THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 212 OF 2009

TWINOMUGISHA MOSES::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

RIFT VALLEY RAILWAYS (U) LTD::::::::::::::::::::::::DEFENDANT

BEFORE: THE HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff entered into a contract of employment with the defendant on 1st November, 2006, as a Principal Accountant, Budgets, Grade RG5 in the defendant's Finance Department and the same was confirmed on 18th July 2007. In October 2008, a regrading exercise was carried out by the defendant which saw the plaintiff being demoted from Grade RG5 to RG6.

While on RG5 level, the plaintiff was paid his monthly salary through Deloitte & Touche but after the degrading, he was transferred to the payroll managed by the defendant internally. This change was to be effected by M/s Christina Sigowa-Wadulo, the defendant's General Manager. The plaintiff's name was however not deleted from the Deloite & Touche payroll and he was, therefore, paid two salaries for a period of five months.

When this was discovered, the plaintiff undertook to refund the double payments, and he remitted the full amount overpaid, to the defendant on the 2nd April 2009.

On the 21st May 2009, he was verbally summoned by Executive Chairman of the RVR Board, Mr. Brown Odongo to explain his double salary payment and was also verbally suspended and he handed over his office.

On 23rd July, 2009 the plaintiff's contract of employment was terminated but the termination letter was received by the plaintiff on 23rd September 2009. On 30th September, 2009, the plaintiff wrote to the General Manager of the defendant demanding that he be paid his salary arrears and terminal benefits but the same has never been paid to date. The plaintiff alleged that at the time of termination, he was servicing a salary loan with Barclays Bank (U) Ltd.

In their written statement of Defence, the defendant company alleged that the plaintiff was paid two double salaries for five months but he did not inform the management of the company about the anomaly. He simply chose to benefit from it in breach of his fiduciary duty. An inquiry was carried out by the company and the plaintiff was requested to take his annual leave. On 26th May 2009, the defendant wrote to the plaintiff asking him to continue with the leave. The plaintiff's leave days of 35 days expired on 13th July 2009 but he did not report back to work and both his company and personal phones were switched off. The defendant's management at this point took a decision to stop the

plaintiff's salary payments at the end of July 2009 and eventually, to terminate the plaintiff's contract by a letter dated July 23, 2009.

During the scheduling conference, the following issues were agreed upon by the parties;

1. Whether the suspension of the plaintiff by the defendant was lawful.
2. Whether the termination of the plaintiff's contract of employment by the defendant was lawful.
3. What are the remedies?
4. Whether RVR (U) Ltd (defendant) is liable for the salary loan.

The plaintiff was represented by Dr. Barya from Barya, Byamugisha & Co. Advocates, while the defendant was represented by Mr. Paul Kutesa & Mr. Jet Tumwebaze of Kampala Associated Advocates.

It was the evidence of PW1, Moses Twinomugisha, the plaintiff through his witness statement that in 2008, he was moved from management pay to non-management pay managed by the General Manager since he had been demoted from RG5 to RG6. He stated that this was done by Christine Wadulo, the General Manager and she is the only one who had access to the pay roll. He stated that he objected to the demotion together with other staff since the demotion was unfair considering his 15 years experience and further, that no reasons had been advanced by the General Manager for the demotion. According to the plaintiff, the General Manager had usurped the powers of the Financial

Controller and gave instructions to Deloittee and Touche that no person should instruct them to make any kind of changes on the Manager's payroll except her.

It was also the plaintiff's testimony that everybody was getting pay slips through Human Resource and at no time did Christine Wadulo issue a pay slip to him. He realized at the end of the 5th month when he was trying to analyze his account to see how much he was earning from other businesses to separate it from employment income that there was double salary and he immediately reported to the staff who was managing the payroll. He then refunded the exact amount he had been receiving as double salary. Christine Wadulo, was the one responsible for the double payments.

PW1 testified further that on 21st May, he was verbally summoned by the Executive Chairman of the defendant Board, Mr. Brown Odongo, who informed him that he was being suspended pending investigations in the double payments. The General Manager, and the Head of Human Resource, Ms. Jacqueline Githungi were present.

PW1 stated further that at the said meeting, the Chairman informed him of the institution of an investigation into the matter by KPMG, an audit firm. Another enquiry was instituted by the defendant conducted by one Rogers Were of an internal audit firm in Nairobi. No report from either of the investigations was ever provided to him to respond to allegations of double payment of salary, before his termination.

The plaintiff added further that his phone and that of the company were at all material times on and had never been switched off but instead were disconnected by the defendant.

