

He felt mistreated and served the defendant with a notice of intention to appeal. To his surprise, the defendant served him with a termination letter;

a) Without giving him a detailed verdict or findings of the disciplinary committee with reasons for their findings.

b) They served him with a termination letter even after receiving his notice of intention to appeal in which he had requested for a written transcript of the proceedings of the committee so that he can be able to prepare his appeal.

c) Without regard of human life, and wellbeing the defendant never responded to the plaintiff's accident issues yet he was comprehensively insured.

In cross-examination DW2 admitted to not giving the plaintiff a copy of the said written transcript which was in breach of the principles of natural justice whereby a person is entitled to access documents relating to his case. This prevented the plaintiff from presenting his appeal properly, and indeed he did not succeed.

Counsel further the plaintiff relied on Clause 10 of the defendant's Disciplinary Policy (Exhibit P.9) which provided as follows:

> ***"Every member of staff against whom a disciplinary decision has been made shall be entitled to an appeal to the Chief Executive Officer who shall appoint a committee of Senior Management officers on his behalf, including the chairman of the committee, to hear the appeal excluding any person who was member of the Disciplinary committee.***
>
> ***The employee against whom disciplinary action has been taken shall advise the Human Resource Department, who in turn after appointment of the appeal committee by the Chief Executive Officer, present the appropriate papers to the appeal committee.***
>
> ***After receipt of the documents relating to the appeal, the committee shall review the record of the case calling for further information if necessary and within three business days thereafter issue notice of the hearing of the appeal to the concerned employees including the accused employee nesting out the date, time and venue for the hearing and inform the same to the accused employee, minimum twenty four hours before the date of the hearing.***

At the hearing, having examined all facts the appeal committee shall take a decision on the accuracy etc. of the decision given and the disciplinary action proposed by the disciplinary committee. The decision of the appeal committee shall be taken through the rule of the majority and shall be final and binding on the parties subject to confirmation of the Chief Executive."

Counsel further submitted that under Clause 5 bullet 8, in cases where dismissal is deemed appropriate, the matter had to be submitted to the Chief Executive Officer for approval.

Further the plaintiff does not know whether the appeal committee made any decision because none was communicated to him.

In view of the above, the said dismissal was wrongful, more so when the Chief Executive officer did not approve it.

Further, the plaintiff complained that he was accused and charged with offences which were strongly inter linked, that is to say, wrongful mileage claim and abscondment from duty. The Disciplinary Committee unanimously cleared him of abscondment from duty and found him guilty of wrongful mileage claim. In any case the Disciplinary Policy does not provide for outright

dismissal. It provides for the option of a warning and or/caution, since this was not under the category of grave offences.

He relied on Clause 11 of the Disciplinary Policy provides for the option of warning, as follows;

> ***"Warnings will have a period as may be specified in the said letters or otherwise, but any warning given to the employee shall form part of his official record and personal and filed and may be used for future reference."***

Although policy provided for two types of warnings, formal verbal warning and months and first written warning of 12 months, none of these warnings was given to the plaintiff, yet there was no evidence that the plaintiff had been given an earlier warning as per the policy.

Counsel concluded that the manner the plaintiff was dismissed without being given opportunity to prepare his appeal tantamounted to wrongful dismissal. He relied on ***Bank of Uganda Vs Betty Tinkamanyire Supreme Court Civil Appeal No. 12 of 2007*** to state that depending on the circumstances, an employee who is unfairly or unlawfully dismissed should be compensated adequately in accordance with the law. In that case the respondent was awarded Shs. 100million as aggravated damages.

He also relied on ***Omunyokol Akol Vs Attorney General Court of Appeal Civil Appeal No. 071 of 2010,*** the court found that the

appellant who was employed on permanent and pensionable terms, with good conduct, could have left public service on reaching the retirement age of 60 years, and awarded him Shs. 180,000,000= as general damages, exemplary damages for loss of employment and unlawful dismissal.

Counsel submitted that because the plaintiff was unlawfully dismissed without giving him an opportunity to be heard contrary, to the principals of natural justice, he was also deprived of his opportunity to enjoy his employment until normal retirement in 2016. He prayed that the issue be resolved in his favour. In the circumstances, we pray that court resolves the above issue in favour of the plaintiff.

The defendant was of a different view. In his submissions, he clarified that the plaintiff was issued with two notices, the second of which specified the two allegations against him for which he was required to defend himself. Although the documents were not tendered by the plaintiff in his examination in chief, they were admitted in cross-examination of the plaintiff.

