

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HIGH COURT CIVIL APPEAL N. 31 OF 2015

ARISING FROM MENGO CIVIL SUIT NO. 1042 OF 2008

**NATIONAL WATER AND SEWERAGE
CORPORATION.....APPELLANT**

VERSUS

GLORIA RWENDEIRERESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant through its advocates appealed the judgment of Charles Tasika Kisakye Chief Magistrate (RIP) dated 29th May 2014 on nine grounds of appeal that I will revert to later in the judgment. The respondent cross appealed on one ground.

The appellant was represented by MMAKS Advocates while the respondent was represented by KRK Advocates.

Both counsel filed written submissions and availed authorities that I have carefully considered.

The duty of the first appellate court is to re-evaluate the evidence adduced in the lower court and arrive at its own conclusions on matters of fact and law bearing in mind that the trial court had an opportunity to observe the demeanor of witnesses.

The respondent Gloria Rwendeire sued the appellant (NWSC) for wrongful termination from employment in breach of the terms and conditions of service and for malicious prosecution. NWSC denied the claim and averred that the termination was lawful and that the prosecution followed reasonable suspicion that she had committed a criminal offence.

At the trial three issues were framed for trial.

1. Whether the plaintiff's employment was lawfully terminated
2. Whether the plaintiff was maliciously prosecuted and if so whether the defendant was liable.

3. Remedies.

After the trial whose evidence was recorded by different magistrates, the chief magistrate determined in favour of Gloria on the first issue and awarded both special and general damages.

It was not disputed that the respondent was appointed as a copy typist in 1992 vide a letter of appointment dated 19.2.1992. It was also not disputed that on 30.12.1999, she was terminated from service by the chief Human Resource manager.

What was in dispute was whether this termination was lawful

Respondent's case

It was the respondent's case that on 15.12.99, she was instructed by the manager and Accounts officer to hand over the cash office and later the manager told her money was missing. In her evidence, the respondent who testified as PW1 testified she was told at police that 6.2m was missing to which she responded that she had handed it to DW1 Connie Nagimesi the Accounts officer. It was the respondent's case that money she collected was to be handed to DW 4 Kyagaba for banking. But in cross examination, she conceded that she received, receipted and banked the money until 13.12.99 although she insisted Kyagaba was also doing the same and one Kyobutungi also received money in the respondent's absence. In other words, the respondent did not unequivocally deny the allegation of missing funds.

It was also the respondent's case that she was not subjected to the disciplinary process of the appellant and instead was prosecuted in court where she was acquitted. Prior to the acquittal, the respondent's services with the appellant were terminated on 30.12.99.

Appellant's case

The appellant's case on the other hand was that the respondent was not banking money the next day on receipt but much later. DW2 Ekanya the auditor discovered that the amount due on the receipts was 8,100,000/ between 1. 12.99 and 14.12.99 but cash available was 1,900,000/ while 6,200,000/ could not be accounted for. He also found that the date on the receipt was written in ink but the month and year were in carbon copy upon which Ekanya that concluded the respondent was playing about with dates to dupe management. DW 3 Joseph Kamu a retired

engineer confirmed there were variations between money receipted and money banked during the period under question.

These variances and the absence of dates on receipts were also confirmed by DW 5 Chan Lapenga who was Human resource manager at the time.

DW 4 Kyagaba Godfrey's testimony was there was shortage in the cash figures and besides he only banked cheques as he did not receive any cash from the respondent.

Connie Nagimesi the Accounts officer summoned the respondent to her office to explain the failure to bank money as it was collected and the shortages to which the respondent asked for time to look for the money.

The issue on appeal was whether the summary dismissal of the respondent from employment was wrongful. While the appellant submitted that the dismissal was justified, counsel for the respondent submitted that the dismissal was wrongful because the appellant did not strictly follow the discipline process under the conditions of service and staff regulations 1995 .

It was also counsel for the respondent's contention that the principles of natural justice were not observed.

The case law on wrongful dismissal

In **Barclays Bank of Uganda v Godfrey Mubiru SCA No. 1 of 1998**, the Supreme Court held that an employee may be summarily dismissed if he or she flouts essential conditions of the contract of employment or willfully disobeys an employer's lawful order.

