

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]
CIVIL SUIT NO 161 OF 2010**

FRANCIS OYET OJERA:::PLAINTIFF

VERSUS

UGANDA TELECOM LIMITED:::DEFENDANT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff brought this action against the defendant for wrongful dismissal, and claimed special, general and aggravated damages arising from such dismissal.

The facts as agreed by the parties are as follows:

On the 13th of September 1999, the Plaintiff was appointed by the Defendant as an accountant with effect from the 20th of September 1999 on permanent terms. Between 1999 and 2009, the Plaintiff worked for the Defendant and was promoted to various managerial positions within the Defendant's organizational structure.

On the 24th of August 2009, the Plaintiff was suspended by the Defendant pending investigations into alleged complaints by the Defendant's customers '*regarding their statements*'. Subsequently, on the 1st and 2nd of October, 2009, the Plaintiff was arraigned before the Defendant's disciplinary committee on the allegations that he 'instructed Nsitta to update Sudan Relief Rehabilitation Commission with an old Electronic fund Transfer dated 25/9/2007 worth Shs. 11,736,721/=.

The Plaintiff was eventually dismissed by the Defendant on the 14th of October 2009 on grounds that he did not follow the established procedures for handling Electronic Funds Transfers, raising credit notes, and authorizing waivers, all of which caused financial loss to the Defendant. The Defendant also advertised the Plaintiff's dismissal in the Red Pepper Newspaper dated 9th December 2009, the New Vision and the Observer.

The following issues were agreed;

- 1) Whether the Defendant's dismissal of the Plaintiff was wrongful and/or unlawful.
- 2) Remedies available to the Parties.
- 3) Costs.

Issue 1: Whether the Defendant's dismissal of the Plaintiff was wrongful and/or unlawful;

The plaintiff's Counsel argued this issue in two folds:

- i) Plaintiff's dismissal was without a fair hearing and
- ii) Was without justification.

The Plaintiff's dismissal was without a fair hearing;

The plaintiff sought to prove in the submissions that:

- i) The Defendant's disciplinary committee which tried the Plaintiff was improperly constituted.
- ii) The Plaintiff was not informed of the charges preferred against him prior to the disciplinary hearing to enable him prepare and present his defence to the same, and

iii) The Plaintiff was not given an opportunity to hear the testimonies of his accusers and specifically answer to the same. The sum totals of which renders his hearing unfair and illegal.

a) **Improperly constituted disciplinary committee;**

The plaintiff sought to rely on Clause 20.6 of the Human Resource Policy (Exhibit D1) which provided:

“The supervisor shall review the dossier and decide if there is a case to be heard whereupon he/she shall refer the case to the Hearing Officer if there is to be a hearing.

The Hearing officer who shall be the supervisor’s immediate manager shall review the case, calling for all relevant facts. When the Hearing Officer is satisfied that he/she has all the details necessary to make a decision, a date and time for the hearing shall be set and the employee advised’.

Counsel for the plaintiff submitted that according to DW1’s testimony in cross-examination, the Plaintiff’s immediate supervisor was James Wanjugu, and that **Abdulbaset** was James Wanjugu’s immediate supervisor. The “Hearing Officer” of the Plaintiff’s case, therefore, ought to have been **Abdulbaset**. Further, DW1 could not explain to Court why herself, Donald Nyakairu, James Wanjugu, Jackie Balungi, ZephrKibenge, Martin Mugisha who were not the ‘Hearing Officer’ envisaged in clause 20.6 of the Defendant’s Human Resource Policy took on the said role.

Counsel relied on *Batabare James Vs Makerere University Business School* for the proposition that the inclusion of ineligible members on the tribunal vitiated its findings, recommendations and decisions, rendering them to be null and void and of no effect. He concluded that the inclusion of DW1, Donald Nyakairu,

James Wanjugu, Jackie Balungi, Zephr Kibenge and Martin Mugisha on the disciplinary committee vitiated its findings and decision.

Plaintiff not informed of charges well in time

It was the plaintiff's further case under Paragraph 10 of his witness statement that he was not informed of the charges preferred against him prior to the disciplinary hearing to enable him prepare and present his defence to the same, contrary to paragraph 4 and 5 of Clause 20.6 of the defendant's Human Resource Policy which states:

“The immediate supervisor shall complete a Disciplinary Form attaching full details of the evidence to support the allegations. This is designed to inform the employee (accused), in writing, of the allegations leveled against him or her.

The employee shall respond to the alleged misconduct in writing, attaching full reasons in support of the response within 24 hours.”

The plaintiff complained further in his statement (paragraph 10) on the 30th of September 2009, he received a call asking him to appear before a disciplinary committee at Rwenzori Courts on 1st October 2009. Counsel submitted that DW1 had corroborated this evidence that when the findings of the audit report allegedly linking him to misconduct were communicated to him, the plaintiff was never served with a Disciplinary Form attaching full details of the evidence to support the allegations against him to enable him exercise the right to prepare a written defence to the charges leveled against him. The plaintiff referred to the disciplinary hearing as trial by ambush. It is further submitted that on the 2nd day of the hearing, fresh allegations were introduced. Counsel relied on *Soon Yeon Kong Kim Vs Attorney General Constitutional Reference No. 6 of 2007*, where it was held;

“Our Article 28(1) and (3) that guarantees the right to a fair hearing must contain in it the right to pre-trial disclosure of material statements and exhibits. This is the only to ensure equality between contestants in litigation.”

He further relied on the Kenyan case of *Juma and others Vs Attorney General of Kenya (2003)2 EA 461* to state that:

“In an open and democratic society based on freedom and equality with the rule of law as its ultimate defender such as ours, the package constituting the right to a fair trial contains in it the right to pre-trial disclosure of material statements and exhibits. In an open and democratic society of our type courts cannot give approval to trial by ambush.....”