During cross-examination, the plaintiff said he was given no reason for termination, and that the double payment was caused by the General Manager who was managing the payroll at the time. He realized after the last payment that there had been a double payment. There were many transactions on the account. So it was difficult to detect the double payment. He immediately reported to the staff concerned. As to whether the double payment was not discovered by auditors, PW1, responded that books were audited after June, and this had happened before June.

In re-examination, PW1 stated that although everybody was getting pay slips through the Human Resource Manager, at no time did the General Manager issue a pay slip to the plaintiff. This would have helped him to detect the anomaly.

PW2, Okello Nymlord, was the former Human Resource Manager of the defendant who testified in his witness statement that he was instructed in 2007 to implement the medical policy for the company in Kenya and Uganda. He testified that it was the duty of the General Manager to instruct Deloitte and Touche on any changes in the payroll system and upon the plaintiff being demoted, she instructed the payroll administrator to include the plaintiff on the local payroll but failed to inform Deloitte and Touche to delete the plaintiff from the managers' payroll, thus

causing double salary payments to the plaintiff. It was his further testimony that it was the plaintiff who went to the General Manager's office and informed her that he had found extra money on his account which he did not expect. The plaintiff then contacted Deloitte and Touche to inquire whether they were sending his monthly salary to the account and he was informed that the General Manager never instructed them to stop the payments. He further stated that this was the second mistake the General Manager had made since the ex-Human Resource Manager was paid salary on the same payroll after he had resigned from the company because the General Manager had failed to stop the payment.

PW2 further testified during cross examination that he wrote an e-mail to the defendant's company dated 14th August 2009 concerning his illegal suspension from work, and the disconnection of him and the plaintiff's mobile phones. He also complained he and the plaintiff had stayed on suspension beyond the mandatory period. He added that he had an ongoing case against the defendant for unlawful termination.

DW1, Mr. Belagia Basemera, was the payroll clerk of the defendant. She testified in court during examination in chief that she was queried by Alexander Forbes, the auditors, as to why the plaintiff was on two payrolls upon which she approached the plaintiff about the double payments and was told that he was not sure but would check, as he had left that account for the loan. He later sent an e-mail stating that he had found out that it is true, he was receiving double payments and he instructed her to delete

him from the non-management payroll. She contended that the plaintiff promised to refund the money which he had been receiving wrongly to which he did later. DW1 confirmed to court during cross-examination that Alexander Forbes are the ones who found out the double payment and when it was discovered that the plaintiff had been paid double, he paid back what constituted the double payment.

Issue 1: Whether the plaintiff was suspended and if so, if the suspension was lawful;

Counsel for the plaintiff submitted that on 21st May, 2009 the plaintiff was verbally summoned by the Executive Chairman (EC) of RVR Board, Brown Odengo after a management meeting that he had got information from the General Manager, Christine Wadulo that he was earning a double salary. The Executive Chairman informed the plaintiff that he was suspending him pending investigations. The plaintiff handed over office and left. And although two inquiries were instituted on the matter, the plaintiff was never called to give evidence. Neither was any report ever given to him to respond to the findings, if any, of either inquiry.

Counsel then referred court to Exhibit P7, a letter dated 4th August 2009 by the plaintiff and Nymlord Okello (HRM also on suspension) complaining about breach of disciplinary procedures which included:

i) Failure to follow RVR Human Resources Policies and Procedures Manual (Exhibit P10).

ii) Not following the Employment Act and

iii) Rules of natural justice.

It was the plaintiff's case that in effecting his suspension, the RVR Manual (Exhibit P10) clause 10.5.3(d) at P.60 which provides that where there is a serious breach of company rules, an inquiry had to be held. The employee had to be suspended on full pay and would continue to be paid until the outcome of the inquiry. The employee is also entitled to defend himself, to provide witnesses and to have a representative in the inquiry. All this was not done.

Counsel further submitted that under the Employment Act S. 63(2) any suspension must not exceed four weeks or the duration of the inquiry, whichever is shorter. In this case the suspension was far beyond the 2 weeks.

Thirdly, that the plaintiff was never given opportunity to defend himself contrary to the Human Resource Policies and Procedures Manual (Exhibit P.10), rules of natural justice; and Schedule 1 of the Employment Act (Regulations 2 and 7). Counsel, therefore, submitted that the termination letter (Exhibit P2) came to the plaintiff as a surprise; it pointed out no reason for termination; but claimed "the period from July 14 to July 31st 2009 when the plaintiff was to have resumed duty and failed to do, would be treated as leave without pay. Counsel wondered why, if the investigations had revealed no misconduct or irregularity on the

plaintiff's part, the defendant's General Manager did not recall the plaintiff to work.