On the submission by the plaintiff that he got involved in a car accident but was not compensated, and although he had brought it to the attention of the defendant, they did not bother, Counsel for the plaintiff submitted that the plaintiff had not adduced any credible evidence of him having informed the defendants of the accident; his claim in his testimony of having been brought in an ambulance then appearing at work and being served with notice

is being incredible. He referred court to Exhibit P.5 a notification of the insurance scheme renewal, which made no reference to the accident. Nor had the plaintiff led any evidence that he complied with the direction's therein to go for a medical examination as required. Neither did he state in his testimony that he had raised the matter in his disciplinary hearing.

DW1 had testified in his witness statement that the plaintiff had not mentioned any accidents in his disciplinary hearing. The matter not having been disclosed to the defendant at all, was therefore never followed up.

Further that also staff using their personal vehicle are required to take out a comprehensive insurance policy to protect themselves against any eventualities.

DW1's above evidence was not challenged in cross-examination or at all. Counsel submitted that this was a failed attempt by the plaintiff to create an alleged hostile environment which was not there.

On the allegation by the plaintiff in his written statement that he had received all documents in relation to abscondment from duty, but none of these documents specifically addressed the issue of false mileage documents, Counsel referred court to Exhibit DE1(b) which was his fuel card detail between the 6th – 9th September showing that he had drawn fuel at Bukoto, Kashari, and their Exhibit DE (c) which is his mileage claim form for staff using their

own vehicles, to which DW1 had stated in his written testimony that the fuel cards were there as a control measure, to track the amounts of fuel taken and where taken.

DW1 stated that the policy known to all and the plaintiff had knowledge of its working; and which the disciplinary hearing established he had violated it by seeking mileage payment for the journey he did not make; the reason he was terminated.

On the plaintiff's allegation that when he served the defendant with the notice of intention to appeal he was instead handed a termination letter. Counsel referred court to timelines indicated in the agreed facts as follows:

> ***"4. The plaintiff was on November 6th, 2008 again summoned to attend a disciplinary hearing on November 10th, 2008.***
>
> ***5. The plaintiff's services were terminated on November 11th, 2008 pursuant to the disciplinary hearing.***
>
> ***6. The plaintiff appealed against the decision to terminate his employment on November 13th, 2008."***

The defendant could not and did not serve the plaintiff with the letter of termination after receipt of his notice of intention to appeal. (Emphasis mine). For further clarities sake we invite court to consider Exhibit P.6 which is the letter of termination received and signed for on November 12th 2008 at 4.30 p.m. by the plaintiff, the plaintiff's notice of intention to appeal dated

November 12th 2008 but received by the defendant on November 13th, 2008.

Counsel further submitted that even logically speaking, an appeal is meant to be lodged against a decision that has been made.

On the plaintiff's submission that under the disciplinary code it was the duty of the Human Resource Manager to give the disciplinary committee proceedings to an intended appellant before the appeal, Counsel referred to Exhibit P.9 Clause 10.1 and 10.2 (supra), and also to the testimony of DW1 about the request for the transcribed proceedings which was to the effect that he had prepared the requisite file and handed it over to the management for the appeal process. This was in line with the procedure as provided for in Clause 10. While DW1 admitted that he personally did not hand the record over to the plaintiff, he actually prepared the record for the appeal committee as provided for under the disciplinary policy. Counsel stated further that the documents used in disciplinary committee making a finding that the plaintiff was guilty of wrongful mileage claim were all in the possession of the plaintiff. The plaintiff's argument that Clause 7 of Exh. P.9 was applicable to the appeal process was not true, as this particular clause is in respect of the disciplinary hearing and it was duly complied with.

On the plaintiff's contention that he was accused and charged with offences that are interlinked, and that the disciplinary policy does not provide for outright dismissal, but provides for an option

of warning and/or caution, since this was not under the category of grave offences, Counsel referred court to paragraph 2 of the dismissal letter which stated that the plaintiff had been found guilty of wrongful mileage claims which was a direct violation and breach of the company's code of conduct.

Counsel further referred court to Exhibit P.9 at page 13 – 15 of the Disciplinary Policy at page 14 which provides for disciplinary offences of theft/fraud. It provides:

> ***"Any fraud or attempted fraud including conspiracy, to defraud company customers, employees, forging receipts, medical certificates, academic transcripts for purposes of dodging authentic documentation to benefit as an individual/short change procedure."***_

Counsel submitted that the action of terminating the employment of the plaintiff was properly carried out and provided for in accordance with disciplinary policy and no warning was required as is submitted by the plaintiff having been found to have been involved in fraudulent activities by making wrongful declarations in his claim for fuel. Further, the plaintiff glossed over the fact that he had requested for the documents subject of the claim and made a response to it. (See Exhibit DE (a) – Exh. DE(e)). Counsel also relied on ***Charles Twagira Vs Uganda Criminal Application No. 3 of 2003*** for the proposition that a fair hearing under Article 28, meant that a party is afforded the opportunity to, inter alia, hear the witnesses of the other side testify openly; and he should if he

choose, challenge those witnesses by way of cross-examination; that he should be given the opportunity to give all his evidence in his defense; that he should, if he so wishes, call witnesses to support his case.

