

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO 39 OF 2010**

MAGARA OLIVE :::PLAINTIFF

VERSUS

UMEME LIMITED :::DEFENDANT

HON: LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff was by written appointment [EXH P3] dated 9th February, 2005 employed by the defendant as a Revenue Controller and the terms of employment were contained in the Umeme Terms and Conditions of service.

By letter dated 12th March, 2009, the defendant placed the plaintiff under investigative suspension and by letter dated 17th April, 2009, the plaintiff was summoned to attend a disciplinary interview against her, on allegations of theft of company property, failure to comply with the Company's financial policies and procedures leading to loss of company property and gross negligence. After the disciplinary interview the plaintiff was by letter dated 8th May, 2009 [EXH P6] summarily dismissed. The plaintiff alleges that her dismissal was unlawful and wrongful because it was not conducted in accordance with principles of natural justice.

It was the defendant's case that the plaintiff's summary dismissal was lawful and justifiable on grounds that the plaintiff had failed to comply with the defendant's financial policies and procedures leading to the loss of company property and

failed to account for materials she had requisitioned for, purportedly to carry out company activities. Further, that the plaintiff was given an opportunity to defend herself and that the dismissal was justified and in line with the principles of natural justice and the Employment Act.

At the scheduling conference, two issues were agreed upon by the parties;

1. Whether or not the dismissal of the plaintiff was lawful.
2. Remedies available to the parties.

ISSUE 1;

Whether or not the dismissal of the plaintiff was lawful;

It was the evidence of the plaintiff [PW1] in her sworn statement that on 10th March, 2009, she received a phone call from the Manager, Confidential Investigation that there was theft of materials in Lugogo Stores and that she was required to report to the Manager's office the following morning. That the next morning, the plaintiff went to the manager's office as had been directed and explained to the manager that she did not personally handle materials and that districts have stores where the materials are stored. Further, that accountability had to be submitted before the next requisition could be made.

On 21st April, 2009, the plaintiff received a letter [EXH P5] alleging that she had stolen company property worth UGX 301,269,693/= and requiring her to make a written explanation and to attend a disciplinary interview on 29th April, 2009. On the 23rd April, 2009, the plaintiff submitted her written explanation [EXH P11], explaining that she was not responsible for booking materials; no materials would be issued unless accountability for the last issued materials was made; the period when the materials are alleged to have been stolen she was not working in Masaka;

and that during the said period, she was on her annual leave. On 8th May, 2009, she was served with a letter informing her that she had been summarily dismissed, and that on 9th May, 2009, she wrote to the Managing Director appealing against the dismissal but he has never replied.

It was the plaintiff's (PW1) evidence that the summary dismissal was unlawful because she was not properly summoned before the tribunal to answer the charges that were not properly brought to her attention, she was not accorded the opportunity or right to prepare her defence, she was not informed of her rights, she was dismissed without being given a chance to defend herself against the findings of the investigation, she was not given an opportunity to answer the questions or cross examine the defendant's witnesses and she was not given ample time to prepare her defense or given a right to legal representation which is an important component of a fair hearing.

It was the plaintiff's testimony that she was not allowed to ask questions when she appeared before the disciplinary committee, and that the disciplinary committee that conducted the disciplinary interview was compromised and incapable of impartiality as the chairperson of the committee actively participated in the process of investigation and was a signatory to one of the requisitions in question.

During cross examination, she testified that although according to procedure 021 under EXH P7 it was her duty as the coordinator to review; and under Procedures 6 and 7 the verification officer was to sign and receive the materials/property, this process was never operationalised. They had still been using the process under EXH D6. Further, that there was no evidence that the procurements requisitioned for by one Joan and other people were ever delivered in Masaka and that she was not one of the people who made the requisitions.

The plaintiff's next witness, Natala James (PW2), testified that he was also an employee of the defendant company whose employment was also summarily terminated for the same allegations and during the same period as the plaintiff's. He testified that the documentary evidence that was compiled and given to them by the defendant did not show their involvement in the theft and the combined requisition and issue vouchers (CRIV'S) given did not show anywhere that the materials were received by any of them. Further, that procedures O19, O20 and O21 in EXH P7 were never faulted by the plaintiff or himself; instead they were never followed by UMEME stores because it is stated that before issuing more materials, the first combined requisition and issue voucher (CRIV) had to be signed by the recipient to acknowledge receipt (accountability). Further, that the disciplinary committee was chaired by Simbiso Chimbima, who was in the open conference and had also signed some of the combined requisition and issue vouchers. Further still, whereas they were not supposed to be accompanied by their lawyer during the interview, the defendant had its legal representative who was responsible for editing and printing whatever transpired in the interview room. They were not allowed to ask questions. It was his testimony during cross examination that the supervisor (plaintiff) was the person responsible for forwarding reports that would enable the making of combined requisitions and issue vouchers. Further, that he was not in attendance at the plaintiff's disciplinary hearing, but he was copied in the letter inviting her for the disciplinary hearing.