It was Counsel's contention, therefore, that the suspension was irregular, unlawful and malicious. It was for over 4 months! He prayed that the plaintiff is entitled to compensatory orders and/or damages for this unlawful suspension of at least 3 months as claimed in the plaint, that is to say, Shs. 3,300,000= x 3 = 9,900,000=.

The defendant was of a different view. Counsel for the defendant submitted that the defendant did not suspend the plaintiff, but that after the discussion held between the Chairman Board of Directors and the Head of Human Resource on May 21, 2009, the defendant only advised the plaintiff to take his annual leave. This is confirmed in the plaintiff's email to a workmate, Laeticia Nakigudde dated Thursday May 21, 2009 2.41 p.m. in which the plaintiff handed over his work duties to the said workmate clearly stating that he was going on leave (Exhibit D1). According to the letter dated May 26, 2009 (D1.D1) the defendant further wrote to the plaintiff asking him to continue on his leave however because the plaintiff's phones (both personal and work/official) were off, he could not be contacted. The plaintiff was, therefore, not suspended but merely advised to take his annual leave, which advice he took and implemented.

Without prejudice to the above, Counsel for the defendant submitted that the suspension, if any, was lawful in the circumstances. He referred court to Section 63 (1) of the

Employment Act which allows an employer to suspend an employee and subsection (2) that this suspension shall not exceed a four week's period. Even before the end of May, the month in which the plaintiff left office, the defendant was unable to contact him either on his work phone or his personal phone. The failure to deliver to the plaintiff the defendant's letter dated May, 26, 2009 was evidence of this fact. It was therefore impracticable to expect the defendant to search for the plaintiff's whereabouts any further than was already done in order to inform him that this 'suspension' had expired and/or his services had been terminated. As a prudent employer, the defendant patiently waited nearly an entire month before it took any further action relating to the plaintiff's case.

It was Counsel's further contention that in accordance with the RVR Manual, the defendant continued to pay the plaintiff until it was reasonably believed that the plaintiff had abandoned his duties owing to his non-communication. Since there were no enquiries undertaken by the defendant, there was similarly no requirement for representation or witnesses in preparation for a defence. Moreover, the plaintiff was accorded an opportunity to be heard before the Chairman of the Board and the Head of Human Resource during the meeting held on May 21, 2009 before any action was taken against him.

Counsel relied on ***Albert Lukoru Loduna & 2 Ors Vs Judicial Service Commission & 2 Ors [2013] eKLR*** to state that although procedural fairness requires that a person to be affected by an administrative action be heard, that requirement did not universally demand an

oral hearing; and that as to whether an oral hearing was necessary was dependent on the circumstances of the case and the nature of the decision to be made. (See also ***Karuna Vs Transport Licensing Board (Supra) and R Vs Army Board of the Defence Council, ex p. Anderson [1992] QB 169, 187).***

What was important was that the defendant evaluated the evidence and submissions made and arrived at an informed decision. In this case, the Chairman of the Board and Human Resource were informed of the allegations against the plaintiff, i.e. dishonesty involving receipt of 2 salaries for five months, and also got to hear his response to the same and any decision made thereafter was clearly an informed decision and there was no need for elaborate procedures in order to confirm this position, especially since this was an obvious matter which did not require any additional evidence or witness. It was a simple matter dealing with the fact that the plaintiff received two salaries for five months, a fact he did not deny, and only reported the matter after his employees started to look into it and zero in on him. The defendant could not, therefore, be faulted.

Further, according to Clause 10.5.1 (iv) of the RVR Manual, the disciplinary code is only a guideline and its interpretation must be adequately flexible to adjust to various circumstances.

In his submissions in rejoinder, the plaintiff's Counsel refuted the allegations that the plaintiff had refused to answer the defendant's phone calls, as his phone was on and his place of

abode was known because he was a senior officer in the defendant's employment.

Further, that even as at 4th August when both the plaintiff and Nymlord Okello (PW1) wrote to the defendant complaining about illegal suspension and breach of disciplinary procedure, up to this point they had not received any communication from the defendant since the verbal suspension on 21/5/2009. And although an investigation was set in motion the plaintiff was never called to give evidence and no report was ever written from it. Counsel reiterated his earlier prayers.

I have considered the submissions of either Counsel.