Counsel concluded that by failing to disclose to the Plaintiff the Disciplinary Form attaching full details of the evidence to support the allegations against him, the Defendant breached his right to a fair hearing enshrined in Article 28(1) of the Constitution and paragraph 4 of clause 20.6 of the Defendant’s Human Resource Policy thus rendering his disciplinary hearing and subsequent dismissal a nullity.

b) The Plaintiff was not given an opportunity to hear the testimonies of his accusers and specifically answer to the same;

It was the plaintiff’s case that on the 2nd day of October 2009, from 2.00 pm to 5.00 pm, Nsita Harriet and Joshua Egimu appeared as witnesses in his disciplinary hearing and gave testimony to the disciplinary committee in his absence. Reliance was placed on *Nestor Machumbi Gasasira Vs Inspector General of Government & Attorney General HCT-00-CV-0062 of 2009*, for the proposition that fair hearing includes the right to appear and present one’s case, that is, give oral testimony in criminal trials and the right to examine adversary witnesses in order to check their credibility whether it be in a criminal or civil matter.

Counsel concluded that right to examine adversary witnesses was, therefore, breached, and the disciplinary hearing should be declared illegal.

Plaintiff's trial was without justification

It was further the plaintiff's case that his dismissal was without justification.

The first reason advanced by the Defendant for his dismissal as per the dismissal letter (Exhibit P7) was that on the 12th of January 2009, through Harriet Nsiita, the Plaintiff had authorized the crediting of the Sudan Relief Rehabilitation Commission Account with Shs. 11,736,721/=.

The plaintiff denied this under paragraph 7 of his witness statement, and that the said Harriet Nsiita had denied having received instructions from the plaintiff in that regard.

The plaintiff's Counsel submitted that the Plaintiff's evidence above was never rebutted by the Defendant and should be taken as truthful. Further still, it is the plaintiff's case that:

- 1) The plaintiff had the opportunities to produce Harriet Nsiita but was never produced to give evidence in support of the first reason given for dismissal. This is inspite of the fact that the defendant was given the opportunity and, further, that she still worked for the defendant.
- 2) The evidence of DW1 and DW2 on whether the plaintiff instructed Nsiita to credit the said account was at best hearsay evidence and inadmissible to contradict or rebut the plaintiff's evidence.
- 3) The plaintiff's further contention is that Harriet Nsiita who credited the Sudan Relief Rehabilitation Commission account with Shs. 11,736,721=, did not undergo any disciplinary measures, even when DW2 testified that she was the action officer in this matter.

Counsel contended that the above was proof that the first reason was without justification.

The second reason advanced for the Plaintiff's dismissal was that on the 10th of June 2009, the Plaintiff received correspondence from Naome Agaba requesting authorization for the payment of Sudan Relief Rehabilitation Commission in the sum of Shs. 14,450,000/= to be entered into the system on the premises of a forged manual receipt No. 340262 and that he honoured the request.

The correspondence from Naome Agaba referred to is an email exhibited as P10 dated 10th June 2009. It is the plaintiff's case that what was sought from him was advice and according to paragraph 17 of his sworn statement, he had advised Naome Agaba on the course of action to take.

The third reason for the Plaintiff's dismissal was that he arbitrated a case between Deogratias Biwaga and Caroline Biroli where the said Deogratias Biwaga, appropriated the Defendant's money to her own use and that the Plaintiff only requested the said Deogratias Biwaga to refund the appropriated money and failed to inform the Defendant's management of the fraudulent activities of Deogratias Biwaga.

Counsel referred court to paragraph 18 of the plaintiff's sworn statement, where the plaintiff testified that the email communication that was copied to him from Naome Agaba was in respect of a receipting error that needed to be corrected and he did give advice on how such an error could be corrected without disrupting services on the internet link for the customer. Further, that the defendant led no evidence to prove that Deogratias Biwaga was involved in fraudulent activities with the knowledge of the Plaintiff.

Counsel submitted further that the audit report as presented to court (Exhibit P6) was incomplete as it lacked the statements of Harriet Nsita and that of the plaintiff. Without the said working papers and statements which are in the possession of the Defendant but have been deliberately concealed, the Court cannot rely on the said audit report to sanction the findings indicated therein. Further, although terms of reference mentioned several officers as having been involved in given transactions, the audit report included only the transaction implicating the plaintiff. Further still, out of the 6 objectives, there was only one finding, which is the one implicating the plaintiff. And lastly, page 3 of Exhibit P6 indicates it was an interim audit report, yet DW2 testified that no further investigations were ever carried out.

Counsel concluded that the above salient points led to the conclusion that the audit report was simply designed by the defendant to implicate the plaintiff at all costs so as to have him dismissed. He invited court to find that the defendant's dismissal of the plaintiff was without justification and wrongful in the circumstances.

The defendant was of a different view.

It is the defendant's case that an employer has a right to terminate the services of an employee as long as that is done in accordance with the law, which is the Employment Act 2006. In this respect, Counsel relied on Section 66 of the Employment Act which requires the employer to notify the employee of the reasons for the termination and to accord him a hearing through explaining to the employee, in a language the employee may be reasonably or expected to understand, the reason for which the employer is considering dismissal; and the employee is to be allowed to explain himself. Further, that the employer is also required to hear and consider any representation which the employee on grounds of misconduct or poor performance may make. The employee is also

to be given reasonable time to prepare the representation. Counsel submitted that all the above were complied with.