PW3, Grace Matovu stated in her witness statement that she was an employee of the defendant company and her employment was terminated during the same period as the plaintiff's. It was her testimony that the customer verification supervisor (the plaintiff) had to submit daily reports to the Revenue Protection Manager and the manager was then supposed to call a meeting where the report

would be discussed and then the approval to requisition would be granted. When the material had been procured, it would be transported by the driver stored at the respective locations. This procedure was not followed using the documentation because there was no authorization for the said requests. She wondered how UMEME Ltd staff in the stores section could continue to issue large quantities of materials to a department and not demand for accountability for previous issues as the procedure dictates and how the CRIV's could continue to be approved by responsible managers and no questions asked to check the abnormal movement of large quantities of materials to one department. PW3 further testified that the defendant never brought to the attention of the plaintiff the allegations against her thereby denying her an opportunity to prepare her defense. No audit report, which is alleged to have contained the allegations, was shown to her. Neither was she informed of her rights. The plaintiff was suspended pending further investigations but she was never called back to be informed of the outcome of the investigations. During cross examination, PW3 stated that she was not part of the plaintiff's disciplinary proceedings and could not tell whether the tribunal observed the tenets of a fair trial.

The defendant adduced no witness evidence although a number of documents were exhibited on its behalf. I have put the same into consideration while reaching the decision herein, in as far as they were acknowledged by the plaintiff's witnesses.

With regard to what amounts to unlawful dismissal the court in *Jabi Vs Mbale Municipal Council [1975] HCB 191*, held that a dismissal is wrongful if it is made without justifiable cause and without reasonable notice. A wrongful dismissal occurs when the employer terminates the employment of an employee in a manner that fails to comply with the law.

It is trite that an employment relationship is usually premised on the terms and conditions of employment as well as the Employment Law to regulate and define the employment relationship (See *Barclays Bank Vs Godfrey Mubiru SCCA No 9 of 1998*). The plaintiff's offer of employment by the defendant [EXH P3] makes reference to the Umeme terms and conditions of service [EXH P8] which the plaintiff acknowledged receipt of. The defendant also had in place other written policies and procedures like the Company's Financial Policies and Procedures [EXH P7] and the Discipline and Performance at Work Policy and Procedure [EXH P10]. It is my view that the plaintiff was bound by the above terms and conditions as well as the policies and procedures put in place and brought to her attention by the defendant.

The termination letter [EXH P6] written to the plaintiff partly reads as follows;

"I write to inform you that you are summarily dismissed from the employment of Umeme Limited with effect from 8th May 2009.

This follows the disciplinary interview held on the 6th May, 2009 in which you were heard by the disciplinary panel on the following infractions:

- a) Theft of company property equivalent to UGX 301, 269,693/= by way of manipulating the intra-departmental procurement process for the period covering 25th February, 2008 to 25th November, 2008;***
- b) Failure to comply with the Company's Financial Policies and Procedure (E3) leading to the loss of company property worth UGX 301, 269,693/= or in the alternative;***
- c) Gross negligence in the handling of company CRIV's leading to loss of company funds in the amount of UGX 301,269,693/=.***

The Disciplinary panel was not satisfied with your written and oral explanations and based on the available evidence; found that you were culpable on all infractions thus making your stay in Umeme intolerable."

I have looked at the report from the open conference investigation held on 26th and 27th February, 2006 [EXH D4] as well as the proceedings of the disciplinary hearing held on 6th May, 2009 [EXH D1]. From the observations recorded in EXH D4, the materials alleged to have been stolen or lost by the company were at all material times given to the driver (Lutu) for delivery, and it is the driver who could not explain whether or not he had delivered the materials to their respective destinations, or where he delivered the materials. Also from the observations made and documented under EXH D 4, in most cases, there was no documentation; there was no proper system of receiving the materials; there was no straight forward system of issuing materials; and there was no proper system of material management. Consequently, most materials were never delivered to their destinations.

Further, it is clear from EXH D6 and from the proceedings of the disciplinary hearing [EXH D1] that the plaintiff never signed on the documents [EXH D6] confirming receipt of the materials alleged to have been stolen or lost. In my opinion, there was no proof whatsoever, indicating that the plaintiff ever received the materials in order for the company to terminate her employment on the basis of theft.

With regard to the charge of failure to comply with the company's Financial Policies and Procedures, I agree with the testimony of Grace Matovu (PW3) that the procedures were faulted by the stores section and the responsible managers, and it could not be blamed on the plaintiff since she was ordinarily supposed to be an end user.