The defendant has in place a Human Resource Policies and Procedures Manual dated June 2007 (Exhibit P10). As pointed out by the plaintiff, Clause 10(d) states as follows:

> ***"Enquiry***
>
> ***Where a serious breach of company rules has occurred, the manager shall request that an enquiry is held.***
>
> ***Having advised the employee, in writing, of the purpose of the inquiry and the nature of the allegations, such enquiry shall commence within 48 hours.***
>
> ***After receiving notification of an enquiry, and if required by the company and depending on the nature of the offence, an employee shall be suspended on full pay and shall continue to be paid until the outcome of the enquiry."***

It was testified by the plaintiff and not disputed by the defendant, that 2 enquiries took place, one internal, another one external by

KPMG. It is not in dispute that no report was ever complied out of both enquiries or if there were reports, they are not on record and whether were they availed to the plaintiff.

The defendant denied having suspended the plaintiff, and alleges that the plaintiff was only required to take his leave. The defendant relies on Exhibit D1 which states:

"Dear Laeticia,

Please while I am on leave handle all the duties I have been doing.

Regards/Moses."

The defendant also relies on D1D1, a letter to the plaintiff dated 26th May 2009 from the Head, Human Resource which asked the plaintiff proceeds on his annual leave with effect from May 22, 2009 to pave way for further investigations.

Unfortunately the veracity of the two documents was not proved or testified in court in that although D1 was admitted as an exhibit, it was not tendered in evidence by any witness of the defendant called for that purpose, who would be subjected to cross-examination. Hence the court cannot rely on such a document, which has not been proved in evidence. This is more so when the subject of the exhibit is controversial. The case of D1D1 is even worse because it remained an identification document, which was expected tendered by the maker or person in whose custody it was. Indeed, in their submissions, the defendant admits that they never managed to serve the letter on the plaintiff as his phones were off. This, however, also happens

to be evidence from the bar, as no evidence of any witness was led to support this allegation that the defendant tried to contact the plaintiff and his phones were off. Neither was their evidence to support the submission that the defendant continued to pay the plaintiff until he allegedly abandoned his duties; and that no enquiries were undertaken by the defendant. No witness was called to testify to that hence Counsel was giving evidence from the bar.

That leaves court with the evidence of the plaintiff that he was called by the Chairman of the Board and Head of Human Resource, and verbally suspended. Although the defendant states in his submission that the plaintiff was to take 35 days leave, this amount of days is not indicated anywhere in evidence; not even on the undelivered letter (D1D1). And since any way the letter telling him to take his leave was admittedly undelivered, how would the plaintiff know he was supposed to go on leave?

There is also no indication that the plaintiff filled any leave forms which were approved by his supervisors, as is normally the case when one goes on leave. Evidence of this ought to have been availed to prove the allegation that the plaintiff took his leave.

The plaintiff states he was informed there was to be an investigation. He waited to be informed of the outcome to no avail till he and a colleague who had also been suspended, wrote to the Chairman and Vice Chairman of the Board of Directors, and Head Human Resource Manager Kenya/Uganda, complaining that since the verbal suspension, he had not received any

communication regarding the next course of action, since his suspension was to pave way for investigations (see Exhibit P7). No evidence was led to deny receipt of this letter of complaint and no response was ever received. It was not until 9/9/2009 when the advocate for the plaintiff wrote a letter of complaint and threatening to sue, that the plaintiff on 23/9/2009 received his termination letter dated 23/7/2009).

The termination letter is dated July 23/7/2009 (Exhibit P.2) and stated inter alia:

> ***"The period from July 14th to July 31st 2009 when you were to have resumed duty and failed to do will be treated as leave without pay."***

As I stated, there is no evidence from the Human Resource Department of the defendant that the plaintiff had taken leave.

The court believes the evidence of the plaintiff that he was suspended, as opposed to the allegation that he took his leave, or absconded from work. The suspension exceeded the 4 (four) weeks that allowed under Section 63(1) and (2) of the Employment Act, 2006. It was therefore illegal after the 4 weeks. The first issue is therefore answered in the negative.

Issue 2: Whether the termination of the plaintiff's contract was

lawful;

The plaintiff's contract was terminated on 23rd July 2009 although he received the termination letter, (Exhibit P2), although it was dated 23rd September 2009.

It was the plaintiff's case that although his contract was terminated after suspension on allegations of getting a double salary, he was not responsible for it; and when he discovered the anomaly he refunded the payment and DW1 had confirmed this. The plaintiff, therefore, is said to have committed no wrong.

Counsel relied on Section 68(1) of the Employment Act 2006 to state that in any claim arising out of termination, the employer shall prove the reason or reasons for dismissal and where the employer fails to do so, the dismissal shall be deemed to have been unfair within the meaning of Section 71; and that this section was flagrantly breached by the defendant.