Fair Hearing;

On the constitution of the Disciplinary Committee, the defendant's Counsel pointed out that the impugned Disciplinary Committee consisted of the Chief Legal and Corporate Affairs Officer, Mr. Nyakairu Donald; the Chief Financial Officer, Mr. Wanjogu James, the Chief Human Resources and Administration Officer, Ms. Sarah Kiyangi, the Chief Marketing Officer; the Manager Security and Investigations, Mr. Mugisha Martin, the Head of Audit and Risk Department, Mr. Kinyera Julius; a Human Resources Officer, Mr. Tanzani Zephr and the Customer Care Manager, Ms. Balungi Jacky.

Counsel submitted that the plaintiff in his plaint did not plead the allegation; that the Committee was not properly constituted, hence reliance on this contention would amount to departure from his pleadings. He relied on *Civil Appeal No. 33 of 1992, Interfreight Forwarders (U) Ltd Vs East African Development Bank* for the proposition that a party will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what is alleged in his pleadings except by way of amendment of pleadings. Further, the plaintiff did not challenge the constitution of the committee at the hearing, yet he clearly had the opportunity to do so. Since according to his testimony, the plaintiff was willing to accept the decision of the committee if it decided in his favour, the complaint was an afterthought because the decision did not turn out in his favour.

Finally, that the constitution of the committee did not cause any prejudice to the plaintiff, as it comprised senior and eminent officers of the defendant. In any case, even if the disciplinary committee were to be considered not properly constituted as alleged by the plaintiff, the decision of the committee was ratified

by Mr. Abdulbasset whom the plaintiff contends was the proper hearing officer by signing the plaintiff's dismissal letter. Further still, the Employment Act prevailed over the Human Resource Policy of the Defendant, and where the provisions of the Employment Act have been complied with, the termination should not be considered unfair or unlawful.

On the contention that the plaintiff was not informed of the charges preferred against him prior to the disciplinary hearing to enable him prepare and present his defence, Counsel submitted that this too was not pleaded and hence could not be raised at submission. (See *Interfreight case (supra)*). And since he actually pleaded the particulars of the misconduct in his plaint, he had demonstrated that he knew of the charges leveled against him, apart from the fresh allegations raised at the day of the hearing.

It was the defendant's further contention that through DW2 plaintiff had been interviewed during the Risk Assessment and Revenue Assurance exercise which had resulted into the Audit Report (Exhibit P6) which revealed that the plaintiff had instructed one Nsita to update a customer account with an old Electronic Funds Transfer (EFT) which had been paid by another customer, UNDP; and that plaintiff, himself had on cross-examination admitted being informed of pending investigations and that he became aware of the EFT issue earlier than the audit report. The letter of suspension had also articulated the misconduct. And from the date of suspension till the disciplinary hearing and even at the Disciplinary hearing itself, the plaintiff did not complain of not being informed of the charges levied against him.

On the contention that the plaintiff was not given an opportunity to hear the testimony of his accusers, in particular Harriet Nsita and Joshua Ejimu, Counsel replied that these were not the plaintiff's accusers. Rather, the Audit and Risk

Management Department headed by Mr. Julius Kinyera that conducted the Risk Assessment Revenue Assurance exercise and unearthed the misdeeds the subject of the plaintiff's dismissal were the plaintiff's accusers. Julius Kinyera was present as a member of the Disciplinary Committee. The plaintiff therefore had an opportunity to put questions to his accusers and seek any clarifications if at all, which he did not do. Counsel submitted that *Nesta Machumbi Gasasira Vs Inspector General of Government and Attorney General* relied on by the plaintiff did not apply to this case, in that it was not a labour related case.

The plaintiff's dismissal was without justification;

On the first reason for dismissal, Counsel submitted that the allegation that Harriet Nsita denied having received instructions from the plaintiff to credit the Sudan Relief Rehabilitation Commission (SRRC) account with Shs. 11,736,721=, was hearsay. The evidence that the SRRC account was wrongly credited was not refuted or rebutted by the plaintiff. In his letter (Exhibit PE8) the plaintiff admits that there were fraudulent activities within his unit, even though he alleges that the staff members who admitted knowledge and participation in fraudulent activities were being defended by Human Resource Department. As the Revenue Operations Manager, the plaintiff took personal responsibility for wrongs and misdeeds committed in his section. The defendant's decision to dismiss the plaintiff was therefore, reasonable in the circumstances and thus justified. Nsita was subjected to a disciplinary hearing as testified by DW1 and DW2. Further, that in employment matters the proof of misconduct of the employee by the employer is on a balance of probabilities; where the employer has reasonable grounds to believe that the employee had misconducted himself and the employee does not give a satisfactory defence during the disciplinary hearing, the employer is justified in exercising his right to dismiss the employee. Counsel asked court to find that, on a balance of probabilities, the plaintiff's dismissal was reasonable in the circumstances and thus justified.

On the second reason for dismissal, the defendant submitted that the evidence that this was done and that it was wrong was not refuted by the plaintiff, who directed that the impugned account be credited with the suspicious payments without insisting that the same be verified first. As head of the section, the plaintiff was personally responsible and liable for the said wrongs and misdeeds.

Regarding the 3rd reason for dismissal, Counsel submitted that the plaintiff had been given an opportunity in accordance with Section 66 of the Employment Act, 2006 to present his defence and Disciplinary Committee considered his defence and was not satisfied with it. On this and the other grounds in the plaintiff's dismissal letter, the Disciplinary Committee decided to dismiss him. His dismissal was reasonable in the circumstances and therefore justified.

The Audit Report (Exhibit PE6)

- **Incomplete Audit Report**

The plaintiff did not request for the working papers otherwise the defendant would have availed them. The plaintiff could seek to rely on the substance of the report and later on turn around to state that it is incomplete and challenge its authenticity. The plaintiff's submissions in this regard are mere afterthoughts.