It was never challenged that it was the procedure that more materials were supposed to be issued after accountability for the previous issues had been made. It

is therefore apparent that procedures were also being flouted by the Managers who approved the issuing of more materials, as well as the stores that released the same without accountability for the previous issues, which created space for probable theft and loss of the materials.

It was also the testimony of PW1 (the plaintiff) during cross examination that while procedure O19 – O21 of EXH P7 was in existence, it had not been adopted/implemented and they were still using the procedure under EXH D6. I note from the proceedings of the open conference investigations [EXH D4] that the employees of the defendant had not been adequately guided on the procedures to be followed, although they were aware that the procedures existed. An observation was made under EXH D4 and it partly reads as follows;

“At this point during the investigation exercise, Suzanne asked all the alleged whether they had undergone the RPU training procedures and they all answered in the negative save for Elemetry Peter who admitted having received the mentioned training.”

As noted earlier, the contents and procedures in EXH P7 would ordinarily be binding on the plaintiff as an employee of the defendant. However, it was the plaintiff’s evidence that these had not yet been operationalised. There is no evidence controverting the above. I find that it was the defendant’s negligence in failing to train its employees on the procedures to be followed that eventually resulted into the loss. I also find that by the defendant continuously approving the requisitions and accountability done without following the proper procedures, it acquiesced in the use of the procedures followed by its employees. In my view, it was after encountering losses that the defendant started looking for someone to blame. From my observation, the flouting of the procedures was a continuous process right from the top management to the end users of the materials and the plaintiff should not be blamed for the same.

For the above reasons, I find that the termination of the plaintiff's employment was not justified in the circumstances.

In addition to the above, it was the plaintiff's case that she had been summarily dismissed without being given a fair hearing which was a violation of the principles of natural justice.

Section 69 of the Employment Act, 2006 is to the effect that summary dismissal means dismissal without notice or with less notice than the employee is entitled to and summary dismissal is justified when an employee by his/her conduct shows that he/she has fundamentally broken the contract of service. In *Barclays Bank (U) Ltd Versus Godfrey Mubiru SCCA No. 1 of 1998*, court held that summary dismissal is dismissal without notice, let alone the right to be heard. That once the respondent sought to invoke his rights of summary dismissal, then such an employee has no right to be heard.

However, **Section 73(1) of the Employment Act, 2006** stipulates that termination of employment is unfair, and therefore unlawful if the principles of natural justice and equity are not followed during the dismissal. A right to a fair hearing is one guaranteed by and/or stated to be non derogable under the Constitution. (**See Article 42 and 44 of the Constitution**).

Therefore, even if the plaintiff's conduct was envisaged by the defendant as sanctioning a summary dismissal, she was still entitled to a fair hearing before the termination of her employment. As to what amounts to a fair hearing, the defendant would have complied if the following was done;

1. Notice of allegations against the plaintiff was served on her and a sufficient time allowed for the plaintiff to prepare her defence.

2. The notice should set out clearly what the allegations against the plaintiff are and her rights at the oral hearing. Such rights would include the right to respond to the allegations against her, the right to be accompanied at the hearing, and the right to cross examine the defendant's witnesses or call witnesses of her own.
3. The plaintiff should be given a chance to appear and present her case before an impartial committee in charge of disciplinary issues of the defendant.

(See Ebiju James Vs UMEME Ltd Civil Suit No.0133 of 2012)

It was the plaintiff's case that while she was served with a letter stating the allegations against her, she was by that same letter required to make a written explanation and to attend a disciplinary interview. That she was not accorded the opportunity or right to prepare her defence. I note from the written explanation by the plaintiff [EXH P11] that she expressed herself to the defendant that the time that was given to her was not sufficient to prepare her defence. I also note from the same written explanation that she requested the defendant to furnish her with documents in support of its case. From my observation of the documents and evidence adduced, it is obvious that the plaintiff's complaint that she had not been given ample time to prepare her defence was ignored by the defendant. Also, from her evidence, I find that although some documents were availed to her, some documents like the statements from Rwebugwisa Joan [EXH P8] and Muwaya Edrisa [EXH P9] were not given to her, yet they were referred to and relied upon by the disciplinary committee.

I also find that the plaintiff was indeed not adequately informed of her rights at the hearing before the disciplinary committee. The plaintiff was not informed of her right to ask questions or cross examine the defendant's witnesses, nor was she

informed of her right to bring her own witnesses in support of her case. It is not surprising that the defendant did not bring its witnesses that the plaintiff could get an opportunity of cross examining them.