Counsel further relied on ***Jabi Vs Mbale Municipal Council [1975] HCB 191***, for the proposition that a dismissal was wrongful if it was made without justifiable cause and without reasonable notice; and that it was a fundamental requirement of natural justice that a person properly employed was entitled to a fair hearing before being dismissed on charges involving breach of disciplinary regulations or misconduct. Further that an employee on permanent terms was entitled to know the charges against him and to be given an opportunity to give any grounds on which he relied to exculpate himself, otherwise the dismissal is unlawful.

Counsel concluded that the defendant breached its own Regulations (Exhibit P10, Clause 10.5.3(d) at P.60), the

Employment Act and common law requirement, and prayed that court finds that the defendant unlawfully and unfairly terminated the plaintiff's employment contract. The plaintiff is, therefore, entitled to salaries unpaid (April – September 2009), payment in lieu of notice, payment in lieu of accrued leave, severance pay and general damages.

In reply to the issue whether the termination was lawful, it was the case for the defendant that the plaintiff's contract was terminated on 23rd July, 2009, the date of the letter of termination. The late receipt thereof was as a result of the plaintiff's unavailability inspite of the defendant's many attempts to communicate with him. The letter of termination was not backdated as the plaintiff claims in his submissions. Section 103 of the Evidence Act placed the burden of proof on a particular fact on that person who wished the court to believe in its existence. No evidence was presented by the plaintiff to prove the contrary. (See Section 58, 60 and 63 of the Evidence Act).

Counsel for the defendant further submitted that the letter of termination was clear that the plaintiff's termination was not connected to the earlier issue of dishonesty for which he had been summoned to explain himself. The letter came at the end of July, when the plaintiff stayed away from work even when his leave had ended and refused to take his employer's phone calls. He therefore absconded from duty and thereby already terminated his employment with the defendant. According to Section 40(2) (d) of the Employment Act, the employer is not under a duty to provide work to his employee where the contract

is terminated by the latter. This abscondment by the plaintiff therefore entitled the defendant to discharge him from employment.

Counsel further submitted that it was trite law that a master may terminate the contract of his servant any time and for any reason or for none at all: ***Okori Vs UEB [1981] HCB 52***. In the present case, the defendant chose to terminate the plaintiff's contract without reason which is within his right. With regard to this right Section 68 (1) of the Employment Act is read to mean that the employer shall prove the reason for termination where the reason has been given or at least insinuated by the employer. This section therefore did not apply to the situation at hand.

Counsel submitted in the alternative, that the termination of the plaintiff's contract, even if founded on the dishonesty concerning receipt of a double salary was lawful in the circumstances. He relied on ***Rosemary Nalwadda Vs Uganda Aids Commission Misc. Cause No. 0045 of 2010*** to state that the termination in this case was done lawfully because the plaintiff was given an opportunity to be heard, in accordance with the Manual and the rules of natural justice, on the matter and his response was duly taken into account by his employers before the decision to terminate his employment was made.

I have considered the submissions on this issue.

In the instant case the plaintiff's employment was terminated with a promise for payment in lieu of notice which payment according

to the plaintiff has never been effected. The letter (Exhibit P2) stated as follows:

> ***"Ref: RVR/HR/320579***
>
> ***Date: July 23, 2009***
>
> ***Mr. Moses Twinomugisha***
> ***Principal Accountant (Finance)***
> ***P/No. 320579, Grade 6***
>
> ***Thro' The General Manager (West)***
> ***Kampala***
> ***TERMINATION OF APPOINTMENT***
>
> ***Your appointment is hereby terminated in accordance with clause 14.1.2 of your appointment letter by paying you three months salary in lieu of notice with effect from August 1, 2009. All other termination benefit due to you will be paid in accordance with company rules.***
>
> ***The period from July 14th to July 31st, 2009 when you were to have resumed duty and failed to do, will be treated as leave without pay.***
>
> ***Make arrangement to hand over all company property that may be in your possession to the General Manager (West).***
>
> ***Please acknowledge receipt on the duplicate copy attached and return the same to the undersigned.***
>
> ***……sign……***
> ***Jacqueline Githinji***
> ***HEAD OF HUMAN RESOURCES (K&U)"***

Clause 14.1.2 of the Employment contract states:

> ***"14.1. Your employment may be terminated as follows:***
>
> ***14.1.1. During the probationary period, for any reason whatsoever, by either party giving to the other not less than one month's written notice or one month's salary in lieu of such notice.***

14.1.2. Thereafter, for any reason whatsoever, by either party giving to the other not less than three month's written notice or three month's salary in lieu at such notice."