On the contention that the terms of reference included more people than the report did, Counsel replied that the title to the report reads "*Fraud Investigative Audit Report Highlighting Oyet Francis (PF 29845) Involvement.*" DW2 had testified that there were other such reports issued highlighting the involvement of other staff in the fraud, who were also subjected to disciplinary hearings and most of them dismissed. The plaintiff was therefore, not being framed or victimized.

Further still, the report was called 'Interim' which meant pending the conclusion of other investigations and reports in the entire exercise involving other EFTs and other staff. The Audit Report in issue was conclusive and final as to the plaintiff's involvement.

It was the defendant's submission also that the suggestion that the plaintiff was being witch-hunted was mere conjecture and not supported by evidence. He asked court to find that the plaintiff's summary dismissal by the defendant was reasonable in the circumstances and thus justified.

I have considered the submissions of learned Counsel from either side, and the law and authorities relied upon. The plaintiff who had worked with the defendant since 13/9/1999 was suspended from work on 24/8/2009. The letter suspending him (Exhibit P.5) read as follows:

**Mr. Francis Oyet
Revenue Operations Manager
Finance Function**

Dear Francis,

Re: SUSPENSION FROM DUTY

We refer to the several complaints received from our customers regarding their statements. The affected customers claim to have made cash payments to the Revenue and Collections section. Furthermore their statements indicate that their payments were made by cheque or EFT and the amounts credited are different.

These actions are inconsistent with our operations and are suspicious in nature. In accordance with the HR Policy Section 20.5; it has been decided that you are suspended from work with immediate effect for a period of 4 (Four) weeks as investigations into this matter are carried out.

Please note that during this period you should be on call on your official mobile number in case you are required to give more information regarding this matter and you will be entitled to half pay.

Yours faithfully

**....sign.....
Sarah Kiyingi-Kaweesa
CHIEF HUMAN RESOOURCES
& ADMINISTRATION OFFICER**

**...sign.....
Eng. Abdulbaset Elazzabi
MANAGING DIRECTOR**

- c.c. Chief Legal Counsel & Corporate Affairs Officer**
- c.c. Chief Finance Officer**
- c.c. Head of Audit & Risk Management**
- c.c. Security & Investigations Manager**
- c.c. Pay & Benefits Consultant**
- c.c. Personal File”**

On 14/19/2009, the plaintiff was dismissed vide the following letter, (Exhibit P.7).

“Our Ref: PF 29845

14th October 2009

**Mr. Francis Oyet
Revenue Operations Manager
Finance Function**

Dear Francis,

Re: DISMISSAL

We refer to the several complaints received from our customers regarding their account statements.

Investigations into this matter indicate that on 12th January 2009 you authorized the crediting of the Sudan Relief Rehabilitation Commission (SRCC) account with Ug. Shs. 11,735,721= (Shillings Eleven Million Seven Hundred Thirty Six Thousand Seven Hundred Twenty One Only). The instructions were on a schedule that was given to Ms. Harriet Nsita by Joshua Egimu. When they cross-checked the Electronic Funds Transfer (EFT) used, it had been sent by UNDP on 25th September 2007.

On 10th June 2009 you received a correspondence from Ms. Naome Agaba requesting you to authorize the payment for Sudan Relief Rehabilitation Commission to be entered into the system. In her explanation she claimed that the payment was by Electronic Funds Transfer (EFT) but the customer’s account had taken long to be updated. You were also informed that the customer payment of Ug. Shs. 14,450,000= (Shillings Fourteen Million Four Hundred Fifty Thousand only) was acknowledged through a manual receipt number 340262. You went ahead and honoured the request, however, the manual receipt was later found to be forged.

It was also established that you arbitrated in a case where Ms. Deogratias Biwaga had presented a cheque for China Nanjing Ltd for payment. She requested Ms. Christine Biroli to credit the account with half the amount and she took the balance for personal use. When told about what had happened you advised Ms. Deo Biwaga to refund the money but did not inform Management of such fraudulent actions.

In the subsequent disciplinary meetings held you admitted that you advised Ms. Naome Agaba to handover the documents for Sudan Relief Rehabilitation Commission to Ms. Norah Nambozo in order to credit the account and that you had advised Ms. Deo Biwaga to refund the money in your capacity as Revenue Operations Manager.

In view of the above and in accordance with HR Policy Section 20.4.4 under category “D”, it is evident that you failed in your supervisory role. You did not follow the established procedures for handing EFTs, raising credit notes and or

authorizing waivers. As a result your actions have caused the company financial loss. Management has therefore decided that you are dismissed with immediate effect with no benefits other than your savings in the pension fund.

Yours faithfully

***Donald Nyakairu
Ag. CHIEF HUMAN RESOURCES
& ADMINISTRATION OFFICER***

***Eng. Abdulbaset Ellassabi
MANAGING DIRECTOR***

***c.c. Chief Legal Counsel & Corporate Affairs Officer
c.c. Chief Finance Officer
c.c. Head of Audit and Risk Management
c.c. Security & Investigations Manager
c.c. Talent & Performance Management Consultant
c.c. Pay and Benefits Consultant
c.c. Personal File”***

It is not indispute that the plaintiff was summarily dismissed. Counsel for the defendant submitted that the dismissal was in order because the Audit Report had found that the applicant had participated in misconduct and causing financial loss to the 2nd respondent thus fundamentally breaking his obligations under his contract of service.

Under Employment Act 2006, the law on summary dismissal is as follows:

- i) Summary dismissal means a dismissal without notice or with less notice than the employee is entitled to under the contract or under the Act.
- ii) Summary dismissal is justified when an employee, by his conduct shows that he has fundamentally broken the contract of service. (See Section 69 of the Act).