It also appears from the evidence adduced for the plaintiff that the chairperson of the disciplinary committee was one of the people who actively participated in the process that was under investigation and was a signatory to one of the requisitions that were being questioned. I agree with the contention of the plaintiff that such a committee was indeed compromised and incapable of impartiality.

I find that the plaintiff was not subjected to a fair and just process, before and during the disciplinary hearing.

For the above reasons, it is my finding that the plaintiff was wrongfully and unlawfully dismissed.

ISSUE 2;

Remedies available to the parties;

The plaintiff claims for special damages, general damages, severance allowance, repatriation allowance and costs of the suit against the defendant for wrongful and unlawful dismissal.

An employee who is unlawfully or wrongfully dismissed as in the present case is entitled to adequate compensation in accordance with the law. In *Barclays Bank Vs Godfrey Mubiru SCCA No.1/1998*, it was held that;

“in my opinion, where any contract of employment, like the present, stipulates that a party may terminate it by giving notice of a specified period, such contract can be terminated by giving the stipulated notice for the period. In default of such notice by the employer, the employee is entitled to receive payment in lieu of notice and where no

period for notice is stipulated, compensation will be awarded for reasonable notice which should have been given, depending on the nature and duration of employment.”

In the present case, it was the plaintiff's testimony that at the time of her dismissal, she was not paid a monthly salary amounting to UGX 1,278,390/= and that she was entitled to payment in lieu of notice for three months which was not paid to her. There was no provision in relation to the notice period or payment in lieu of notice in the terms of employment for the plaintiff. The plaintiff contended that she had been in continuous employment with UEB to UEDCL then to the defendant. On the other hand, the defendant alleged in its written statement of defence that the plaintiff's employment commenced on 1st March, 2005 as per the plaintiff's terms and conditions of service. It denied that the plaintiff accrued a period of continuous service from September 1994. I find that the plaintiff's employment with the defendant commenced on 9th February, 2005 as per her written appointment [EXH P3]. Regardless of the fact that UEB, UEDCL and UMEME were sister companies/organizations, they offered different employments with different appointments to their employees. I therefore find that the plaintiff had worked with the defendant for a period of 4 years. Section 58(3)(b) of the Employment Act, 2006 provides that notice required to be given shall not be less than one month, where an employee has been employed for a period of more than 6 months but not more than 5 years. I therefore award the plaintiff one month's salary as payment in lieu of notice. However, there is no proof that the plaintiff had not been paid a month's salary amounting to UGX 1,278,309/= and I therefore decline to award it.

General Damages;

It is my finding that the plaintiff was inconvenienced and humiliated owing to the defendant's unlawful and wrongful dismissal. It is apparent that the plaintiff had

been a good and exemplary employee who had built a good record and the defendant admits to the same in its written statement of defence.

In *Bank of Uganda Vs Betty Tinkamanyire SCCA No.12 of 2007*, court held that;

“...the reasoning of the court of Appeal in Agbettah Versus Ghana Cocoa Marketing board (1984-86) GLRD 16 should be followed so that the courts were able to award damages which reflected the courts disapproval of a wrongful dismissal and the sum was not confined to an amount equivalent to the worker’s wages.”

Taking that into account, and the fact that the plaintiff had worked with the defendant for a considerable period of time, I shall award UGX 30,000,000/= as general damages.

Severance allowance;

Section 87(a) of the Employment Act, 2006 provides that an employer shall pay severance allowance where an employee has been in his or her continuous service for a period of six months where the employee is unfairly dismissed by the employer. In the present case, the plaintiff had been in the defendant’s employment for more than six months, and as stated above, she was unlawfully/wrongfully dismissed. I therefore award her 2 month’s pay as severance allowance. The total severance allowance is therefore **UGX 2,556,780/=**.

Repatriation allowance;

Section 39 of the Employment Act, 2006, stipulates that an employee recruited for employment at a place which is more than one hundred Kilometers from his/her home shall have the right to be repatriated at the expense of the employer. I find

that the plaintiff has not given any evidence in order to justify the award of this claim. However, the defendant's Regulations for Employees [EXH P8] provides that an employee is entitled to repatriation allowance amounting to UGX 300,000/=. In the circumstances, I award **UGX 300,000/=** to the plaintiff as repatriation allowance.

In conclusion, the following claims of the plaintiff are hereby granted;

- a) Payment in lieu of I months notice - UGX 1,278,390/=
- b) General damages - UGX 30,000,000/=
- c) Severance allowance - UGX 2,556,780/=
- d) Repatriation allowance - UGX 300,000/=
- e) Interest on items (a), (c) and (d) at the rate of 20% per annum from the date of dismissal till payment in full.
- f) Interest on (b) above at court rate from the date of judgment till payment in full.
- g) Costs of the suit.

Orders accordingly.

Elizabeth Musoke

JUDGE

20/08/2015