In their submissions, the defendant stated that in the present case the defendant chose to terminate the plaintiff's contract without reason which was squarely within his rights. It is with regard to this right that S. 68(1) of the Employment Act is read to mean that the employer shall prove the reasons for termination where the reason has been given, or at least insinuated by the employer. This section does not apply to the situation at hand.

I do not agree with the submission of Counsel on this point.

Section 66 of the Employment Act, 2006 now makes it mandatory for an employer to afford a hearing to his employee in every form of dismissal. It is not also true that the defendant's Human Resource Manual (Exhibit 10) allows the defendant to terminate without any reason. Clause 14.1.2 talks of ***"for any reason whatsoever"*** which means there must be a reason given. In the circumstances of this case it is quite obvious that the reason for dismissal is premised on the alleged dishonesty of the plaintiff when two salaries were posted on his account by the defendant for 5 months. Even if the Human Resource Manual (Exhibit P10) had allowed for termination without any reason, the court would not allow the defendant to use such a provision as a pretext for failing to have due process take place. In any case the law now requires that there has to be a hearing afforded in all types of dismissals.

Further still, during cross-examination of the plaintiff by Mr. Tumwebaze, Counsel for the defendant, when the plaintiff stated that nobody gave him a reason why he was dismissed, Counsel Tumwebaze retorted that:

> ***"I put it to you that you were dismissed because of receiving a double salary".*** (See page 15 of the record of proceedings).

Counsel cannot now turn and claim that the plaintiff was dismissed for no reason at all, because the reason was known. Hence with regard to Section 68(1) of the Employment Act, that is the reason that has to be proved before termination.

Section 66(1) and (2) of the Employment Act, state:

> ***"66 Notification and hearing before termination***
>
> ***(1) Notwithstanding any other provision of this Part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.***
>
> ***(2) Notwithstanding any other provision of this Part, an employer shall, before reaching any decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.***

It is to be noted that “termination” and dismissal are used interchangeably. (See heading). Therefore, this court would always enquire into whether the plaintiff was accorded a right to be heard.

Generally, courts have considered a right to a fair hearing as having been afforded by the employer where Notice of allegations against the employee has been served on him, and a reasonable time left between the date of such notification and the date of a scheduled disciplinary hearing. This is meant to afford the employee sufficient time to prepare his defence. The notice ought to set out clearly the allegations against the employee and what his rights at the oral hearing would be. Such rights would include the right to respond to allegations against him orally and/or in writing; the right to be accompanied at the hearing; and the right to cross-examine the employer’s witnesses or call witnesses of his own.

The employee is then expected to present his case before an impartial committee of the employer in charge of disciplinary matters.

A look at the disciplinary process carried out by the defendant/counter claimant in respect of the plaintiff in this case reveals none of the above basic requirements for a fair hearing having been adhered to, in fulfillment of the right to be heard. Indeed I did not find on record any letter inviting the plaintiff to any disciplinary hearing. Such letter would have contained the above stated basic requirements.

In the present case the defendant stated in their submissions, relying on Nalwadda's case, that;

> ***"The termination in this case was done lawfully because as discussed above, the plaintiff was given an opportunity to be heard, in accordance with the Manual and the rules of natural justice, on the matter and his response was duty taken into account by his employers before the decision to terminate his employment was made."***

This is quite an amazing submission not based on any evidence, as there was no evidence led to that effect. All we know regarding the disciplinary process is from the plaintiff who stated that he was summoned by the Chairman of the Board and the Human Resource Manager in the presence of the General Manager and was asked about the double payment. He was then told to go on suspension as investigations were carried out. So where was the hearing before dismissal? The so called hearing above was before suspension. If there were investigations after that, a report would have been compiled and availed to the plaintiff and then he would be involved to a disciplinary meeting after being informed of all the charges against him. Since none of the above occurred, the termination has to be adjudged unlawful. There is no way the employer will prove his reasons for the termination of employment without having given due process to the plaintiff. The second issue is therefore answered in the affirmative.

Indeed the right to a fair hearing in administrative decisions has now been made constitutional under Article 42 of the Constitution of the Republic of Uganda which states:

> ***"Right to just and fair treatment in administrative decisions;***
>
> ***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 emphasizes that the right to a fair hearing cannot be derogated from.

It is not clear what the results of the investigations were.

But with such allegations as are contained in the statement of defence and submissions of the defendant the defendant took it as an open and shut case of unanswerable charges. However, the law and the rules of natural justice require that a fair hearing must be afforded in all cases and in very clear and unambiguous terms. They should not just be imagined.