The phrase fundamentally broken as used in Section 69 is not defined in the Act. However, under common law, which applies by reason of the provisions of the Judicature Act, the law on summary dismissal is, (like in ***Barclays Bank Vs***

Mubiru SCCA 1 of 1997) a dismissal without notice (and without a hearing) and it is reserved for serious misconduct.

There is no exhaustive list of the misconduct that justifies summary dismissal, but according to *Laws Vs London Chronicle [1959] 1 WLR 698* one isolated act of misconduct is sufficient to justify summary dismissal. The test is stated in the above case to be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.

Be the above as it may, it is important to note that the post 2006 Employment Act position is that there is a mandatory right to be heard now reserved by Section 66 of the Act for every form of dismissal, a right not available in summary dismissals previously (*Godfrey Mubiru Vs Barclays Bank (supra)*) otherwise, the rest of the common law meaning of summary dismissal as stated above was substantially left intact by the Act. This is course excludes only the probationary contracts (S. 67 of the Act).

Therefore, even if the plaintiff's conduct (or misconduct) was regarded as one that amounted to disregarding the essential conditions of the contract of service such as to be regarded as having fundamentally broken the contract of service and therefore justifying summary dismissal, the plaintiff had to be accorded the right to a hearing, and a fair one at that. The right to a hearing is guaranteed by the Constitution of the Republic of Uganda under Article 42 as follows:

“Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.”

Article 44 (c) also provides that the right to a fair hearing cannot be derogated from.

The question here is whether the applicant was accorded such a right to a fair hearing as required by the law.

Constitution of the Disciplinary Committee;

According to the defendant's submissions, the above committee was by Donald Nyakairu, James Wanjogu, Jackie Balungi, Sophy Kibega and Martin Mugisha, Tanzani Zephr, Kinyera Julius, and Sarah Kiyingi. The relevant excerpts of Clause 20.6 of the Human Resource Policy states:

“20.6. Disciplinary Procedure

When an employee breaches the terms and conditions of his/her employment or behaves in unacceptable way, a detailed investigation into the alleged misconduct shall be carried out and, if warranted, disciplinary action taken in accordance with procedure set out in the code.

In cases of serious misconduct or repeated minor misdemeanours, with the assistance of the Human Resources Relationship officer and, where necessary, the Company Secretary's office, the procedures detailed below shall apply:

The immediate supervisor shall complete a Disciplinary Form attaching full details of the evidence to support the allegations. This is designed to inform the employee (accused), in writing, of the allegations leveled against him/her.

The employee shall respond to the alleged misconduct in writing attaching full details in support of the response within 24 hours.

The supervisor shall review the 'dossier' and decide if there is a case to be heard where upon he/she shall refer the case to the Hearing Officer if there is to be a hearing.

The Hearing Officer who shall be the supervisor's immediate manager shall review the case, calling for all relevant facts. When the Hearing Officer is satisfied that he/she has all the details necessary to make a decision, a date and time for the hearing shall be set and the employee advised.

The employee shall be advised of his right to have a colleague in attendance as a witness.

The case must be heard within seven working days, if an employee has been duly notified of a hearing and is unable to attend on reasonable grounds, the matter shall be postponed. Should the employee fail to attend without good reason, the hearing shall be conducted in his/her absence.

Having examined all the facts, the Hearing Officer shall determine the disciplinary action to be taken during the hearing.

The Hearing Officer shall advise the employee of the disciplinary measures to be taken.

Where the hearing officer's decision is to recommend dismissal, the Managing Director shall be advised without delay (not later than three days) for approval, if no appeal is lodged.

On conclusion of the hearing, three copies of the disciplinary form shall be completed and signed for distribution as follows:

Copy to the employee concerned.

Copy to the individual's file, together with all other documentary evidence concerning the case and copy to the line manager."

According to the above, it appears the Disciplinary Committee should be composed of the "Hearing Officer" who in this case was stated to be Eng. Abdulbaset Ellassabi who eventually signed the dismissal letter. The defendant contended that the complaint that the Committee was not properly constituted was neither pleaded nor raised at the committee hearing. I have looked at the plaint. It is averred under paragraph 12 thereof "*the plaintiff shall aver and contend that in the circumstance, his dismissal by the defendant was without a fair hearing and unlawful*". I agree with the plaintiff's Counsel that this was enough statement of the material facts complained. The rest was to come under the evidence as it did in this case. It would be absurd if all the evidence is expected to be laid out in the plaint. I find that the complaint on the improper constitution of the committee squarely falls under the unfair and unlawful dismissal which was pleaded. The averment in the plaint fulfills the requirements of Order 6 rule 1 of the Civil Procedure Rules which states that "*Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be.*"

I further find the defendant's contention that the plaintiff did not contest the constitution of the committee at the hearing incapable of validating an improperly constituted committee, if at all that was the case, and I am yet to make a finding on that particular issue.

And further still, if it was to be found that the committee was improperly constituted the ratification by Eng. Abdulbaset Ellassabi would not do much to validate what was illegally done.

I now turn to the question whether as alleged by the plaintiff the Constitution of the committee was improper. I must say, I would find a disciplinary committee which is made up of one person, the Hearing Officer, a strange one. By its nature, a committee, disciplinary or otherwise, is meant to be composed of a number of officials of the company who are usually drawn from Management and Human Resource Department. If the Human Resource Policy of the defendant does not provide for such a committee as a disciplinary committee, and only envisages a one man disciplinary committee, I must say there is something not right. One person cannot constitute a committee. He has only one mind, yet matters of discipline at the level where the proceedings may result into dismissal, would require the meeting of several minds over such a far reaching decision. For this reason I would find that a disciplinary committee made of appropriate officials of management would be seen to render a more balanced decision than where a single soul sits and decides alone. I would therefore say, for purposes of fair hearing, a committee of several officials would constitute a fair hearing process than a one-man committee.