Further still, Counsel referred to the evidence of DW1 to the effect that the plaintiff was duly notified of the disciplinary hearing; attached to the notice were the documents that were requested by the plaintiff in order for him to respond to, to wit, his fuel card drawing records (fuel amount, date, fuel place where fuel is drawn), communication complaints from the Zonal Sales Manager and the franchise complaining of plaintiff absence in his territory to address complaints with customers and mileage claim form showing dates when plaintiff travelled to different places within his area of operation, the time and mileage covered which he later claims for mileage covered during the course of his work on official company duty to be reimbursed; that the plaintiff made a written response to the allegations in the said notice to attend the disciplinary hearing in which he denied the allegations raised in the notice and duly attended the disciplinary meeting held on November 10th, 2008.

DW1 testified in cross-examination that the plaintiff's written response was in respect of the 2nd notice of hearing. Exhibit P.3,

the notice of hearing, also provided for the rights of the employee attending the disciplinary hearing.

On the plaintiff's testimony that he did not complete the appeal hearing because he raised objections, Counsel invited court to consider this testimony in line with the plaintiff's previous conduct in handling the matters with his employer. No evidence of what had happened at the appeal was adduced by the plaintiff.

Counsel further submitted that the cases relied on by the plaintiff, that is to say, ***Bank of Uganda Vs Betty Tinkamanyire and Omunyokol Akol Vs Attorney General*** (Supra) as the basis for his claim of wrongful dismissal, were distinguishable, in that in both cases the plaintiffs' (former employees) services were terminated without hearings or at all. In the matter before court the plaintiff was duly given the opportunity to defend himself against the allegations that had been leveled against him. Counsel also relied on the decision in ***Gachigi Vs Kamau [2003] EA 69 at 72,*** the Court of Appeal of Kenya to state that it was the duty of the trial court to take note of the demeanor of the witness before it, as it is evaluating the evidence before it. He concluded that the plaintiff's services were lawfully terminated.

I have considered the submissions of Counsel on either side. I note that although in the plaint the plaintiff had made several claims, some were not followed through during submissions. Counsel for the plaintiff, for example, informed court during submissions that the claim for terminal benefits had been abandoned. And although in the plaint mention was made of an accident claim which was allegedly not settled by the defendant. I see that in the prayers made at the end of the plaint, no mention of judgment for such claim is made. Apart from the claim for special damages, which appears to have been wholly abandoned, there is a prayer for general damages following wrongful dismissal, interest and costs.

I shall therefore restrict myself to what was prayed for of this court, that is to say, general damages for wrongful dismissal, starting of course with determining whether or not there was wrongful dismissal.

It is not in dispute that the plaintiff was summoned twice to attend disciplinary meetings but it is clear from the defence of the plaintiff (Exh. P.4) that the notice to which he was responding was the one dated 6/11/2008 which had two charges of alleged misconduct, being absence from his duty station and wrongful mileage claims. The meeting was held on 10/11/2008 (D.Ex.1.A-E). In his testimony, the plaintiff also confirmed that;

> ***I came for the hearing and requested my line manager, David Nsiyona, to avail me with more details. I was not given the***

details requested for. I refused to write a defence until details of the allegations were availed to me. Later I was given details of absconding from duty and wrongful mileage claim. The second hearing was scheduled for 27th October 2008 and I filed my written defence."

The actual dates on which the meetings took place were confirmed in the agreed facts which state as follows:

"3. The plaintiff attended a disciplinary hearing on 27th October and requested for more time to respond.

4. The plaintiff was on November 6th, 2008 again summoned to attend a disciplinary hearing on November 10th, 2008."

Apparently the plaintiff was terminated on the ground of wrongful mileage claims and cleared of the other allegation. The plaintiff complained that the committee did not consider his explanations, even when there was no formal mileage policy; he was not given the option of a warning, and the two offences he was charged with were interrelated so if he was cleared for one he should not have been found guilty of the other.