As stated by ***Megarry J, in John Vs Rees [1970] Ch 345 at 402***, which was cited with approval in the Kenyan case of ***Oloo Vs Kenya Posts and Telecom Corporation Court of Appeal Civil Appeal No. 56 of 1981.***

> ***"It may be that there are some who may decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start. Those who take***

this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which somehow, were, of unanswerable charges, which, in the event, were completely answered; or inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings or resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

I find that whatever the Employment Contract or Human Resource Manual provide on termination, the provisions of the Constitution and the Employment Act 2006 are paramount. Since the applicant was not given a fair hearing, I can state that the termination was not in conformity with the law and hence was unlawful.

The issue is therefore answered in the affirmative.

Issue 3: Whether the defendant is liable for the payment of the balance of the plaintiff's salary loan with Barclays Bank

Court attention was drawn to paragraph 6 of the plaint and paragraph 28 of the plaintiff's witness statement he was servicing a salary loan which at the time of termination amounted to Shs. 33,042,331= (Exhibit P9). It was the plaintiff's case that if he had

not been terminated unfairly, maliciously and unlawfully he would have continued to service it comfortably.

Counsel relied on ***National Forestry Authority Vs Sam Kiwanuka (Civil Appeal No. 5/2009)*** the Court of Appeal awarded the respondent special damages on a loan facility of Shs. 500,000,000= an amount equivalent to the loan or more depending upon when the respondent would be put in possession of land unlawfully taken from him by the National Forestry Authority. Counsel prayed that on the authority of this case, the defendant at the minimum be ordered to pay to the plaintiff the equivalent of the loan as at the time of termination in 2009, that is Shs. 33,042,331= because it was the defendant's unlawful and malicious termination of his contract that made the loan due and payable after this termination. He prayed for general damages of at least Shs. 15million as was awarded to Sam Kiwanuka above for the inconvenience, embarrassment and suffering caused to the plaintiff as a result of the unlawful acts/termination perpetrated by the defendant.

The defendant was of a different view. He sought to distinguish ***National Forestry Authority Vs Sam Kiwanuka (Civil Appeal No. 5 of 2009),*** as it was based on different circumstances that could not resemble the facts at hand. In this case, the respondent was awarded an amount to compensate him for the loss of opportunity to sell the plots of land so as to service the loan, based on the fact that the respondent was the registered proprietor of the land. There was an assumption that except through the appellant's unlawful interference with his property, the respondent could not

have failed to make good his pledge to pay the bank loans. The failure was directly and only attributable to the appellant.

It was the defendant's case that the plaintiff did not own his job with the defendant in the present case and it was not a right. It is trite law that an employer is endowed with the right to terminate an employment relationship, even for no reason at all. The defendant could have terminated this contract of employment at any time, even if the circumstances were different. The failure to make payments of the bank loan could not therefore be attributable to the defendant. To make the defendant liable would set a dangerous precedent for employers in Uganda who would be held liable for payment of loans acquired by their employees during their employment.

On the claim for repayment of the plaintiff's salary loan, which became payable when his employment was terminated, the court finds it a strange claim.

First of all, the terms of the agreements between the plaintiff and the Bank, or the one between the Bank and the defendant are unknown to court since no copies of any agreements related to this claim were attached. That being the case, I find myself unable to determine whether the loan agreement provided that once an employee whose loan was guaranteed by the defendant is illegally terminated, the defendant would pay back the loan or otherwise. Normally such salary loans are for the benefit of the employee and employer just comes in to help to guarantee repayment through salary deductions which are made at source.

If there is more salary payable, the loan becomes due and payable. But as I have indicated above I have not sighted any agreements relating to the loan in question.

This claim has not been proved, and the issue is answered in the negative.

The last issue is in respect of the remedies available to the parties.

Unpaid salaries

The plaintiff claims for unpaid salary from March up to 23rd when he received his termination letter. It is not in dispute that the letter of termination was dated 23/7/2009 though received on 23/9/2009. Termination of employment, unlawful or otherwise, becomes effective when it is effected. In this case, the effective date is 23/7/2009. The employee who feels unlawfully terminated could under such circumstances claim for damages, but not for salary after termination. Further, the plaintiff testified that he was unpaid from March to September. The ball would now go into the defendant's court to show that they paid the plaintiff for that period. The plaintiff has nothing by way of evidence to show that he was not paid, but the defendant, if he claims he paid, should have some evidence to show that they paid. Therefore, the plaintiff is entitled to payment of salary from March 2009 to July 23rd 2009, when termination was done, that is to say, Shs. 3,300,000= x 3 = Shs. 9,900,000=. I have stated already that he cannot get salary after termination.