When this happens, the dismissal is not wrongful and that means the employee is not entitled to notice or compensation in lieu of notice.

Under the common law, whether a dismissal is fair or unfair depends on the reason for the dismissal and whether the employer acted reasonably in the circumstances. In **Sinclair v Neighbour [1967]2Q.B. 279**, a manager took 15 pounds from a till and left an IOU in its place which was an intention to replace the money later. His summary dismissal was upheld because his conduct was regarded as dishonest.

Kyagaba who was supposed to be doing the banking only banked cheques as he was not handed cash by the respondent during the period of the shortages.

For all intents and purposes, it was the respondent to explain the cash shortages which she admitted in her evidence.

From the evidence adduced in the lower court, the missing funds, the conduct of the respondent in not entering full particulars of dates when payments were received, the shortfall between money banked and money received, and her admission to DW 1 Connie Nagimesi the Accounts assistant that she would make good the loss amounts to dishonest conduct that justifies dismissal without notice or compensation in lieu of notice.

The argument that the disciplinary process under Conditions of service and staff regulations 1995 was not followed.

Under the appellant's conditions of service regulations, chapter 4, the various management responses/actions in the event of alleged misconduct are detailed. Under para 4.01, after investigations into an alleged misconduct, the employer may terminate service with or without benefits. It seems this is the option available where there is gross misconduct because dismissal is authorized that leads to loss of benefits.

Counsel for the respondent submitted that the regulations are silent on summary dismissal and that as she was acquitted, she should not have been dismissed. He cited para 4.08 which precludes the appellant from subjecting an employee to disciplinary process on a charge on which she was acquitted.

Obviously counsel has misinterpreted the regulations.

As observed earlier, the authorized actions open to the employer in chapter 4 are independent of each other and do not apply at the same time. Under para 4.01, this is the most extreme disciplinary measure because the employee can be dismissed with or without benefits depending on the alleged misconduct and after investigations.

Summary dismissal as expounded in Godfrey Mubiru case means dismissal without notice or compensation in lieu. This is exactly what regulation 4.01 envisages by authorizing dismissal without benefits. Notice or compensation in lieu is an entitlement that can be forfeited like any other benefits where there is gross misconduct.

The reference to para 4.08 by counsel for the respondent is misplaced because that paragraph comes into play only if the employee is still on suspension under para 4.02. In the instant case, the appellant exercised its powers under para 4.01 of the regulations to dismiss the respondent as a disciplinary action.

My analysis of the staff regulations is that they provide for the different options available to management to discipline an employee after investigations, which was done.

In this case, after carrying out investigations in accordance with regulation 4.01, management went for the most extreme option to terminate the respondent's employment summarily and without benefits on 30.12.99 .

The argument that principles of natural justice

Counsel for the respondent submitted that the appellant did not observe principles of natural justice and that the respondent was not heard.

As submitted by counsel for the appellant, investigations were carried out before the dismissal. The respondent admitted interacting with Connie Nagimesi and Ekanya. These were supervisors of the respondent and those interactions were part of ongoing investigations. Indeed the respondent in Dexh. 1 asked for time to check her work. I reproduce this document for clarity:

Mbarara, 15th December 1999

The regional manager, Mbarara

Request to allow me time to sort out my problem

Sir,

I hereby submit my request to look at my work carefully and try to see the shortage which has just occurred. Therefore I am kindly requesting you sir to allow me four days I try.

Rwedeire Gloria

This letter is evidence that the respondent was availed an opportunity to defend herself and she offered no plausible defence or even during the proceedings in the lower court. All that she was concerned with was she was dismissed without benefits and without going through a disciplinary process.

The regulations give employees the right to defend oneself which includes the right to know the case against him or her and to be accorded an opportunity to make a defence.

The fact that the respondent asked for time to check her books of account and the interactions with the supervisors Ekanya and Nagimesi is evidence that she was availed an opportunity to defend herself. As counsel for the appellant submitted, the defence did not have to be made at a 'hearing' as in an ordinary trial. It was sufficient that she was asked to explain the shortages but no plausible explanation was forthcoming.