Having found as I have above, I will turn to the composition of this particular committee. Was it fairly constituted? I noted that one of the plaintiff's complaints was that the dismissal was unfair in that during the hearing of the disciplinary committee, he was not given the opportunity to listen to his

accusers, as they testified before the committee. That is to say, Ms. Harriet Nsita and Mr. Joshua Egimu. In their reply, the defendant contended that those two were not the accusers. The defendant stated: on page 4 of their submissions:

“We invite court to note and we submit that Harriet Nsita and Joshua Egimu were not the plaintiff’s accusers. The Audit and Risk Management Department headed by Mr. Julius Kinyera that conducted the Risk Assessment Revenue Assurance exercise and unearthed the misdeeds the subject of the plaintiff’s dismissal were the plaintiff’s accusers. At the disciplinary hearing, the Head of the Audit and Risk Management Department, Mr. Julius Kinyera was present as a member of the disciplinary committee. The plaintiff therefore had an opportunity to put questions to his accusers and seek any clarifications if at all, which he did not do.”

That is where I find a problem with the composition of the committee. It compromised the accuser of the plaintiff as a member of the committee. Indeed on page 2 of their submissions, the defendant had listed the members of the committee as follows:

“Notable members of the committee were the Chief Legal and Corporate Affairs Officer, Mr. Nyakairu Donald; the Chief Financial Officer, Mr. Wanjogu James, the Chief Human Resources and Administration Officer, Ms. Sarah Kiyangi, the Chief Marketing Officer; the Manager Security and Investigations, Mr. Mugisha Martin, the Head of Audit and Risk Department, Mr. Kinyera Julius; a Human Resources Officer, Mr. Tanzani Zephr and the Customer Care Manager, Ms. Bangi Jacky.”

Since Mr. Kinyera was the accuser of the plaintiff, he ought not again have sit in judgment of the same plaintiff to influence the decision taken. His role should have stopped at laying before the committee the case against the plaintiff, and responding to questions from the committee or the plaintiff regarding his investigations. He should never have been made a member of the

committee which deliberates on the presentations of the accusers and the defence of the employee, to come to a decision whether to dismiss or not.

The court held in *Miscellaneous Cause 0045 of 2010 Rosemary Nalwadda Vs Uganda Aids Commission* as follows:

“Article 28 (1) of the Constitution provides that in the determination of civil rights and obligations, or any criminal charge, a person be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law (emphasis mine).

Dr. Kihumuro Apuuli had preferred charges against her. His presence on the committee was unnecessary. In Cooper Vs Wilson & Others [1937] 2 K. B. 309 the court observed that the presence of the Chief Constable, whose mind was made up in advance and who was in effect the respondent to the appeal, was fatal to the validity of Watch Committee’s decision. Scott L.J. could not have put it better when he said (at p.344).

“.....The risk that a respondent may influence the court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such possibility is sufficient to deprive the decision of judicial force, and to render it a nullity.”

The same Dr. Kihumuro, the Chairperson of the Committee, Ms. Annette Biryetesa; Dr. Jesse Kagimba and Ms. Abbie Hope Kyoya, participated in the Board decision that terminated the applicant’s services. Surely a person who previously chaired or participated in an investigation in which the aggrieved party was condemned, would obviously be perceived as biased in a hearing or trial of the same victim to justify the result of the investigation.”

I agree with the plaintiff’s Counsel in his submissions in rejoinder that Julius Kinyera’s appearance on the committee would obviously be perceived as biased and be sufficient to render its findings and decision a nullity in law.

I therefore find that the composition of the committee was improper for the above reasons. Hence the resultant decision of the committee cannot be said to have been free of bias.

Regarding the complaint that the plaintiff was not informed of the charges preferred against him prior to the disciplinary hearing to enable him prepare and present his defence to the same. The defendant did not controvert the above allegations which the plaintiff alleges contravened clause 20.6 of the Human Resource Policy. The defendant's contention is that the plaintiff did not plead that he was not given details of the charges against him that the plaintiff was made aware of the investigations for misconduct against him and the results thereof; and that his suspension letter articulated his misconduct. The contention of not pleading details of a claim has already been dealt with. This was a detail that would flow from the allegation of unfair and unlawful dismissal which was pleaded. I will not belabor the point further.

On the contention by the defendant that the plaintiff was made aware of the investigations and results, the plaintiff's Counsel in their submissions in rejoinder submitted that Exhibit P.6 had only one allegation that the plaintiff had instructed Harriet Nsita to credit the Sudan Relief Rehabilitation Commission account with an old EFT. The Audit Report could therefore, not have prepared the plaintiff for the fresh allegations that were leveled against him and formed basis for his dismissal.

I noted from the defendant's contention that the plaintiff had participated in the making of the Audit Report (Exhibit P6) since he was asked questions (interviewed) and he answered, and that this, therefore, meant that the misconduct had been drawn to his attention. The way I understand it is that the right to be heard reserved under the Act, and the (Constitution) is meant to be

accorded after the employer finds that there is conduct that may call for the dismissal of the employee.

The fact that the plaintiff was asked some questions during the audit did not constitute the right to be heard reserved under the Act. This was before the employer decided to subject the plaintiff to disciplinary procedures. It is not even contended that the plaintiff admitted liability when he was questioned during the process of the Audit. It is not disputed by the defendants that the audit report only had one allegation relating to the alleged instruction to credit the Sudan Relief Rehabilitation Commission account. But even if that was the only allegation dealt with by the committee, the plaintiff was entitled to be officially invited to the committee in writing. The letter would have to inform him of all the charges against him and give him sufficient time to respond; and sufficient time to appear before the committee; and also inform him of all his rights under the law and the Human Resource Policy. There was no communication spelling out the above, even in respect of the one allegation that was contained in the Audit Report. Failure to do this was a grave affront to the rules of natural justice regarding fair hearing. To compound matters, fresh allegations were introduced at the hearing itself. This was a grave miscarriage of justice, against the plaintiff.