Notice

The requirement for 3 months payment in lieu of notice, being uncontested, stands unchallenged at Shs. 3,300,000= x 3 = Shs. 9,900,000=.

Accrued Leave

The claim for 2 months pay in regard to the accrued leave of two years is as well granted to the plaintiff as all employees who have performed continuous service for their employer for a minimum period of six months or those who normally work under a contract of service for sixteen hours a week or more are entitled to annual leave. Since the plaintiff never took his leave for two years, it is fair and equitable that he be given 2 months payment in lieu of the accrued leave. This is in line with section 54(5) of the Employment Act which provides that;

> ***"An employee is entitled to receive upon termination of employment a holiday with pay proportionate to the length of service for which he or she has not received such a holiday or compensation in lieu of the holiday."***

See also ***Stanbic Bank Ltd Vs Kiyemba Mutale SCCA No. 2 of 2010.***

The plaintiff is, therefore, entitled to Shs. 2 x Shs. 3,300,000= = 6,600,000=.

Severance pay

The plaintiff had worked for the defendant for about 3 years in a senior position that is Principal Accountant. He was put on wrongful suspension and eventually unfairly and illegally terminated. Court found that there was no evidence that the plaintiff had absconded from duty. He is, therefore, entitled to severance pay under Section 87 and 89 of the Employment Act. He is awarded 3 months pay under this head, equivalent to Shs. 9,900,000=.

General Damages

Counsel for the plaintiff submitted that where an employee's contract of employment was unfairly terminated the employee was entitled to general damages in compensation. This is due to the loss of earnings, inconvenience and embarrassment suffered. Counsel relied on ***Jabi Vs Mbale Municipal Council [1975] HCB 191***, and the Supreme Court decision of ***Bank of Uganda Vs Betty Tinkamanyire (SCC Appeal No. 12/2007)*** in which Betty Tinkamanyire was awarded Shs. 100,000,000= as aggravated damages following an unlawful termination of her contract of employment. Further that the plaintiff who was maliciously terminated for no fault of his own or any cause should be awarded general damages of Shs. 80,000,000= (Eighty million).

Counsel for the defendant was of a different view. He relied on ***Ombaya Vs Gailey and Roberts Ltd [1974] EA 522***, to state that where a person was employed and one of his terms of employment included a period of termination of that employment, the damages suffered are the wages for the period during which

his normal notice would have been current. He further relied on ***Eng. Pascal Gakyaro Vs Civil Aviation Authority Civil Appeal No. 60 of 2006*** for the proposition that though the appellant's services were wrongfully terminated, on ground of the respondent's failure to observe the principle of natural justice, (audi alterem partem), he would only be entitled to damages equivalent to the salary he would have earned for the period of the notice and no further amount in general damages. Further, that ***Bank of Uganda Vs Tinkamanyire*** was not applicable in this case.

In the present case, I will agree with the plaintiff that the way the plaintiff, then a senior officer of the defendant, Principal Accountant, budgets, was treated in a very callous and embarrassing manner yet he had no part to play in the double payment of salary, erroneously made to him by the defendant's personnel and indeed refunded it at the earliest opportunity. He was not subjected to due process and was kept in balance for long, much to his embarrassment.

General and aggravated damages, to signify court's disapproval of the defendant's conduct, are in order. Taking into account that he had worked for a short period, I shall award Shs. 30,000,000= as general and aggravated damages.

The claim for loss of medical cover is untenable as per the holding in Tinkamanyire's case (supra).

Provident Fund

It was the plaintiff's case that he was a member of a contributory provident fund run by Alexander Forbes (court allowed a verbal

amendment for this claim on 10 July, 2013). Counsel gave the formula as 20% x monthly salary x number of months (36). This therefore should come to 20% x 3,300,000= x 36 = Shs. 23,700,000= which should be paid to the plaintiff.

The defendant made no submission on the validity or not of the claim. I, therefore, take it that the claim is not contested. The same is hereby granted as claimed.

In conclusion the following claims of the plaintiff are hereby granted:

a) Unpaid salaries of 3 months from March to July 2009 = Shs. 9,900,000=.

b) Payment in lieu of 3 months notice = 3 x Shs. 3,300,000= = Shs. 9,900,000=.

c) Accrued leave – 2 months accrued leave – 2 x Shs. 3,300,000= = Shs. 6,600,000=.

d) Severance pay – 3 month's salary – Shs. 9,900,000=.

e) General and aggravated damages – Shs. 30,000,000=.

f) Provident Fund – Shs. 23,700,000=.

g) Costs of the suit go to the plaintiff.

Orders accordingly.

Elizabeth Musoke

JUDGE

30/01/2015