I am therefore not persuaded with counsel for the respondent's submission that the principles of natural justice were breached and that the regulations were not observed by the appellant prior to the dismissal.

As earlier stated, under the case law of **Barclays bank v Mubiru**, an employee is not entitled to notice if he disobeys his employer or breaches an essential term of the contract. The respondent breached the duty not to cause financial loss under chapter 3.02 p and the employer opted to terminate her contract under regulation 4.01 without benefits. This was done after investigations by management which involved interactions with the respondent.

Therefore, the appellant observed due process under the regulations and carried out investigations and availed the respondent a right to defend herself before terminating her employment.

My analysis is that the investigations process was part of the disciplinary process and the decision of the appellant to terminate her services without benefits and without compensation in lieu was justified. The dismissal was therefore lawful both under the Staff regulations and case law.

The learned trial magistrate erred when he found that principles of natural justice were breached.

I now turn to the grounds of appeal.

Ground one

The trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record.

This ground has merit because had he properly evaluated the evidence, he would have found for the appellant. The claim by counsel for the respondent that the ground is too general and offends order 43 lacks merit.

Ground two

The learned trial magistrate erred in law and in fact when he found that the respondent's employment had been unlawfully terminated.

I have re-appraised the evidence and found that the termination was lawful because it was justified and moreover, due process was observed as stipulated in the conditions of service staff regulations.

Ground three

The trial magistrate erred when he found that the termination was unlawful because the respondent was acquitted of the criminal offence.

I have found that although regulation 4.02 stipulates that once acquitted, an employee shall not be subjected to further disciplinary process, this applies only when the employee is on suspension. In the instant case, the respondent was dismissed long before the acquittal and therefore the regulation did not apply to her case.

Grounds four, five and six

These grounds relate to special damages. The gist of these grounds is that the trial magistrate erred when he awarded legal fees and terminal benefits without proof.

I have found that the dismissal was lawful and therefore special damages do not arise. However, I will discuss these grounds with a view to putting the record straight.

Legal fees for the criminal trial

The legal fees incurred in the criminal prosecution should not be claimed a special damages because it is the state that decided to prosecute the respondent.

Salary arrears

The trial magistrate awarded the respondent 11,730,000/ as salary she would have earned had she not been dismissed. This award is not supported by case law which suggests that it is untenable. The only salary a complainant is entitled to is the payment in lieu of notice if the termination of services is on amicable grounds or it is an unfair dismissal. **Bank of Uganda v Betty Tinkamanyire SCA No. 12 of 2007.**

In the instant appeal, the respondent was lawfully dismissed for gross misconduct and she was not entitled to notice or payment in lieu.

The magistrate therefore erred when he awarded salary arrears.

Lost terminal benefits

As the respondent had been lawfully dismissed without benefits, she was not entitled to any benefits under the conditions of service staff regulations.

Grounds four, five and six succeed.

Ground seven

The trial magistrate erred when he awarded general damages of 18,000,000/

As I have found that the dismissal was lawful, general damages will be set aside.

Grounds eight and nine

The trial magistrate erred in law and in fact when he awarded interest on all awards at 25% p.a and interest on general damages from date of filing the suit until payment in full.

The awards were made in error and therefore I need not discuss these grounds.

In the premises, I allow the appeal and make the following orders:

1. The judgment and orders of the lower court are set aside.

2. While the principle is costs follow the event, the respondent is a former employee of the appellant and therefore, the respondent will bear half the costs of this appeal and the lower court.

Cross appeal

The only ground of the cross appeal by the respondent was that the trial magistrate erred when he found that she was not maliciously prosecuted by the appellant.

The decision to prosecute was made by the Director of Public Prosecutions and in any case there were sufficient grounds to commence and conduct criminal prosecution. Therefore, the prosecution was not malicious. This ground of appeal fails and the cross appeal is dismissed with the order that the respondent bears half the costs of the cross appeal.

DATED AT KAMPALA THIS 3RD DAY OF FEBRUARY 2017.

HON. LADY JUSTICE H. WOLAYO