Neither could the suspension letter have served as the charges against the plaintiff. The letter did not refer to any envisaged disciplinary proceedings. The contention by the defendant that this letter could have been basis for the plaintiff to know and prepare his defence is just a joke.

On the complaint that Harriet Nsita and Joshua Egimu testified against the plaintiff in his absence, which allegation was not denied apart from the fact that they were the accusers, this clearly went against principles of natural justice which require that the person charged and appearing before an administrative

committee shall be treated fairly, (Article 41 of the Constitution of the Republic of Uganda (supra)). I therefore find that the instant disciplinary hearing breached the rules of natural justice, in a substantive way.

Considering the above, I find that the plaintiff was dismissed without being afforded a fair hearing, and the irregularities were of such a grave nature as to vitiate the proceedings and its outcome.

I will now turn to the complaint by the plaintiff that his dismissal was without justification. The defendants gave three reasons for the dismissal of the plaintiff as detailed in the letter of dismissal (supra). However, I have already found that the irregularities were of such a grave nature that they vitiated the outcome of the proceedings on which they were based, I don't find it useful to engage in determining whether the dismissal was justified. It could not be justified when the plaintiff was not granted a fair hearing.

All in all, I find that the dismissal was wrongful for the given reasons.

Remedies

The plaintiff prayed for special damages as follows:

1) Special damages:

Staff Contribution Scheme

The plaintiff was on dismissal, paid Shs. 17,724,116= as his contribution to the above scheme. The defendants contribution to the scheme of Shs. 35,448,233= was not paid. (See Exhibit D3). The defendant did not pay allegedly because the plaintiff was dismissed from service for fraud, dishonesty and misconduct and according to Rule 11 (a) of the Schedule to the terms of the Staff Contributory Pension Scheme; he was not entitled to the amount contributed by the defendant.

I have found that the dismissal was wrongful because of reasons already stated. The plaintiff is, therefore, entitled to payment of the defendant's contribution to his Staff Retirement Benefit Scheme. If he had not been wrongfully dismissed he would have been entitled to the payment of Shs. 35,448,233=.

Salary arrears

The plaintiff is likewise entitled to the withheld half of his salary during the period when he was under suspension, that is to say, from August 24th, 2009 to 14th October 2009. Since his salary was Shs. 5,000,000= as per Exhibit P4, the half pay would amount to Shs. 2,500,000= x 3 months, amounting to a total of Shs. 7,500,000=.

Payment in lieu of accumulated leave

The plaintiff claims for payment in lieu of accumulated leave of 9 days which he states he had not taken by the time of his dismissal. It is surprising that coming from such a big company like the defendant, DW1 could not provide evidence to show whether or not the plaintiff had taken his said leave. The plaintiff relies on Exhibit P13 (a) to prove his claim. However, as pointed out by the defendant's Counsel, the handwritten note on P13 (a) was clear that the accumulated leave of 59 days had to be taken within the year 2008. There is no evidence of further carrying forward of leave days. Further, according to Clause 19.3 of Exhibit D.1, the Human Resource Policy relating to the Leave Policy, failure to use leave entitlement without any acceptable reason shall lead to forfeiture of the unused leave days. The plaintiff has not shown that any leave pending prior to 2009 was officially carried forward. However, I believe he was still entitled to the leave guaranteed in 2009 up to the time of dismissal.

Since the defendant has no evidence that the leave due in 2009 was taken, the plaintiff is entitled to payment (prorata) in lieu of leave for the period until his dismissal.

Payment in lieu of Notice

It is the plaintiff's case in paragraph 2 and 19 of his sworn statement, that he was employed by the defendant on the 20th day of September 1999 and dismissed on the 16th day of October 2009 after a period of service of over ten

years. It was submitted for the plaintiff that under Section 58 (3) (d) of the Employment Act 2006, the plaintiff would be entitled to notice period of three months from the defendant, and having failed to give the requisite notice to the plaintiff, the defendant ought to pay him in lieu of notice; given that his monthly salary was Shs. 5,000,000= he ought to be paid Shs. 15,000,000= in lieu of notice. I entirely agree, since the dismissal has been found to be wrongful.

General Damages

Counsel for plaintiff submitted that the plaintiff had a well-paying job with the defendant earning a monthly salary of Shs. 5,000,000= (see paragraph 2 of Exhibit P1 – letter of appointment). In his cross-examination, the plaintiff indicated that he is now 42 years and is without employment thus far. If he had not been wrongfully dismissed by the defendant he would have earned the said sum until he attained the retirement age of 55 years earning him approximately Shs. 1,080,000,000= (One Billion and Eighty Million only) as salary for 17 years from the date of his dismissal to his attainment of the age of 55 years; because of the defendant's actions the plaintiff will not be able to earn the said sum.

Counsel relied on *SCCA No. 12 of 2007, Bank of Uganda Vs Tinkasimire* to state that an employee was entitled to full compensation only in those cases where the period of service is fixed without provision for giving notice. In the instant case the plaintiff's period of service was fixed, and in his employment contract, there was no provision for termination which notice Counsel contended that he (the plaintiff) was entitled to full compensation until the attainment of the retirement age, and an award of Shs. 1,080,000,000= was suggested as appropriate.

On aggravated damages, it was the plaintiff's case in paragraph 23, 24, and 25 of sworn statement that threats were made to him by the Chief Financial Officer

of the defendant, which put him under a lot of stress and mental anguish. Further, his picture was advertised in the Red Pepper (Exhibit P9) in a derogatory manner as someone who no longer worked for the defendant insinuating that he was a mischievous character capable of making misrepresentations to the public about the defendant thus putting his reputation in bad light. Further, that plaintiff has been unable to get employment to date.