I note that as regards the hearing of the disciplinary committee, the principles of natural justice were adhered to as the plaintiff was summoned, informed of the allegations against him, given details he sought for and time to put in his defence. He put in his written defence and also attended a disciplinary hearing. In my view the above was enough to satisfy the requirements of natural justice. The plaintiff did not allege that he was prevented from

asking questions at the hearing, or prevented from bringing in any witnesses of his choice to assist him in his defence. If I was to go any further than that by questing why the committee reached the decision that they did, I would be second guessing the decision of the committee and taking over their role as the disciplinary committee. Warnings could be provided for, but as indicated by the defendant in their submission, some offences like those related to fraud draw a punishment of termination without the option for a warning. In any case even if an employee who had a clean record, may be found guilty of misconduct which justifies dismissal despite the past clean record of the employee.

The plaintiff also complained that he was handed a termination letter yet the defendant knew he was intending to appeal. But indeed, the appeal would only be based on the decision of the committee as contained in the termination letter.

The plaintiff further complained that he did not adequately prepare for the appeal because although he had asked for the proceedings of the disciplinary committee, none was availed him. I find that the defendant, relying on the same Clause 10 of the Disciplinary Policy of the defendant, sought to show that there was no requirement for the Human Resource Manager to hand over the proceedings to the employee who was the subject of the appeal. This policy may indeed not contain a requirement that the proceedings of the disciplinary committee be availed to an employee who intended to appeal. This does not make it a right

policy. And in my view, the refusal by the defendant to avail the plaintiff with the proceedings of the disciplinary committee negatively impacted on the appeal of the plaintiff. The plaintiff stated in his submissions that his preparations were inadequate because he did not get the proceedings.

The defendant states in the submissions that the documents used in the disciplinary committee making a finding that the plaintiff was guilty of wrongful mileage claim were all in the possession of the plaintiff. This appears to be the reason why the plaintiff's request for the proceedings was not responded to. But clearly the proceedings contain more than just the documents that had been availed to the plaintiff for the disciplinary hearing. For example, there are questions put to the plaintiff and answers thereto; plus the evaluation by the committee of all that has been answered by the plaintiff. These and other recordings of what transpired are contained in the proceedings/minutes of the disciplinary committee hearing. The plaintiff was denied this, yet clearly the appeals committee got everything before them.

I find that here was a denial of natural justice by the defendant, when they so denied the plaintiff. In fact it does matter that the appeals committee would have arrived at the same decision, if the plaintiff had been availed the information he sought. Further there is no indication that there was a decision of the appeal committee, as confirmed by the Chief Executive Officer of the defendant.

I therefore find that although the earlier part of the disciplinary proceedings was satisfactory as far as principles of natural justice are concerned, the appeal process was flawed as indicated. For that reason I shall answer the first issue in the affirmative.

Issue 2: Remedies available to the plaintiff, if any;

The plaintiff claimed for general damages for wrongful dismissal. He relied on ***Bank of Uganda Vs Betty Tinkamanyire*** (supra) where the plaintiff was awarded Shs. 100million as general and exemplary damages for wrongful dismissal; and ***Omunyokol Akol Vs Attorney General (supra)*** where the plaintiff was awarded Shs. 200million as general and exemplary damages for wrongful dismissal; and submitted that the plaintiff in this case deserved Shs. 200million as general and exemplary damages, for wrongful dismissal. He also claimed for interest at 20% per annum from date of judgment, and costs of the suit.

In reply the defendant relied on ***Stanbic Bank Vs Kiyemba Mutale SCCA No. 12 of 2007*** for the proposition that the award of general damages should take into account a person's status, the manner of termination and the way he was handled by the appellant (defendant in this case). Counsel submitted that unlike in the cases cited by the plaintiff where the plaintiff had not been given a hearing at all, in the matter before court, there was clear evidence that the plaintiff was duly notified of allegations against him and given an opportunity to question the witnesses and call his own evidence. Counsel suggested a sum of Shs. 2,000,000=

as adequate compensation to the plaintiff in the “unlikely event” that court finds that there was wrongful dismissal.

I have taken into account the submissions above and it is my view that the defendant needs to fine tune their disciplinary procedure to ensure that natural justice is observed at all levels; and that the employee who is subject of disciplinary proceedings is kept informed of the progress and outcome of the processes at all levels. I already found that the defendant failed to fulfill its obligations to ensure that the plaintiff was kept at per with the appeals board, in as far as getting information to prepare himself was concerned. It is not enough for the Human Resource Manager to disclaim responsibility for availing the required documentation/transcripts and just leave it at that, while feeding only one side.

I find that the plaintiff was unfairly treated, and that a sum of Shs. 30,000,000= would be adequate compensation to him by way of general and aggravated damages.

In conclusion, I find that the plaintiff’s claim has merit and award him Shs. 30million as stated, with interest at court rate from the date of judgment till payment in full. Costs of the suit will go the plaintiff.

It is so ordered.

Elizabeth Musoke

JUDGE

29/08/2014