Counsel relied on *SCCA No. 12 of 2007, Bank of Uganda Vs Betty Tinkasimire* where seven year ago, the Supreme Court awarded a sum of Shs. 100,000,000= (One Hundred Million Only) as aggravated damages for conduct similar to the defendant's. Counsel proposed a sum of Shs. 200,000,000= as aggravated damages to deter the defendant from similar acts in the future. Counsel also prayed for costs.

The defendant did not agree that the plaintiff was entitled to general or aggravated damages as the dismissal was lawful and justified. Counsel submitted that although the plaintiff submitted that his employment was a fixed term contract, Exhibits P1 – P4 with respect to the plaintiff's appointment do not bring this out. Further, Exhibit D1, the Human Resource Policy provides for termination of employees of the defendant. Furthermore, the plaintiff's contract was governed by the Employment Act, which provides in Section 58 that a contract of service can be terminated upon notice. And further the plaintiff has also already claimed for payment in lieu of notice which is a recognition that his contract was subjected to termination by notice. The case of *Bank of Uganda Vs Betty Tinkasimire* relied on by the plaintiff in relation to the submission on fixed term contract is distinguishable. In that case, the plaintiff's contract was clearly for a fixed term.

Having considered both submissions on a fixed term contract, I agree with the defendant that there is no indication that the plaintiff's contract was a fixed term

contract; the Employment Act provides for notice, which provision the plaintiff has already taken advantage of.

It is also now the position as per *Betty Tinkasimire (supra)* that an employee whose contract is terminated prematurely or illegally cannot claim compensation for the remainder of the years or up to the period when they would have retired. The plaintiff's claim in this respect is therefore untenable.

It is true that in the same case of Betty Tinkasimire court went ahead to say that compensation for unlawful dismissal should be confined to the monetary value of the period that was necessary to give proper notice for termination which is commonly known as compensation in lieu of notice.

I have already found that the plaintiff's employment was unlawfully terminated. Although it has always been trite law that an employee who was unlawfully terminated would be redressed through the payment of money in lieu of notice for the period of notice he was entitled to, it is also true that a principle has been developed by the courts over time in cases of unlawful dismissal. It is to the effect that courts, where appropriate, in exercise of their discretion, may award damages which reflect the courts disapproval of a wrongful dismissal of an employee. In regard to general damages, Kasule J, in *Issa Baluku Vs SBI INT Holdings (U) Ltd HCCS NO.792 OF 2005*, held that;

“However, another additional principle has been developed by courts overtime in cases of unlawful dismissal. This is the principle that courts, where appropriate in exercise of their discretion, may award damages which reflect the courts disapproval of a wrongful dismissal of an employee. The sum that may be awarded under this principle is not confined to an amount equivalent to the employees’ wages”.

In *Bank of Uganda Vs Betty Tinkamanyire SCCA No. 12 of 2007*, Tsekooko JSC, expounding on the above principle, cited with approval the principle in the Supreme Court of Ghana case of *NORTEY-TOKOLI & OTHERS VS VOLTA ALUMINIUM CO. LTD (1990) LRPCAGES 579 and 599*, where that court justified the principle on the ground that:

“A Ghanaian who has suffered a wrong expects redress and our law of wrongful dismissal should reflect it”.

It follows, therefore, that general damages may be awarded to an employee, whose employment has been unlawfully terminated, if that employee proves facts that result in court’s disapproval of the employer’s conduct in terminating the services of the employee. In this present case the defendant, dealt with the disciplinary process of the plaintiff, which process could have the effect of adversely affecting the the livelihood of the plaintiff and his dependants, so casually and in such a callous and inhumane manner. They ought to put a human face to matters relating to the livelihood of their employees. In this case the plaintiff was invited on phone to face disciplinary proceedings without charges being preferred and drawn to his attention. It was like a Kangaroo court where no charges are revealed and no time allowed for preparation of a defence. Evidence from key witnesses was taken by the committee behind the plaintiff’s back, while the committee membership included his accusers who must have influenced the decision of the committee. Fresh charges were introduced on the second day of hearing without giving the plaintiff time to prepare his defence. The plaintiff’s name was advertised in the news papers reflecting him as a dubious character, yet he had not been subjected to any due process by his employer. The plaintiff stated he was put under great stress and anguish and the advertisements put his reputation in disrepute. It has also resulted in a lot of inconvenience, since having been advertised in the papers, he has not been able to obtain any employment up to now.

Taking the decisions referred to the above in consideration and other factors relating to the case, I believe that this is a case where court has to reflect its disapproval of all those wanton acts of the defendant through the award of appropriate damages for the wrongs suffered. I award the plaintiff general and aggravated damages of Ug. Shs. 150,000,000= for the stress, mental anguish and the resultant inconvenience.

In conclusion, the plaintiff, having been successful in his claim, is awarded the following:

- 1) Shs. 35,448,233= (Thirty Five Million Four Hundred Forty Eight Thousand Two Hundred Thirty Three only) being defendant's contribution to the Staff Contributory Pension Scheme.
- 2) Shs. 7,500,000= (Seven Million Five Hundred Thousand only) being salary arrears representing half pay for 3 months.
- 3) Payment in lieu of leave for the period from January 2009 to 12th October 2009 when he was dismissed (to be calculated on a prorata basis).
- 4) Shs. 15,000,000= (Fifteen Million only) being payment in lieu of notice.
- 5) Shs. 150,000,000= (One Hundred Fifty Million only) being general and aggravated damages.
- 6) Costs of this suit.

Orders accordingly.

Elizabeth Musoke

JUDGE

5/06/2015